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NOTE

Watering Down Enforcement: Inadequate Criminal Liability in State Clean Water Act Programs

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Abstract. Environmental criminal liability plays an important role in deterring corporate polluters and motivating regulatory compliance. Accordingly, the Clean Water Act (CWA) requires states to apply criminal enforcement standards at least as stringent as the federal standards. For decades, however, the U.S. Environmental Protection Agency (EPA) has been undermining CWA enforcement by approving state permit programs with weaker criminal liability provisions. This Note surveys the state codes of all 47 states with authorized permit programs and finds widespread noncompliance with the CWA: 34 states fail to authorize appropriate felony penalties for all knowing violations, and at least 33 states apply misdemeanor intent standards above ordinary negligence. These deficiencies erode the deterrent effect of environmental criminal liability.

EPA has neglected its nondiscretionary duty under the CWA to withdraw its authorizations of noncompliant state programs. Recent cases have alerted environmental groups that EPA has been violating the CWA and its own regulations for decades. As a result, a flood of litigation may be on the horizon. Now EPA has rewritten its regulations to allow weaker state standards, reversing its longstanding position since 1979 that states must apply criminal intent standards at least as stringent as the federal standards.

This Note argues that EPA's new rule violates the text of the CWA and that EPA must bring state permit programs into compliance with the CWA. Specifically, EPA must require states to authorize (1) appropriate felony penalties for all knowing violations and (2) criminal liability for ordinary negligence. Only then can states serve as an effective backstop for clean water protection after *Sackett v. EPA*, a recent U.S. Supreme Court case that narrowed federal CWA jurisdiction. The stakes are enormous—not only for the environment and public health, but also for constitutional questions about the nondelegation doctrine and the proper scope of agency authority on criminal matters.

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Introduction

Four minutes past midnight on March 24, 1989, the *Exxon Valdez* struck Bligh Reef.[1] The impact ripped open a massive gash in the 200,000-ton supertanker's steel hull,[2] pouring 11 million gallons of crude oil into the tranquil waters of Prince William Sound in Alaska.[3] The Coast Guard's frantic efforts to contain the spill were unsuccessful,[4] and oil spread 1,300 miles along the formerly pristine coast.[5] As the crude oil hit the water, it released toxic chemicals such as benzene into the air.[6] "My eyes were watering from the oil fumes even at 1,000 feet," recalled the marine advisor who flew over the *Exxon Valdez* hours after impact.[7]

The aftermath was heartbreaking. Sea otters slowly died from hypothermia as the oil stripped their fur of its insulating properties.[8] Whales suffocated as oil coated their breathing passages.[9] Eagles covered in oil could not fly,[10] and orcas' lungs were "seared" by toxic fumes that saturated the air.[11] Fish populations collapsed, bankrupting local fishermen and destroying their livelihoods.[12] Ultimately, the death toll comprised "250,000 seabirds, almost 3,000 sea otters, 300 harbor seals, 250 bald eagles, 22 killer whales," and countless fish.[13]

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1. SAMUEL K. SKINNER & WILLIAM K. REILLY, THE EXXON VALDEZ OIL SPILL: A REPORT TO THE PRESIDENT 3 (1989).
2. *Id.*
3. Timothy Arbaugh, *The Long Blue Line: Four Minutes After Midnight—Bligh Reef, Murphy Prefers Midnight!*, U.S. COAST GUARD (May 20, 2022), https://perma.cc/8W72-K6HK; *Exxon Valdez Oil Spill*, HISTORY (updated Mar. 23, 2021), https://perma.cc/FF7L-5Q8F.
4. *See* Arbaugh, *supra* note 3; *Exxon Valdez Spill Profile*, EPA, https://perma.cc/SBE6-AA4W (last updated Nov. 19, 2024).
5. Stephen Leahy, *Exxon Valdez Changed the Oil Industry Forever—But New Threats Emerge*, NAT'L GEOGRAPHIC (Mar. 22, 2019), https://perma.cc/A4UT-TJ69.
6. *See* Yereth Rosen & Peter Henderson, *Lessons from the Exxon Valdez Disaster*, REUTERS (May 6, 2010, 4:36 PM PDT), https://perma.cc/D5QY-JWY4.
7. Leahy, *supra* note 5.
8. *See* Krista Langlois, *The Toxic Legacy of Exxon Valdez*, HIGH COUNTRY NEWS (Mar. 25, 2014), https://perma.cc/FC6V-JH8J; *These Are the Greatest Threats Facing Sea Otters Today*, MONTEREY BAY AQUARIUM, https://perma.cc/UB3W-NYJN (archived Feb. 7, 2025).
9. *See* Rosen & Henderson, *supra* note 6.
10. *See* The Associated Press, *Alaska Coast Shows Evidence of Increasing Wildlife Damage*, CHRISTIAN SCI. MONITOR (May 5, 1989, 12:05 PM ET), https://perma.cc/4SAC-3PDU.
11. *See* Doug Struck, *Twenty Years Later, Impacts of the Exxon Valdez Linger*, YALE ENV'T 360 (Mar. 24, 2009), https://perma.cc/7LL4-ZRYP.
12. *See* Leahy, *supra* note 5.
13. *Id.*

An investigation later revealed that at the time of the collision, Captain Joseph Hazelwood had been drinking and had allowed an unlicensed third mate to steer the enormous supertanker.[14] A jury convicted Hazelwood of "negligent discharge of oil," a misdemeanor under Alaska state law.[15] However, the Alaska Court of Appeals reversed, finding that the jury instruction on ordinary negligence constituted reversible error because the statute did not specify ordinary or gross negligence.[16] In 1997, the Alaska Supreme Court upheld Hazelwood's conviction, concluding that the Alaska state statute's "unadorned use of the word 'negligently'" authorized misdemeanor penalties for ordinary negligence.[17]

As Hazelwood's case illustrates, criminal intent standards play a crucial role in defining environmental crimes. If the Alaska Supreme Court had decided that Hazelwood could be convicted only for the higher mens rea standard of gross negligence, rather than ordinary negligence, then he may not have faced criminal liability.[18] Two years after the Alaska Supreme Court decided that the text of the state statute authorized misdemeanor penalties for ordinary negligence, the Ninth Circuit reached the same conclusion when interpreting the standard for negligence in the federal Clean Water Act (CWA).[19] Other circuits have followed suit,[20] making the CWA one of the few environmental statutes where ordinary negligence can result in criminal liability.[21]

The CWA's criminal liability provisions empower prosecutors to bring misdemeanor charges for ordinary negligence violations and felony charges for knowing violations.[22] In the environmental context, where corporate entities may view civil penalties as a mere cost of doing business, the potential

14. *Exxon Valdez Oil Spill*, *supra* note 3.

15. *See* Hazelwood v. State, 836 P.2d 943, 944 (Alaska Ct. App. 1992), *aff'd in part, rev'd in part*, 866 P.2d 827 (Alaska 1993).

16. *See* Hazelwood v. State, 912 P.2d 1266, 1277-80, 1278 nn.15-16 (Alaska Ct. App. 1996), *rev'd in part*, 946 P.2d 875 (Alaska 1997).

17. *Hazelwood*, 946 P.2d at 878, 885.

18. The Alaska Court of Appeals had reversed Hazelwood's conviction and remanded his case for a new trial where the jury would be instructed on criminal negligence. *Hazelwood*, 912 P.2d at 1279-80.

19. United States v. Hanousek, 176 F.3d 1116, 1118-21 (9th Cir. 1999); *see infra* Part IV.A.

20. *See infra* note 216.

21. David E. Roth, Stephen R. Spivack & Joseph G. Block, *The Criminalization of Negligence Under the Clean Water Act*, CRIM. JUST., Winter 2009, at 5; David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1419 (2011).

22. *See infra* Part III.A.

for criminal prosecution plays an important deterrent role in safeguarding the environment.[23]

This Note shows that the U.S. Environmental Protection Agency (EPA) has been weakening CWA criminal enforcement for decades by approving state permit programs with inadequate criminal liability provisions. Sections 402 and 404 of the CWA govern different types of pollutant discharges, and both allow EPA to authorize equivalent or more stringent state programs.[24] But even though Congress intended the CWA to set a national floor for water pollution control,[25] EPA has been approving dozens of state programs with less stringent criminal liability provisions that violate the plain text of the CWA as well as EPA's own regulations.[26]

First, EPA has neglected to require appropriate felony provisions for state programs authorized under Sections 402 and 404, even though the 1987 Amendments to the CWA established baseline felony penalties for all "knowing" violations.[27] In a survey of the state codes of all 47 states with authorized Section 402 and 404 programs, I find that 33 states currently fail to authorize felony penalties at least as stringent as those of the CWA for all "knowing" violations of their Section 402 programs, and the same is true for one of the two states with an authorized Section 404 program.[28]

Second, EPA has approved numerous state programs with criminal intent standards higher than ordinary negligence, even though courts have interpreted "negligence" in the CWA to mean ordinary negligence.[29] I find that at least 32 states with authorized Section 402 programs apply misdemeanor intent standards higher than ordinary negligence, and the same is true for one of the two states with an authorized Section 404 program.[30]

These discrepancies not only violate the CWA and EPA's regulations but also weaken environmental criminal enforcement and diminish the deterrent effect of environmental criminal liability. This Note argues that EPA must bring states into compliance with the CWA by requiring state enforcement standards at least as stringent as the federal standards. In fact, the CWA imposes a nondiscretionary duty on EPA to withdraw authorization from state permit programs that do not comply with the CWA.[31]

23. *See infra* Part I.C.2.
24. *See infra* Parts I.B, II.B.
25. *See infra* Parts I.A, II.A.
26. *See infra* Parts III, IV.
27. *See infra* Part III.
28. *See infra* Part III.B.
29. *See infra* Part IV.
30. *See infra* Part IV.B.
31. *See infra* notes 88-95 and accompanying text.

EPA's dereliction of this duty is only underscored by its new rule expressly allowing states to authorize CWA prosecution based on gross negligence.[32] Because the federal intent standard is ordinary negligence,[33] this rule reverses EPA's longstanding position—codified in its own regulations since 1979—that the mens rea for state criminal enforcement of the CWA "shall be no greater than" the mens rea for federal criminal enforcement of the CWA.[34] This Note argues that EPA's rule violates the plain text of the CWA while also implicating thorny constitutional questions about the nondelegation doctrine and the scope of agency authority on criminal matters.[35]

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32. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. 103454, 103484-88 (Dec. 18, 2024) (to be codified at 40 C.F.R. pts. 123-24, 232-33).

33. *See infra* Part IV.A.

34. For Section 402, EPA has held this position since 1979. *Compare* 40 C.F.R. § 123.27(b)(2) (2023) (establishing that "[t]he burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, *shall be no greater than* the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act" (emphasis added)), *with* 40 C.F.R. § 123.9(b)(2) (1980) (identical language as the parenthetical above), *and* 40 C.F.R. § 123.32(h)(2) (1979) ("The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraphs (e), (f) and (g) *shall be no greater than* the burden of proof or degree of knowledge or intent EPA must show when it brings an action under section 309 of the Act." (emphasis added)). In 1978, the section on enforcement did not include this language; in fact, it did not discuss burden of proof or degree of knowledge or intent at all. *See* 40 C.F.R. § 124.73 (1978).

    For Section 404, EPA has also held this position since 1979. *Compare* 40 C.F.R. § 233.41(b)(2) (2022) ("The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, *shall be no greater than* the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act." (emphasis added)), *with* 40 C.F.R. § 233.28(b)(2) (1983) (establishing that "[t]he burden of proof and degrees of knowledge or intent required under State law for establishing violations under paragraph (a)(4) of this section, *shall be no greater than* the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the CWA" (emphasis added)), *and* 40 C.F.R. § 123.32(h)(2) (1979) ("The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraphs (e), (f) and (g) *shall be no greater than* the burden of proof or degree of knowledge or intent EPA must show when it brings an action under section 309 of the Act." (emphasis added)). In the HeinOnline database, 1983 is the first year that Title 40 of the C.F.R. included Part 233, which is the Part that governs state Section 404 programs today. But in 1979, Part 123 governed states' Section 402 *and* Section 404 programs. 40 C.F.R. § 123.1(a)(1) (1979).

    EPA's new rule appends the following language to 40 C.F.R. § 123.27(b)(2) (2023) and to 40 C.F.R. § 233.41(b)(2) (2023): "except that a State may establish criminal violations based on any form or type of negligence." Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. 103454, 103499, 103505 (Dec. 18, 2024) (to be codified at 40 C.F.R. pts. 123-24, 232-33). *See generally infra* Part IV.E (discussing EPA's new rule).

35. *See infra* Parts IV.E, V.B.

This Note proceeds in five Parts. Part I provides essential background information on the CWA, including a discussion of state programs under Sections 402 and 404. Part II argues that the text of the CWA requires state enforcement to be at least as stringent as federal enforcement. Part III describes how EPA has failed to require states to authorize appropriate felony penalties, while Part IV discusses how EPA has failed to require states to authorize criminal liability for ordinary negligence violations. Part IV also analyzes recent litigation on inadequate intent standards and assesses EPA's new rule expressly allowing states to apply gross negligence intent standards. Finally, Part V argues that EPA must bring states into compliance with the CWA—especially considering the need for states to serve as a backstop for clean water protection after *Sackett*,[36] a recent U.S. Supreme Court case that substantially curtailed the jurisdiction of federal CWA programs.[37] Part V also highlights the potential constitutional implications of unelected agency administrators modifying the criminal liability standards set by Congress.

I. The Clean Water Act

Part I.A begins by tracing the origins of the CWA to show how inadequate federal oversight over state water pollution control motivated Congress to pass the CWA. Then, Part I.B explores the details of CWA permitting under Sections 402 and 404, with a particular focus on how states may assume Sections 402 and 404 permitting authority. Part I.B also discusses how EPA has a nondiscretionary duty to withdraw permitting authority from states that fail to administer their programs in compliance with the CWA. Finally, Part I.C discusses the importance of both civil and criminal enforcement in achieving the CWA's goals.

A. Origins

Starting in the late 1800s, industrial factories subjected urban populations in the United States to unprecedented water pollution.[38] Rivers and lakes were flooded by chemicals and waste including "sulfuric acid, soda ash, muriatic acid, limes, dyes, wood pulp, and animal byproducts."[39] The Cuyahoga River in Cleveland, Ohio became so contaminated with oils and debris that it caught on fire in 1936—and several more times in the following years.[40] Rampant water

36. Sackett v. EPA, 143 S. Ct. 1322 (2023).

37. *Infra* note 400.

38. *See* Nat'l Ocean Serv., *A Brief History of Pollution*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://perma.cc/JHC6-H98C (archived Feb. 8, 2025).

39. *See id.*

40. *Id.*

pollution caused multiple cities to suffer epidemics of typhoid, cholera, and dysentery.[41]

In response to growing concerns over water pollution,[42] Congress passed the Federal Water Pollution Control Act of 1948,[43] the first major U.S. statute addressing water pollution.[44] However, the 1948 Act still confined the federal government to a supporting role for local water pollution control programs,[45] as federal enforcement authority was heavily constrained.[46] Severe water pollution continued to plague the United States,[47] and national concern for ecological degradation reached a new peak in the 1960s.[48] Congress then passed the 1965 Water Quality Act, but that statute remained heavily reliant on states to address water quality and thus still failed to control water pollution.[49] A radical new solution was needed.

In 1972, Congress passed the Federal Water Pollution Control Act Amendments, now referred to as the CWA.[50] The CWA passed with strong bipartisan majorities.[51] Described by some scholars as "one of the most

41. Jouni Paavola, *Sewage Pollution and Institutional and Technological Change in the United States, 1830-1915*, 69 ECOLOGICAL ECON. 2517, 2520 (2010).

42. *See History of the Clean Water Act*, EPA, https://perma.cc/87W2-UT44 (last updated June 12, 2024).

43. *See* Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.).

44. *History of the Clean Water Act*, *supra* note 42; *see* Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENV'T AFFS. L. REV. 527, 529-30 (2005).

45. *See* N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality Part III: The Federal Effort*, 52 IOWA L. REV. 799, 810 (1957).

46. *Id.* at 812; *see also* Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1106 (1970) ("[T]he enforcement provisions of the 1948 Act left much to be desired.").

47. *See* N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, GEO. WASH. J. ENERGY & ENV'T L., Summer 2013, at 80, 81-82.

48. Robert B. Moreno, *Filling the Regulatory Gap: A Proposal for Restructuring the Clean Water Act's Two-Permit System*, 37 ECOLOGY L.Q. 285, 290 (2010).

49. JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 176-77 (4th ed. 2014).

50. *See* Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387); William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 547 (2004).

51. Richard J. Lazarus, *Judicial Destruction of the Clean Water Act:* Sackett v. EPA, U. CHI. L. REV. ONLINE 1, 1 (2023).

revolutionary statutes ever drafted,"[52] the CWA "nationalized the business of water pollution control in the United States."[53]

Most importantly, the CWA "establishes national minimum standards—essentially, a stringency 'floor'—beneath which states are not allowed to fall in their protection of water quality."[54] The CWA's central theme of uniformity is meant to address concerns that an unstandardized permit system would encourage dischargers to simply seek out areas with weaker pollution standards.[55] Absent the CWA's national minimum standards, this "industrial equivalent of forum shopping" would result in "pollution havens."[56] The requirement that states cannot fall short of the CWA's baseline protections is thus a "foundational and well-established principle" of the statute.[57]

52. *E.g.*, Andreen, *supra* note 50, at 537.

53. *Id.*; *see infra* Part II.A. Andreen goes on to state that the CWA "relegat[ed] the states . . . to a largely secondary, supporting role." Andreen, *supra* note 50, at 537. But this is not entirely accurate. Under the CWA, states take the lead in administering CWA programs, albeit subject to federal oversight; as long as state-administered programs meet the CWA's minimum federal standards, states retain this leading role. *Compare infra* note 141 and accompanying text (discussing how 33 U.S.C. § 1251(b) establishes this leading role for states), *with infra* notes 88-95 and accompanying text (discussing how the CWA imposes a nondiscretionary duty on EPA to withdraw approval for any state programs that fall out of compliance with the CWA).

54. ENV'T L. INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 1 (2013); *see, e.g.*, Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs, 335 F.3d 607, 617 (7th Cir. 2003) ("[T]he Clean Water Act's permitting provisions, like many federal regulatory laws, establish a floor, but not a ceiling, on state and local regulation."); Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1300 (1st Cir. 1996) ("Simply put, the CWA provides a federal floor, not a ceiling, on environmental protection."); Bell v. Cheswick Generating Station, 734 F.3d 188, 197-98 (3d Cir. 2013) ("Thus, the [U.S. Supreme] Court recognized that the requirements placed on sources of pollution through the 'cooperative federalism' structure of the Clean Water Act served as a regulatory floor, not a ceiling . . . .").

55. Nat. Res. Def. Council, Inc. v. U.S. EPA, 859 F.2d 156, 174 (D.C. Cir. 1988).

56. *Id.* (quoting CONG. RSCH. SERV., NO. 93-1, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 263 (1973)).

57. Dominique Burkhardt et al., Comments in Opposition to U.S. Environmental Protection Agency Proposed Rule Regarding the Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs, at 2 (Jan. 13, 2021), https://perma.cc/CS4J-SERT.

B. Permitting

1. The mechanics of Sections 402 and 404

The CWA establishes that "the discharge of any pollutant by any person shall be unlawful" without first obtaining a permit.[58] At the heart of the CWA are two permitting programs: the Section 402 National Pollutant Discharge Elimination System (NPDES) program and the Section 404 "dredge and fill" program.[59] While Section 402 authorizes EPA to issue permits for point source discharges,[60] Section 404 "carves out an exception to this authority by allowing the [U.S. Army Corps of Engineers] to issue permits for the discharge of 'dredged or fill material.'"[61]

The CWA's prohibition on unpermitted pollutant discharges applies only to discharges into "navigable waters."[62] The CWA defines "navigable waters" as "waters of the United States" (commonly abbreviated as WOTUS).[63] The definition of WOTUS is hotly contested,[64] but in 2023, the Supreme Court defined WOTUS as "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[65]

The Section 402 NPDES program allows EPA to regulate point source discharges into WOTUS.[66] Point sources are discrete and singular sources of pollution, such as pipes or ditches,[67] while nonpoint sources encompass all other sources of water pollution, most commonly runoff.[68] Section 402

58. 33 U.S.C. §§ 1311(a), 1342, 1344; *see Summary of the Clean Water Act*, EPA, https://perma.cc/29AX-FQYV (last updated June 12, 2024).

59. 33 U.S.C. § 1342 (codifying Section 402); *id.* § 1344 (codifying Section 404).

60. Moreno, *supra* note 48, at 292.

61. *Id.* at 287 (quoting 33 U.S.C. § 1344). *See generally* J.B. Ruhl & James Salzman, *No Net Loss? The Past, Present, and Future of Wetlands Mitigation Banking*, 73 CASE W. RES. L. REV. 411, 415-16 (2022) (discussing the early debate over whether the U.S. Army Corps of Engineers or EPA should administer the Section 404 program).

62. *See Clean Water Act Programs Utilizing the Definition of WOTUS*, EPA, https://perma.cc/7HP2-ARYK (last updated Aug. 21, 2024).

63. 33 U.S.C. § 1362(7).

64. Attempts to define WOTUS have "sparked decades of agency action and litigation." Sackett v. EPA, 143 S. Ct. 1322, 1332 (2023).

65. *Id.* at 1336 (quoting Rapanos v. United States, 547 U.S. 715, 739 (2006)); *see Amendments to the 2023 Rule*, EPA, https://perma.cc/QTC9-JT2T (last updated Sept. 25, 2024).

66. *See* 33 U.S.C. § 1342.

67. The Clean Water Act defines "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14); *see* Andreen, *supra* note 50, at 537-38.

68. *See Basic Information about Nonpoint Source (NPS) Pollution*, EPA, https://perma.cc/Z76P-ZQ3J (last updated Nov. 22, 2024); *Nonpoint Source*, NAT'L OCEANIC & ATMOSPHERIC

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prohibits anyone from discharging pollutants from a point source into WOTUS without first obtaining an NPDES permit,[69] which "specif[ies] the quantity or concentrations of specific pollutants that may be discharged from the point source."[70]

Section 404 of the CWA authorizes a separate permitting program, run by the U.S. Army Corps of Engineers, to regulate discharges of "dredged or fill material" into WOTUS.[71] Dredged material is "material that is excavated or dredged from [WOTUS],"[72] while fill material is material that replaces WOTUS with dry land or changes the bottom elevation of WOTUS.[73] Anyone applying for a Section 404 permit "must first show that steps have been taken to avoid impacts to wetlands, streams and other aquatic resources; that potential impacts have been minimized; and that compensation will be provided for all remaining unavoidable impacts."[74]

Violators of the Section 402 permit program or the Section 404 permit program may be subject to civil actions and/or criminal penalties as outlined in Section 309 of the CWA.[75]

2. State programs under Sections 402 and 404

Sections 402 and 404 both contain provisions allowing states to submit their own equivalent permitting programs.[76] Submissions must include a "full

ADMIN., https://perma.cc/AEP7-DCJ2 (archived Feb. 8, 2025). *See generally* Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 CHI.-KENT L. REV. 479, 480-82 (1989) (discussing the challenges of combatting nonpoint water pollution).

69. 33 U.S.C. § 1342.

70. Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENV'T L. REV. 409, 415 (2007); *see NPDES Permit Basics*, EPA, https://perma.cc/U966-ZNL6 (last updated Nov. 26, 2024).

71. 33 U.S.C. § 1344.

72. 33 C.F.R. § 323.2(c) (2024).

73. *Id.* § 323.2(e); *see also* 40 C.F.R. § 232.2 (2022) (defining "discharge of dredged material" and "discharge of fill material").

74. *Permit Program Under CWA Section 404*, EPA, https://perma.cc/43VQ-9XZ2 (last updated Dec. 31, 2024). *See generally* Palmer Hough & Morgan Robertson, *Mitigation Under Section 404 of the Clean Water Act: Where It Comes From, What It Means*, 17 WETLANDS ECOLOGY & MGMT. 15, 15-16 (2009) (describing the history of Section 404's mitigation requirement).

75. 33 U.S.C. § 1319 (codifying Section 309). In Part II.B, I explore the criminal enforcement standards required by Section 309.

76. *See* 33 U.S.C. § 1342(b); *id.* § 1344(g). Tribes can also submit their own equivalent permitting programs. *See* 40 C.F.R. § 123.31-34 (2023); *NPDES State Program Authorization Information*, EPA, https://perma.cc/U7S7-6VD3 (last updated Sept. 16, 2024); *Basic Information About Assumption Under CWA Section 404*, EPA, https://perma.cc/NXA7-GPR3 (last updated Jan. 10, 2025) [hereinafter EPA, *Section*

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and complete description of the program it proposes to establish," as well as a statement from the state's attorney general that "the laws of such State . . . provide adequate authority to carry out the described program."[77] If EPA deems the state permitting program adequate under the CWA and EPA's implementing regulations, then the state program supplants the federal program.[78]

Currently, only two states have assumed Section 404 permitting authority: Michigan and New Jersey.[79] The U.S. Army Corps of Engineers continues to exercise Section 404 permitting authority in all other states,[80] though recently more states have sought to assume the 404 permitting program.[81] In contrast, EPA has already relinquished some or all of its Section 402 permitting authority to 47 states.[82] Only Massachusetts, New Mexico, and New Hampshire currently lack any authorized state NPDES permit program,[83] and,

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404]; *see also* 40 C.F.R. § 122.2 (2023) (defining "State" as "any of the 50 States . . . or an Indian Tribe").

So far, however, no Tribes have assumed Section 402 or 404 permitting authority. U.S. EPA, 820-F-16-005, REVISED INTERPRETATION OF CLEAN WATER ACT TRIBAL PROVISION—FINAL INTERPRETIVE RULE 2, https://perma.cc/48S3-JJLB (archived Feb. 8, 2025); U.S. EPA, Proposed Rule: Revision of Clean Water Act Section 404 Tribal and State Program Regulations 1, https://perma.cc/CB3F-DCUU (archived Feb. 8, 2025).

77. 33 U.S.C. § 1342(b); *id.* § 1344(g).

78. *Id.* § 1342(b)-(c); *id.* § 1344(g)-(h); *see NPDES State Program Authorization Information*, EPA, https://perma.cc/P2LF-DXZF (last updated Sept. 16, 2024) (stating that "[i]f EPA approves the program, the state assumes permitting authority," and then "[s]ubmission of all new permit applications would go to the state agency for NPDES permit issuance"); EPA, *Section 404*, *supra* note 76 ("Section 404 permits for those assumed waters would be issued by the state or tribe instead of the U.S. Army Corps of Engineers . . . .").

79. *Tribal and State Section 404 Assumption Efforts*, EPA, https://perma.cc/SZ4L-6S9Z (last updated Jan. 17, 2025). Starting in 2020, Florida enjoyed Section 404 permitting authority as well. Ctr. for Biological Diversity v. Regan, 734 F. Supp. 3d 1, 22 (D.D.C. 2024). In 2024, however, a court vacated EPA's grant of Section 404 permitting authority to Florida, holding that EPA had failed to comply with the Endangered Species Act. *Id.* at 63-64; *see infra* Part IV.D.

80. *Tribal and State Section 404 Assumption Efforts*, *supra* note 79.

81. Adam Blalock, *The Process for Assuming Clean Water Act Section 404 Permitting Authority and an Overview of the States Seeking Assumption*, ADMIN. & REG. L. NEWS, Summer 2018, at 15, 15. *See generally* Leah Stetson & Jeanne Christie, Ass'n State Wetland Managers, Expanding the States' Role in Implementing CWA § 404 Assumption 1 (2010), https://perma.cc/2RV6-GNG2 (discussing why so few states have assumed Section 404 permitting authority).

82. *NPDES State Program Authority*, EPA, https://perma.cc/6D5W-6QFB (last updated Jan. 31, 2025).

83. *Id.*

as of 2025, New Mexico is seeking to assume Section 402 permitting authority.[84]

But consistent with the CWA's cooperative federalism structure,[85] EPA still retains significant oversight over authorized state programs. Even "[a]fter the EPA has transferred permitting authority to a State, the agency continues to oversee that State's permitting program."[86] In theory, EPA continues to review each 402 and 404 permit application, and "if the EPA objects to the issuance of the permit, the State may not issue the permit 'unless it modifies [the] proposed permit in accordance with [EPA's] comments.'"[87]

Additionally, the CWA requires EPA to withdraw approval for any state programs that fall out of compliance with the CWA. For Section 402, the CWA establishes that "[a]ny State permit program under this section shall at all times be in accordance with this section."[88] If EPA determines after a public hearing that a state is not administering its Section 402 program in compliance with the CWA, then EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . [EPA] shall withdraw approval of such program."[89] Similarly, for Section 404, if EPA determines after a public hearing that a state is not administering its program in compliance with the CWA, EPA "shall so notify the State."[90] Then, "if appropriate corrective action is not taken within a reasonable time," EPA shall "withdraw approval of such program until the [EPA] determines such corrective action has been taken."[91]

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84. *See Surface Water Quality State Permitting Program*, N.M. ENV'T DEP'T, https://perma.cc/2BZY-GZKM (archived Feb. 28, 2025); Gabe Racz, Jerry D. Worsham II, Axel Buchwalter & Alex Timbas, *Citing* Sackett v. U.S.*, New Mexico Developing NPDES Permit Program Covering Both Federal and State Waters*, CLARK HILL (Feb. 19, 2025), https://perma.cc/BV2E-4TBU.

85. *Infra* Part II.A.

86. Ctr. for Biological Diversity v. Regan, 734 F. Supp. 3d 1, 21 (D.D.C. 2024).

87. *Id.* (quoting 33 U.S.C. § 1344(j)); *see* 33 U.S.C. § 1344(j) (describing EPA's review process for Section 404 permits); 33 U.S.C. § 1342(c) (describing EPA's review process for Section 402 permits). However, it is unclear how frequently or thoroughly EPA actually reviews state permit issuances, especially given EPA's resource constraints. *See* OFFICE OF INSPECTOR GEN., EPA, NO. 21-P-0132, RESOURCE CONSTRAINTS, LEADERSHIP DECISIONS, AND WORKFORCE CULTURE LED TO A DECLINE IN FEDERAL ENFORCEMENT 163 (2021), https://perma.cc/6UZ3-2M7N.

88. 33 U.S.C. § 1342(c)(2).

89. *Id.* § 1342(c)(3). For convenience, this Note replaces "Administrator" in quotes of the CWA with "EPA" in brackets throughout; "Administrator" simply refers to the EPA Administrator. *See* 40 C.F.R. § 110.1 (2023).

90. 33 U.S.C. § 1344(i).

91. *Id.*

The Second, Third, Fourth, Sixth, Ninth, and D.C. Circuits have all established that "'[s]hall' is ordinarily the language of command and indicates a mandatory intent unless a convincing argument to the contrary is made."[92] Thus, once EPA has determined after a public hearing that a state is failing to properly administer its permit program, the CWA *requires* EPA to withdraw its approval of that program. Various courts have recently taken this position,[93] and indeed, this reading of the CWA makes the most sense in light

92. Am. Fed'n of Gov't Emps. v. Fed. Lab. Rels. Auth., 739 F.2d 87, 89 (2d Cir. 1984); *see, e.g.*, *In re* FTX Trading Ltd., 91 F.4th 148, 153 (3d Cir. 2024) ("The meaning of the word 'shall' is not ambiguous. It is a 'word of command' . . . ." (quoting *Shall*, BLACK'S LAW DICTIONARY (5th ed. 1979))); Reid v. Kayye, 885 F.2d 129, 131 n.1 (4th Cir. 1989); United States v. White, 887 F.2d 705, 710 (6th Cir. 1989); City of Edmonds v. U.S. Dep't of Lab., 749 F.2d 1419, 1421 (9th Cir. 1984); Ass'n of Am. R.R.s. v. Costle, 562 F.2d 1310, 1312 (D.C. Cir. 1977).

In a case examining the use of "shall" in Section 309(a)(3) of the CWA, the Fifth Circuit concluded that a duty imposed by Section 309(a)(3) was discretionary. Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977). However, the Fifth Circuit was addressing whether EPA had a mandatory duty to issue abatement orders requiring compliance with the CWA. *Id.* at 488. The Fifth Circuit correctly explained that it would be unreasonable for Congress to strip EPA of its discretion to issue abatement orders. *Id.* at 490. The present issue involving state noncompliance with the CWA is distinguishable; it would be entirely reasonable for Congress to require EPA to withdraw authorization of noncompliant state programs, given that it was inadequate federal oversight over state water pollution control that motivated Congress to pass the CWA in the first place. *See supra* Part I.A.

93. As of 1999, there was "little judicial review of EPA's position that it has wide discretion in reclaiming NPDES programs." Erik R. Lehtinen, *Virginia as a Case Study: EPA Should Be Willing to Withdraw NPDES Permitting Authority from Deficient States*, 23 WM. & MARY ENV'T L. & POL'Y REV. 617, 628 (1999). But recently, various courts have stated that withdrawal of noncompliant state programs is mandatory. *See* Cahaba Riverkeeper v. U.S. EPA, 938 F.3d 1157, 1161 (11th Cir. 2019) ("[T]he EPA *must* withdraw a state's authorization to run its own NPDES permit program if it determines, after conducting withdrawal proceedings and giving the state a chance to take corrective action, that the program has fallen out of compliance." (emphasis added)); Defs. of Wildlife v. U.S. EPA, 420 F.3d 946, 950 (9th Cir. 2005) ("If the state does not take [corrective] action, [EPA] *must* withdraw approval of the state program.") (emphasis added), *rev'd and remanded sub nom.* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 649-50 (2007); Askins v. Ohio Dep't of Agric., 809 F.3d 868, 877 (6th Cir. 2016); Sierra Club v. U.S. EPA, 377 F. Supp. 2d 1205, 1205 (N.D. Fla. 2005); Ohio Valley Env't Coal. v. Miano, 66 F. Supp. 2d 805, 810 (S.D. W. Va. 1998); Johnson Cnty. Citizen Comm. for Clean Air & Water v. U.S. EPA, No. 05-0222, 2005 WL 2204953, at *1 (M.D. Tenn. Sept. 9, 2005).

Note that the dicta in some other cases use "may" instead of "shall" when mentioning withdrawal, which seems to suggest discretion. *See, e.g.*, District of Columbia v. Schramm, 631 F.2d 854, 857 n.5 (D.C. Cir. 1980); Riverkeeper v. U.S. EPA, 806 F.3d 1079, 1080 (11th Cir. 2015); Am. Forest & Paper Ass'n v. U.S. EPA, 137 F.3d 291, 294 (5th Cir. 1998). But given the CWA's clear usage of "shall" with regard to withdrawal, *see supra* notes 88-91 and accompanying text, the usage of "may" in those cases is likely attributable to unintentional imprecision.

of the origins of the CWA.[94] However, EPA has never withdrawn approval of a state program authorized under Section 402 or Section 404,[95] even though many state programs have fallen out of compliance with the CWA, as I discuss in Parts III and IV.

I briefly note that the question of whether the CWA requires EPA to hold a public hearing in the first place is arguably less clear. According to the Sixth Circuit in 2016, EPA is required to withdraw program approval once it holds a hearing and determines noncompliance, but EPA is not required to hold a hearing:

> While the Clean Water Act *does* require the U.S. EPA to withdraw approval of a state-NPDES program after a hearing, notice, and time to cure, it does *not* require the U.S. EPA to hold a hearing in the first place. . . . Accordingly, the non-discretionary action does not kick in until *after* the hearing, but the hearing itself is discretionary.[96]

District courts in various jurisdictions have reached the same conclusion as the Sixth Circuit,[97] with one court remarking that the CWA "creates no

94. *See supra* Parts I.A, II.A.

95. Citizen groups have repeatedly petitioned EPA to withdraw states' Section 402 programs, but none of these petitions have ever succeeded. *See NPDES State Program Withdrawal Petitions*, EPA, https://perma.cc/USG7-JC93 (last updated July 30, 2024). I have found no information suggesting that EPA has ever withdrawn a state's Section 404 program.

Future research may explore why EPA is so reluctant to withdraw authorized state programs; perhaps EPA does not want to shoulder the administrative burden of running these programs itself, given its resource constraints. *See infra* notes 380-85 and accompanying text (discussing how EPA is concerned about states returning their approved programs to EPA); *cf. infra* note 114 (describing how resource scarcity has contributed to federal underenforcement).

96. Askins v. Ohio Dep't of Agric., 809 F.3d 868, 877 (6th Cir. 2016) (citation omitted). EPA's regulations comport with this reading of the statute. 40 C.F.R. § 123.64(b)(1) (2023) states that EPA "may order the commencement of withdrawal proceedings" and "may conduct an informal investigation," but 40 C.F.R. § 123.64(b)(8)(vi) (2023) states that EPA "shall" withdraw approval of the state program after time to cure if EPA concludes that the state has not administered its program in compliance with the CWA.

97. *See, e.g.*, Ohio Valley Env't Coal. v. McCarthy, No. CIV. 15-0277, 2015 WL 3824255, at *3 (S.D. W. Va. June 19, 2015) ("The statute makes no attempt to specify when, if ever, the EPA must hold a public hearing or when, if ever, the EPA must make a determination regarding the adequacy of a state NPDES permit program."); Johnson Cnty. Citizen Comm. for Clean Air & Water v. U.S. EPA, No. 05-0222, 2005 WL 2204953, at *4 (M.D. Tenn. Sept. 9, 2005) ("[T]he decisions of whether to hold a public hearing and whether to make a subsequent determination that a state is not administering its NPDES program in accordance with the CWA are wholly discretionary exercises of the EPA's authority.").

express requirement that a public hearing be held at any specific time, or indeed ever."[98]

This conclusion creates a loophole clearly antithetical to the CWA's goal of establishing a federal floor of water pollution control.[99] Thus, one district court expressly held, in two separate opinions, that EPA *is* required to hold a public hearing once it becomes aware that a state program may be noncompliant.[100] Future research should explore this topic further. But for the purposes of this Note, suffice it to say that after a public hearing, the CWA creates a nondiscretionary duty for EPA to withdraw its authorization of a noncompliant state program.

3. The importance of Sections 402 and 404

While these programs and their provisions may seem dry and technical, the stakes could not be greater. The Section 402 NPDES program regulates all point source discharges into WOTUS—a monumental task. NPDES program areas range from animal feeding operations and aquaculture to watershed-based permitting and whole effluent toxicity.[101] For instance, the NPDES program regulates wastewater treatment facilities, which process 34 billion gallons of wastewater *every day* in the United States.[102]

Without the Section 402 NPDES program, trillions of gallons of wastewater would be discharged subject only to the disjointed patchwork of local and state regulations, with severe consequences.[103] As one scholar notes,

98. Sierra Club v. U.S. EPA, 377 F. Supp. 2d 1205, 1207 (N.D. Fla. 2005) (emphasis omitted).

99. *Cf. supra* Parts I.A, II.A (discussing the CWA's goal of establishing a federal stringency floor).

100. Save the Valley, Inc. v. U.S. EPA, 223 F. Supp. 2d 997, 1006-07 (S.D. Ind. 2002) ("The procedures outlined in § 1342(c)(3) call for a public hearing to take place if the State continues to fail in its enforcement of the NPDES program." (quoting Save the Valley, Inc. v. U.S. EPA, 99 F. Supp. 2d 981, 985 (S.D. Ind. 2000)); *Save the Valley*, 99 F. Supp. 2d, at 985 ("[W]e read the CWA to impose a mandatory duty on [EPA] to make the requisite finding or determination when he becomes aware of such violations as articulated in § 1319(a)(2).").

101. *All NPDES Program Areas*, EPA, https://perma.cc/37GQ-Y8M2 (last updated Jan. 3, 2025).

102. *Id.*; *Sources and Solutions: Wastewater*, EPA, https://perma.cc/65V3-VTPW (last updated Nov. 18, 2024).

103. For instance, starting in the 1980s, a Maui County wastewater treatment facility discharged 4 million gallons of treated sewage every single day. County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1469 (2020); *The Clean Water Case of the Century*, EARTHJUSTICE (Oct. 21, 2021), https://perma.cc/5GGP-VV79. The facility never obtained an NPDES permit, and as a result, decades of "pollutants from injected sewage . . . devastated [a] once-pristine [coral] reef" in the Pacific Ocean. Brief for Respondents at 9-10, County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020) (No. 18-260), 2019 WL 3230945.

the NPDES permit system's "effluent limitations . . . [have] produced remarkable reductions in both municipal and industrial pollution."[104] A key component of the NPDES program's success is that its design facilitates robust enforcement: Point sources are required to regularly report discharges to EPA and to any state with delegated enforcement powers.[105]

The Section 404 "dredge and fill" permit program is just as far-reaching as the Section 402 NPDES program. Section 404 covers not just dams, levees, and mining projects, but also "infrastructure development" more broadly, including "highways and airports."[106] Section 404 is especially important for protecting wetlands,[107] which are "critical for life on Earth."[108] Unfortunately, many wetlands have been "drained and filled in with sediment"—i.e., dredged and filled—because they were "historically considered wastelands."[109] Section 404's "dredge and fill" permit program is thus essential for wetland protection,[110] and scholars have found that the Section 404 permit program substantially slowed the loss of wetlands.[111] Importantly, Section 404

104. Andreen, *supra* note 50, at 592.

105. *See* SALZMAN & THOMPSON, JR., *supra* note 49, at 180.

106. *Permit Program Under CWA Section 404*, EPA, https://perma.cc/DYW7-B6TN (last updated Dec. 31, 2024).

107. *See id.*

108. Sarah Gibbens, *What Are Wetlands, and Why Are They So Critical for Life on Earth?*, NAT'L GEOGRAPHIC (Feb. 24, 2023), https://perma.cc/UN5Y-2MZF. Wetlands "provide habitats for thousands of species" while also offering "flood protection, water quality improvement, shoreline erosion control, natural products, recreation, and aesthetics." *Why Are Wetlands Important?*, U.S. GEOLOGICAL SURV., https://perma.cc/QP7Z-MZBH (archived Feb. 8, 2025).

109. Gibbens, *supra* note 108; *cf. Arrested Development: Visiting Ours* (20th Century Fox television broadcast Dec. 7, 2003) ("I hate the wetlands. They're stupid and wet, and there are bugs everywhere . . . .").

110. *See Permit Program Under CWA Section 404*, *supra* note 106.

111. William L. Andreen, *Success and Backlash: The Remarkable (Continuing) Story of the Clean Water Act*, GEO. WASH. J. ENERGY & ENV'T L., Winter 2013, at 25, 30; *see also* Alyson C. Flournoy & Allison Fischman, *Wetlands Regulation in an Era of Climate Change: Can Section 404 Meet the Challenge?*, GEO. WASH. J. ENERGY & ENV'T L., Summer 2013, at 67, 67-68 ("Despite section 404's shortcomings, the long-term decline in the pace of wetlands loss . . . is no doubt attributable in part to section 404 and its implementation."); Michael C. Blumm, *Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response*, 18 LAND & WATER L. REV. 469, 470-74 (1983) (defending Section 404's importance for wetlands).

This is not to suggest that Section 404 and its implementation have no flaws. *See, e.g.*, Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 699 (1989) (finding that a "long-held regulatory ambivalence" on the part of the U.S. Army Corps of Engineers had resulted in severe issues with Section 404's "jurisdictional scope, permit criteria, and enforcement"); Phillip M. Bender, Comment, *Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean*

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enforcement actions not only impose penalties, but may also require projects to restore or mitigate damaged wetlands.[112]

C. Enforcement

1. Systemic underenforcement and noncompliance

Without effective enforcement, these ambitious permitting programs are nothing more than empty promises.[113] Unfortunately, resource constraints and political barriers have caused various environmental statutes to suffer from severe underenforcement in recent years.[114] As the former head of EPA's Office of Enforcement and Compliance Assurance (OECA) recently wrote, "Serious noncompliance with environmental rules is common. . . . Significant violations occur at 25 percent or more of facilities in nearly all programs for which there is compliance data. For many programs with the biggest impact on health, serious noncompliance is much worse than that."[115]

As of August 2020, there were 9,457 CWA permittees in "Significant Noncompliance," a designation reserved for facilities which "hold a more

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Water Act § 404 Permit Violations, 27 ENV'T L. 245, 248, 250 (1997) (calling the U.S. Army Corps of Engineers' enforcement of Section 404 "weak and ineffective").

112. *How Enforcement Actions Protect Wetlands Under CWA Section 404*, EPA, https://perma.cc/DV8V-YBJZ (last updated Mar. 26, 2024). *But see* Steven G. Davison, *General Permits Under Section 404 of the Clean Water Act*, 26 PACE ENV'T L. REV. 35, 37 (2009) (discussing how "many compensatory mitigation projects . . . are not completely successful").

113. *See generally* Robert L. Glicksman & Dietrich H. Earnhart, *The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry*, 26 STAN. ENV'T L.J. 317, 319 (2007) ("Effective enforcement of the obligations created by federal and state laws is crucial to achieving the objectives of the federal environmental statutes."); SALZMAN & THOMPSON, JR., *supra* note 49, at 180 ("[A] regulatory system is only as good as its enforcement mechanisms.").

114. *See, e.g.*, OFFICE OF INSPECTOR GENERAL, EPA, *supra* note 87 (finding that "EPA-led compliance monitoring activities, enforcement actions, monetary enforcement results, and environmental benefits generally declined from FYs 2007 through 2018 nationwide," with "[t]he decline in enforcement resources" being a "primary driver" of these trends); Tim McLaughlin, *U.S. Environmental Enforcement Activity Has Dropped, Study Shows*, REUTERS (Feb. 25, 2022 8:34 AM PST), https://perma.cc/SZ55-2Z4D; Lisa Friedman, *Depleted Under Trump, a 'Traumatized' E.P.A. Struggles With Its Mission*, N.Y. TIMES (updated June 20, 2023), https://perma.cc/SL43-WKE3; Lisa Friedman, *Trump Administration Aims to Eliminate E.P.A.'s Scientific Research Arm*, N.Y. TIMES (Mar. 17, 2025), https://perma.cc/PMG7-VKAU.

115. CYNTHIA GILES, NEXT GENERATION COMPLIANCE: ENVIRONMENTAL REGULATION FOR THE MODERN ERA 45 (2022); *see also* Robert L. Glicksman, *Fixing What's Wrong with Environmental Enforcement*, YALE J. REG. NOTICE & COMMENT BLOG (Jan. 12, 2023), https://perma.cc/3L7Y-W8X7.

severe level of environmental threat."[116] Furthermore, systematic CWA underenforcement disproportionally impacts low-income communities and communities of color,[117] leading researchers to describe the current "water crisis" in the United States as an "ongoing environmental injustice."[118]

2. Civil versus criminal enforcement

CWA enforcement can take the form of civil or criminal actions,[119] and civil actions constitute the vast majority of environmental enforcement.[120] However, the potential for criminal liability plays an important role. Though the deterrent effect of criminal liability is likely overstated for individual defendants,[121] criminal liability is much more effective in the environmental context,[122] where most environmental crimes are committed by

116. J. Tom Mueller & Stephen Gasteyer, *The Widespread and Unjust Drinking Water and Clean Water Crisis in the United States*, 12 NATURE COMMC'NS 1, 2 (2021). *See generally National Enforcement and Compliance Initiative: Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System (NPDES) Permits*, EPA, https://perma.cc/R9K5-JXPE (last updated Dec. 13, 2024) (describing efforts to reduce significant noncompliance with NPDES permits).

117. Mueller & Gasteyer, *supra* note 116, at 2.

118. *Id.*

119. 33 U.S.C. § 1319. *See generally* David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T L. REV. 159, 167, 171 (2014) ("Environmental crimes are no different than other crimes. They require proof that the defendant committed a prohibited act (the actus reus, or act requirement) and did so with the requisite intent (the mens rea, or mental state requirement). . . . [M]ental state requirements impose an additional burden of proof on criminal prosecutors that their civil counterparts are not required to meet.").

120. SALZMAN & THOMPSON, JR., *supra* note 49, at 95. Furthermore, most civil proceedings are "administrative hearings conducted within the agency rather than in the court system." *Id. See generally Basic Information on Enforcement*, EPA, https://perma.cc/X9FR-Q697 (last updated Dec. 5, 2024) (describing three types of enforcement actions: civil administrative actions, civil judicial actions, and criminal actions); 33 U.S.C. § 1319(g) (establishing administrative penalties).

121. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW 7 (2007) ("Social scientists have amassed a wealth of evidence to show that people are law-abiding mainly because they internalize social norms, not because they are deterred by their fear of arrest and prosecution.").

122. *See* Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1138-43 (1986) (discussing the "deterrent value" of environmental criminal liability, especially the possibility of jail sentences); Helen J. Brunner, *Environmental Criminal Enforcement: A Retrospective View*, 22 ENV'T L. 1315, 1315-16 (1992). *But see* Joshua Ozymy & Melissa Jarrell Ozymy, *Sub-Optimal Deterrence and Criminal Sanctioning Under the U.S. Clean Water Act*, 24 U. DENV. WATER L. REV. 159, 183-84 (2021) (discussing how the deterrent effect of CWA prosecutions could be improved); SALZMAN & THOMPSON, JR., *supra* note 49, at 98 (arguing that "criminal sanctions can be problematic in an environmental

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corporations.[123] Corporations may view civil penalties for environmental violations as a mere "cost of doing business,"[124] but criminal prosecution may cause corporations to lose government contracts, suffer greater reputational damage, and even risk incarceration for their corporate officials.[125] Furthermore, criminal penalties are generally not covered by insurance policies.[126] Congress and EPA have both recognized that criminal sanctions "provide an increased deterrent effect and greatly enhance voluntary compliance with civil provisions" as well.[127] Since EPA and the Department of Justice began emphasizing environmental criminal sanctions in the late 1970s and early 1980s,[128] media coverage of high-profile environmental disasters caused by illegal discharge of waste has alerted the public—and potential violators—to EPA's increasingly "active and broad-based criminal program."[129]

In addition to the deterrence rationale, some scholars also forward a justification rooted in the "moralizing force of criminal law."[130] Imposing criminal liability "makes an important symbolic statement regarding the moral culpability of the transgressor,"[131] which may be appropriate for extreme incidents such as the *Exxon Valdez* oil spill or the 2010 *Deepwater Horizon* oil spill.[132] Environmental criminal enforcement serves as a unique expression of "societal condemnation."[133]

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context," partly because proving intent can be difficult in a "technical, highly regulated field such as environmental law").

123. *See infra* note 135.

124. McMurry & Ramsey, *supra* note 122, at 1143; David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1226 (2009); *see also* Joshua Ozymy & Melissa J. Jarrell, *Illegal Discharge: Exploring the History of the Criminal Enforcement of the U.S. Clean Water Act*, 32 FORDHAM ENV'T L. REV. 195, 201 (2021) ("There are often strong financial incentives for individuals and companies to pollute.").

125. Uhlmann, *supra* note 124, at 1226.

126. McMurry & Ramsey, *supra* note 122, at 1158.

127. *Id.* at 1145.

128. *Id.* at 1137-41.

129. *See id.* at 1141.

130. *See, e.g.*, Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENV'T L.J. 861, 864-65 (1996).

131. *Id.* at 864.

132. *See generally Deepwater Horizon—BP Gulf of Mexico Oil Spill*, EPA, https://perma.cc/ZF4U-KUBS (last updated July 24, 2024) (describing EPA's civil and criminal enforcement responses to the *Deepwater Horizon* oil spill, including a $5.5 billion penalty).

133. Uhlmann, *supra* note 21, at 1448-49.

Environmental statutes afford prosecutors broad discretion in whether to bring a civil or criminal action for an environmental violation.[134] However, three patterns have emerged in how prosecutors have chosen to file environmental criminal charges. First, as mentioned above, environmental crimes are overwhelmingly committed by corporations rather than by individuals.[135] Second, environmental criminal enforcement is generally reserved for flagrant and egregious misconduct, such as repeated violations causing significant public health impacts.[136] Third, "[m]ost environmental crimes involve intentional acts of pollution, such as midnight dumping or efforts to hide illegal pollution."[137] The CWA is thus unusual among environmental statutes in criminalizing negligence.[138]

134. Uhlmann, *supra* note 119, at 163. One might argue that broad prosecutorial discretion renders moot this Note's discussion of deficiencies in state programs. For instance, if prosecutors are unwilling to bring charges for ordinary negligence violations, perhaps it does not matter if a state program fails to authorize prosecutors to do so. *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) ("The definition of crimes and defenses plays a different and much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system's real lawmakers."); *id.* at 508 ("[C]hanges in criminal liability rules do not necessarily mean changes in the scope or nature of behavior the system punishes. . . . [T]he law on the street may remain unchanged even as the law on the books changes dramatically."). But deterrence is based largely on perception, and the *potential* for criminal liability shapes behavior. Unless corporations are certain that prosecutors will choose not to prosecute, authorizing expanded criminal liability will help deter pollution. Furthermore, these deficiencies in state programs violate the CWA, *see* Part II.B, and statutory violations should be remedied regardless of whether they contribute to environmental degradation.

135. Uhlmann, *supra* note 21, at 1439 ("The fact that [environmental crime] involves corporations is beyond paradigmatic; the overwhelming majority of environmental crimes . . . are committed by corporations."); *cf.* David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1239 n.10 (2016) ("Environmental crimes historically are the subject matter of the largest number of corporate prosecutions.").

136. Uhlmann, *supra* note 119, at 215 ("These findings suggest that prosecutors have reserved criminal enforcement for egregious misconduct."); *see Enforcement Under CWA Section 404*, EPA, https://perma.cc/DSR2-FSQ2 (last updated Mar. 26, 2024) ("EPA and the [U.S. Army Corps of Engineers] reserve their criminal enforcement authority for only the most flagrant and egregious Section 404 violations."); Memorandum from Earl E. Devaney, Dir., Off. of Crim. Enf't, to all EPA Employees Working or in Support of the Criminal Enforcement Program 2 (Jan. 12, 1994), https://perma.cc/6C4Y-Y63Q ("[C]riminal enforcement authority should target the most significant and egregious violators.").

137. Uhlmann, *supra* note 21, at 1419.

138. *Supra* note 21 and accompanying text.

II. Federal Standards Set the Floor for States

Part II.A explains how Congress intended the CWA to set a national floor or baseline for water pollution control. Part II.B analyzes the text of Sections 309 and 402 to argue that the criminal enforcement provisions for state programs may not be less stringent than the floor set by the CWA.

A. Cooperative Federalism Generally

Environmental organizations have called it a "fundamental tenet" of the CWA that the federal statute is meant to be "a floor, a minimum baseline in all respects for protection of the Nation's waters."[139] Following the failures of the original Federal Water Pollution Control Act of 1948, Congress intended the CWA to bring order to the chaotic patchwork of state rules.[140] Though the CWA does maintain a significant role for states,[141] a core "predicate" of the CWA is that "clean water and related wetland values inhere to the entire nation and that a federal program is necessary to protect, restore and maintain them."[142] Thus, "[i]f states wish to engage in this tough and nasty business well and good, but the ultimate responsibility remains a national one."[143]

Congress chose to balance state autonomy with nationwide water pollution standards by having the CWA set a "federal floor, not a ceiling, on environmental protection."[144] States are free to implement more stringent programs that go beyond the floor set by the CWA, but "[i]f a state seeks to approve a standard that is *less* stringent than the federal CWA's floor . . . then federal agencies and federal courts are obligated to resolve the application of the federal CWA."[145]

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139. *See, e.g.*, Burkhardt et al., *supra* note 57, at 2; *see supra* note 54 and accompanying text.

140. *See supra* Part I.A.

141. *See, e.g.*, 33 U.S.C. § 1251(b) ("It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title.").

142. Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1243 (1995).

143. *Id.* at 1243; *see* Bonnie A. Malloy, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6 ENV'T & ENERGY L. & POL'Y J., Spring 2011, at 63, 64.

144. Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1300 (1st Cir. 1996).

145. *Id.* (emphasis added). The U.S. Supreme Court has long "recognized that the requirements placed on sources of pollution through the 'cooperative federalism' structure of the Clean Water Act served as a regulatory floor, not a ceiling, and expressly held that states are free to impose higher standards on their own sources of pollution." Bell v. Cheswick Generating Station, 734 F.3d 188, 197-98 (3d Cir. 2013) (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497-98 (1987)).

B. Criminal Liability Specifically

The criminal enforcement provisions for state programs may not be less stringent than the floor set by the CWA because the text of the CWA applies the same criminal liability provisions to federal permit programs as to state permit programs. Section 309(c) of the CWA expressly uses the same intent standards and the same penalties to govern violations of "permit[s] issued . . . by the [EPA] *or by a State*."[146]

For felonies, Section 309(c)(2) states that any person who "knowingly violates . . . a permit issued under [Section 402] by the [EPA] *or by a State*" shall be subject to the following felony penalties: a fine of $5,000 to $50,000 per day of violation and/or imprisonment of up to three years.[147] Similarly, Section 309(c)(2) states that any person who "knowingly violates . . . a permit issued under [Section 404] by the Secretary of the Army *or by a State*" shall be subject to the same felony penalties.[148]

For misdemeanors, Section 309(c)(1) states that any person who "negligently violates . . . a permit issued under [Section 402] by the [EPA] *or by a State*" shall be subject to the following misdemeanor penalties: a fine of $2,500 to $25,000 per day of violation and/or imprisonment of up to one year.[149] Similarly, any person who "negligently violates . . . a permit issued under [Section 404] by the Secretary of the Army *or by a State*" shall be subject to the same misdemeanor penalties.[150]

This language suggests that the same criminal liability provisions apply to federal enforcement and to state enforcement. It would be illogical—and antithetical to the goals of the CWA—for the same use of "negligently" or "knowingly" to simultaneously mean a higher intent standard for state programs and a lower intent standard for federal programs.[151] Thus, Section 309(c) should be read as establishing the same baseline intent standards and penalties for federal *and* state enforcement. Indeed, EPA's own longstanding regulations for Sections 402 and 404 plainly state that the "burden of proof and degree of knowledge or intent required under State law for establishing violations . . . shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action."[152]

146. 33 U.S.C. § 1319(c) (emphasis added).

147. *See id.* § 1319(c)(2) (emphasis added).

148. *Id.* (emphasis added).

149. *Id.* § 1319(c)(1) (emphasis added).

150. *Id.* (emphasis added).

151. In Part IV.E.2 below, I address the alternative interpretation that Section 309(c) establishes only the *federal* enforcement standards for violations of federal and state permits.

152. *Supra* note 34.

In fact, beyond just intent standards, EPA's regulations expressly state that *all* requirements of state programs authorized under Sections 402 and 404 must be at least as stringent as that of the federal program. For Section 404, 40 C.F.R. § 233.1(d) indicates that "[a]ny approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." For Section 402, a note to 40 C.F.R. § 123.25(a) provides that "States need not implement provisions identical to the above listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions."

With regard to Section 402 in particular, the CWA further states that the federal NPDES "permit program . . . shall be subject to the same terms, conditions, and requirements as apply to a State permit program . . . under [Section 402(b)]."[153] Enforcement is a clear component of CWA permit programs under Section 402(b)(7),[154] and furthermore, enforcement requirements (including those for penalties and for intent standards) should be read as included under Section 402's broad language of "terms, conditions, and requirements."[155] Thus, the text of Section 402 creates a single, comprehensive NPDES permitting scheme for the federal government and for states, rather than a two-tiered permitting scheme where EPA may approve state NPDES permit programs with less stringent enforcement requirements than the federal NPDES permit program.[156]

Finally, principles of statutory interpretation also suggest that Congress intended state permit programs to apply the same criminal penalties as the federal permit programs under Sections 402 and 404. In the CWA Amendments of 1987,[157] Congress saw fit to grant EPA discretion to "establish or adjust by regulation a minimum acceptable State *civil* penalty."[158] In fact,

153. 33 U.S.C. § 1342(a)(3).

154. *See id.* § 1342(b)(7) (discussing enforcement).

155. *Id.* § 1342(a)(3).

156. Analogous language does not exist for Section 404, but as just discussed, Section 309(c) is sufficient to establish that the same intent standards and penalties should apply to Section 404 violations for both the federal program and for state programs.

157. *See generally infra* Part III.A (discussing the Amendments).

158. Water Quality Act of 1987, Pub. L. No. 100-4, § 313(b)(2), 101 Stat. 7, 45 (1987) (emphasis added) (codified as amended at 33 U.S.C. § 1319 note); *see also* 33 U.S.C. § 1319 statutory note (Increased Penalties Not Required Under State Programs) (citing the CWA Amendments of 1987).

Congress expressly established that state programs are *not* required to apply the same civil penalties as the corresponding federal program.[159]

However, nowhere does Section 309 include a similar provision for criminal penalties.[160] Thus, the statutory interpretation principle of *expressio unius est exclusio alterius* suggests that Congress intended to grant EPA discretion to authorize state programs with different civil penalties, but not different criminal penalties.[161] It would be illogical if EPA needed an explicit grant of discretion to authorize different civil penalties, but not to authorize different criminal penalties. Indeed, Congress may have sought to grant states the flexibility to apply different *civil* penalties but not different *criminal* penalties because criminal penalties and their heightened consequences warrant greater scrutiny.

III. "Knowing" Felonies

Part III discusses the first way in which EPA has been undermining CWA criminal enforcement: by failing to require states to impose felony penalties at least as stringent as those of the CWA for all "knowing" violations. Part III.A explains how the CWA Amendments of 1987 strengthened enforcement by turning "knowing" violations into felonies. Part III.B explores how EPA never required states to update their criminal liability provisions and shows that 34 states currently fail to authorize appropriate felony penalties for all "knowing" CWA violations.

A. The Creation of Felony Penalties

When Congress passed the CWA in 1972, it established that "willful" or "negligent" violations of the CWA were misdemeanors, punishable by a fine of $2,500 to $25,000 per day of violation and/or imprisonment of up to one year.[162] At this time, no CWA violation carried felony

159. Water Quality Act of 1987, Pub. L. No. 100-4, § 313(b)(2), 101 Stat. 7, 45 (1987) (codified as amended at 33 U.S.C. § 1319 note) (declaring that the CWA "shall not be construed as requiring a State to have a civil penalty for violations described in section 309(d) . . . which has the same monetary amount as the civil penalty established by such section"); *see also* 33 U.S.C. § 1319 statutory note (Increased Penalties Not Required Under State Programs) (citing the CWA Amendments of 1987).

160. *See* 33 U.S.C. § 1319(c).

161. *See generally* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002) (defining *expressio unius est exclusion alterius* as an "interpretive canon" which holds that "expressing one item of [an] associated group or series excludes another left unmentioned" (quoting United States v. Vonn, 535 U.S. 55, 65 (2002))).

162. *See* Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, 860. Repeated violations carried higher penalties. *Id.*

penalties.[163] As a result, when EPA received applications for state permitting programs without any felony penalties, EPA approved them.[164]

In the mid-1980s, however, EPA and the U.S. Department of Justice pushed Congress to promote environmental criminal prosecutions.[165] Congress passed the CWA Amendments of 1987,[166] which strengthened CWA enforcement by turning "knowing" violations into felonies.[167] Today, under Section 309(c)(2) of the CWA, all "knowing" violations are felonies punishable by a fine of $5,000 to $50,000 per day of violation and/or imprisonment of up to three years.[168] "Negligent" violations remain misdemeanors, with the same penalties of the 1972 CWA.[169] This is true for violations under both Section 402 and Section 404.[170]

B. EPA's Failure to Require Felony Penalties

However, after Congress passed the 1987 Amendments, EPA did not require states to update the criminal liability provisions for their Section 402 and 404 programs[171]—even though Section 309(c) of the CWA establishes that state permit programs must apply criminal enforcement provisions at least as stringent as the federal permit program.[172] Table 1 shows that out of the 47 states with authorized NPDES programs, 33 currently fail to authorize felony penalties at least as stringent as those of the CWA for all "knowing" CWA

163. *Id.*

164. *See infra* Part III.B.

165. Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 868-70 (1994) ("At the behest of the [EPA] and the [U.S. Department of Justice], Congress also took a series of deliberate steps designed to promote environmental criminal prosecutions."); *see* Christine L. Wettach, *Mens Rea and the "Heightened Criminal Liability" Imposed on Violators of the Clean Water Act*, 15 STAN. ENV'T L.J. 377, 383 (1996) (describing the increase in federal environmental criminal enforcement efforts beginning in the 1980s). *See generally* Stuntz, *supra* note 134, at 510 ("[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes . . . .").

166. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended in scattered sections of 33 and 42 U.S.C.).

167. Water Quality Act of 1987, § 312(c)(2) (codified as amended at 33 U.S.C. § 1319(c)(2)); 33 U.S.C. § 1319(c)(2).

168. 33 U.S.C. § 1319(c)(2). Repeated violations carry higher penalties. *Id.*

169. *Id.* § 1319(c)(1); Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, 860 (codified as amended in scattered sections of 33 and 42 U.S.C.). Repeated violations still carry higher penalties. 33 U.S.C. § 1319(c)(1).

170. 33 U.S.C. § 1319(c)(1).

171. *See* Tables 1 and 2 below.

172. *See supra* Part II.B.

violations; Table 2 shows that the same is true for one of the two states with Section 404 programs. In fact, some state NPDES programs fail to authorize any felony penalties at all; they authorize only misdemeanor penalties.[173]

Table 1

Felony Provisions for State NPDES Program Violations[174]

A. State	B. Relevant Section(s) of the State Code	C. Authorizes Appropriate Felony Penalties for All "Knowing" Violations?
Alabama	ALA. CODE § 22-22-14 (2024)	No[175]

173. *See, e.g.*, IDAHO CODE § 39-117 (2024); IOWA CODE § 455B.191(3) (2024); KAN. STAT. ANN. § 65-167 (2024).

174. In Table 1, each row is a state with its own authorized NPDES program. Column B refers to the state code section that criminalizes *general* NPDES violations. A state may include a felony provision for *specific* knowing violations, but that on its own is insufficient to comply with the CWA, because the CWA establishes that felony penalties should be authorized for all knowing violations. 33 U.S.C. § 1319(c)(2). For instance, many states apply felony charges for knowingly making false statements with regard to NPDES permits. *See, e.g.*, GA. CODE ANN. § 12-5-53(b) (2024). Many states also apply felony charges for placing someone in "imminent danger of death or serious bodily injury" due to failure to follow permit procedures. *See, e.g.*, N.C. GEN. STAT. § 143-215.6B(h)(1) (2024). However, these felony charges fail to bring states into compliance with the CWA, because they do not authorize felony penalties for all knowing violations.

Column C indicates "Yes" if the section of the state code from Column B explicitly includes a "felony" provision or penalties at least as stringent as the felony penalties outlined in Section 309(c)(2) of the CWA: a fine of $5,000 to $50,000 per day of violation and/or a sentence of up to three years. *See* 33 U.S.C. § 1319(c)(2). Column C indicates "No" if the section of the state code from Column B does not explicitly include a "felony" provision or if it applies penalties less stringent than the felony penalties outlined in Section 309(c)(1) of the CWA. Column C also indicates "No" if the felony provision is only for specific violations or if the felony provision is subject to additional restrictions that would not make it applicable to all "knowing" violations. Finally, Column C also indicates "No" if the felony intent standard is higher than "knowing." For example, Florida attaches a felony charge only to willful violations. FLA. STAT. § 403.161 (2020). This is not compliant with the CWA, because "willfully" is a higher intent standard than "knowingly." *See Knowingly and Willfully*, U.S. DEP'T JUST., https://perma.cc/SPY5-RLSM (archived Feb. 18, 2025); *infra* Figure 1. However, intent standards lower than "knowing" remain compliant with the CWA, given that state programs are free to exceed the floor set by federal standards. *See supra* Part II. For instance, Arizona attaches a felony charge to violations performed with criminal negligence. ARIZ. REV. STAT. ANN. § 49-263 (2024).

175. Alabama authorizes felony penalties only for repeated violations. ALA. CODE § 22-22-14(a) (2024).

Alaska	ALASKA STAT. § 46.03.790 (2024)	No[176]
Arizona	ARIZ. REV. STAT. ANN. § 49-263(B)-(C) (2024)	Yes[177]
Arkansas	ARK. CODE ANN. § 8-4-103(a) (2024)	No[178]
California	CAL. WATER CODE § 13387(c) (West 2024)	Yes
Colorado	COLO. REV. STAT. § 25-8-609(3)(b) (2024)	Yes
Connecticut	CONN. GEN. STAT. § 22a-438(c) (2024)	Yes
Delaware	DEL. CODE ANN. tit. 7, § 6013 (2024)	No[179]
Florida	FLA. STAT. § 403.161(3) (2023)	No[180]
Georgia	GA. CODE ANN. § 12-5-53(c) (2024)	No[181]
Hawaii	HAW. REV. STAT. § 342D-33 (2024)	Yes
Idaho	IDAHO CODE § 39-117 (2024)	No
Illinois	415 ILL. COMP. STAT. ANN. 5/44(j) (West 2024)	Yes

176. Alaska authorizes felony penalties only for a specific violation. ALASKA STAT. § 46.03.790(d)(1) (2024).

177. Arizona attaches a class 6 felony charge to a violation performed with "criminal negligence" and a class 5 felony charge to a violation performed "knowingly." ARIZ. REV. STAT. ANN. § 49-263(B)-(C) (2024). However, the imposition of felony penalties for criminally negligent violations is still compliant with the CWA. *See supra* Part II (discussing how federal standards set the floor, but state programs can be more stringent).

178. Arkansas authorizes felony penalties only for specific violations. ARK. CODE ANN. § 8-4-103(a)(2-3) (2024).

179. Delaware's felony provision applies only to intentional or knowing violations which cause "serious physical injury to another person or serious harm to the environment as one result of such conduct." DEL. CODE ANN. tit. 7, § 6013(a)-(c) (2024).

180. Florida applies a felony charge only to willful violations. FLA. STAT. § 403.161(3) (2023).

181. Georgia's felony penalties correspond with the CWA's monetary range but establish imprisonment of "not more than two years" rather than a sentence of up to three years. GA. CODE ANN. § 12-5-53(c) (2024). Thus, Georgia applies penalties less stringent than the felony penalties outlined in Section 309(c)(1) of the CWA. *See* 33 U.S.C. § 1319(c)(2).

Indiana	IND. CODE § 13-30-10-1.5(i) (2023)	No[182]
Iowa	IOWA CODE § 455B.191(3)(c) (2025)	No
Kansas	KAN. STAT. ANN. § 65-167 (2024)	No
Kentucky	KY. REV. STAT. ANN. § 224.99-010(4) (West 2024)	No[183]
Louisiana	LA. STAT. ANN. § 30:2076.2(B) (2024)	Yes
Maine	ME. STAT. tit. 38, § 349 (2023)	No
Maryland	MD. CODE ANN., ENV'T § 9-343 (West 2024)	No[184]
Michigan	MICH. COMP. LAWS § 324.3115(2) (2024)	No[185]
Minnesota	MINN. STAT. § 609.671(8)(a)-(c) (2024)	Yes
Mississippi	MISS. CODE ANN. § 49-17-43 (2024)	No
Missouri	MO. REV. STAT. § 644.076 (2024)	No[186]

182. Indiana's felony provision applies only if the violator "knows that commission of the act places another person in imminent danger of death or serious bodily injury," if the offense "results in serious bodily injury to any person," or if the offense "results in the death of any person." IND. CODE § 13-30-10-1.5(i) (2023).

183. Kentucky attaches a Class D felony charge to knowing violations, but the penalty is a maximum fine of $25,000 and/or imprisonment of 1-5 years. KY. REV. STAT. ANN. § 224.99-010(4) (West 2024). Thus, Kentucky applies certain penalties less stringent than the felony penalties outlined in Section 309(c)(1) of the CWA; specifically, Kentucky's fine amount is less stringent, while Kentucky's imprisonment duration is more stringent. *Compare id.*, *with* 33 U.S.C. § 1319(c)(2) (authorizing "a fine of not less than $5,000 nor more than $50,000 per day of violation," "imprisonment for not more than 3 years," or both).

184. Maryland has a felony provision only for repeated violations. MD. CODE ANN., ENV'T § 9-343(a)(1)(ii) (West 2024).

185. Though Michigan has a "felony" provision, the penalties are those of a misdemeanor under the CWA. MICH. COMP. LAWS § 324.3115(2) (2024); 33 U.S.C. § 1319(c)(2). Thus, Michigan applies penalties less stringent than the felony penalties outlined in Section 309(c)(1) of the CWA. *See* 33 U.S.C. § 1319(c)(2).

186. Missouri has a felony provision only for repeated violations. MO. REV. STAT. § 644.076(3) (2024).

Montana	MONT. CODE ANN. § 75-5-632 (2023)	No[187]
Nebraska	NEB. REV. STAT. § 81-1508.01(1)(a) (2024)	No[188]
Nevada	NEV. REV. STAT. § 445A.705 (2024)	No[189]
New Jersey	N.J. STAT. ANN. § 58:10A-10(f)(3) (West 2024)	Yes[190]
New York	N.Y. ENV'T CONSERV. LAW § 71-1933(4) (McKinney 2024)	Yes[191]
North Carolina	N.C. GEN. STAT. § 143-215.6B(g) (2024)	No[192]
North Dakota	N.D. CENT. CODE § 61-28-08 (2023)	No
Ohio	OHIO REV. CODE ANN. § 903.99(C) (LexisNexis 2023)	No[193]
Oklahoma	OKLA. STAT. tit. 27a, § 2-6-206(G)(2) (2024)	Yes

187. Montana has a felony provision only for repeated violations. MONT. CODE ANN. § 75-5-632 (2023).

188. Nebraska authorizes felony penalties for violations committed "knowingly and willfully," NEB. REV. STAT. § 81-1508.01(1)(a) (2024), not just "knowingly or willfully." Nebraska state courts have read this language to be synonymous with "intentionally." State *ex rel.* Neb. State Bar Ass'n v. Holscher, 230 N.W.2d 75, 85 (1975) (Clinton, J., concurring in part and dissenting in part) ("Doing or omitting to do a thing 'knowingly' and 'willfully' implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.").

189. Nevada has a felony provision for only repeated violations. NEV. REV. STAT. § 445A.705(2) (2013).

190. New Jersey applies felony penalties to negligent violations. N.J. STAT. ANN. § 58:10A-10(f)(3) (West 2024).

191. New York attaches a Class E felony charge to all knowing violations. N.Y. ENV'T CONSERV. LAW § 71-1933(4)(a) (McKinney 2024).

192. North Carolina authorizes felony penalties for violations committed "knowingly and willfully," N.C. GEN. STAT. § 143-215.6B(g) (2024), not just "knowingly or willfully." The statute defines "knowingly and willfully" as "intentionally and consciously." *Id.*

193. Ohio's felony penalties correspond with the CWA's imprisonment sentencing range but establish a fine of "not more than twenty-five thousand dollars" rather than a fine of $5,000 to $50,000. OHIO REV. CODE ANN. § 903.99(C) (LexisNexis 2023). Thus, Ohio applies penalties less stringent than the felony penalties outlined in Section 309(c)(1) of the CWA. *See* 33 U.S.C. § 1319(c)(2).

Oregon	OR. REV. STAT. § 468.943 (2024)	No[194]
Pennsylvania	35 PA. STAT. AND CONS. STAT. ANN. § 691.602(b.1) (West 2025)	Yes
Rhode Island	46 R.I. GEN. LAWS § 46-12-14 (2024)	No
South Carolina	S.C. CODE ANN. § 48-1-320 (2024)	No
South Dakota	S.D. CODIFIED LAWS § 34A-11-21 (2024)	No[195]
Tennessee	TENN. CODE ANN. § 69-3-115(c) (2024)	No[196]

194. Oregon prohibits charging anyone with a felony under OR. REV. STAT. §§ 468.922-468.956 "without the personal approval of the district attorney of the county or the Attorney General of the State of Oregon." OR. REV. STAT. § 468.961 (2024). Because the felony provision is subject to this additional restriction, *id.* § 468.943, it is not applicable to any knowing violation.

195. South Dakota has a felony provision only for specific violations regarding hazardous waste and making false statements. S.D. CODIFIED LAWS § 34A-11-21 (2024).

196. Tennessee authorizes felony penalties for anyone who "willfully and knowingly pollutes the waters of the state." TENN. CODE ANN. § 69-3-115(c) (2024). "Willfully" is a higher standard than "knowingly," *Knowingly and Willfully*, *supra* note 174, and the language of "and" suggests that a violation must be both willful and knowing for felony penalties to apply, *cf. supra* notes 188, 192 (discussing the language of "knowingly and willfully" in the statutes of Nebraska and North Carolina).

Texas	TEX. WATER CODE ANN. §§ 7.145-154 (West 2023)	Yes[197]
Utah	UTAH CODE ANN. § 19-5-115(3)(b) (West 2024)	Yes
Vermont	VT. STAT. ANN. tit. 10, § 1275 (2025)	No
Virginia	VA. CODE ANN. § 62.1-44.32(b) (2024)	No[198]
Washington	WASH. REV. CODE § 80.50.150 (2024)	No

197. The Texas Water Code specifies five different water pollution violations. While none are specifically designated as felonies or misdemeanors, each violation carries distinct penalties. As outlined in TEX. WATER CODE ANN. § 7.187 (West 2023), the penalties are: (1) a fine up to $100,000 and/or five years imprisonment, TEX. WATER CODE ANN. § 7.187 (West 2023), for intentional or knowing unauthorized discharge, TEX. WATER CODE ANN. § 7.147 (West 2023) (pointing to "Section 7.187(1)(C) or Section 7.187(2)(F) or both" to set these specific penalties for individuals); (2) a fine up to $50,000 and/or one year imprisonment, TEX. WATER CODE ANN. § 7.187 (West 2023), for strict liability unauthorized discharge, TEX. WATER CODE ANN. § 7.147 (West 2023) (pointing to "Section 7.187(1)(B) or Section 7.187(2)(D) or both" to set these specific penalties for individuals); (3) a fine up to $250,000 and/or ten years imprisonment, TEX. WATER CODE ANN. § 7.187 (West 2023), for intentional or knowing unauthorized discharge and knowing endangerment, TEX. WATER CODE ANN. § 7.152 (West 2023) (pointing to "Section 7.187(1)(D) or Section 7.187(2)(G) or both" to set these specific penalties for individuals); (4) a fine up to $250,000 and/or five years imprisonment, TEX. WATER CODE ANN. § 7.187 (West 2023), for intentional or knowing unauthorized discharge and endangerment, TEX. WATER CODE ANN. § 7.153 (West 2023) (pointing to "Section 7.187(1)(D) or Section 7.187(2)(F) or both" to set these specific penalties for individuals); and (5) a fine up to $100,000 and/or one year imprisonment, TEX. WATER CODE ANN. §7.187 (West 2023) for reckless unauthorized discharge and endangerment, TEX. WATER CODE ANN. § 7.154 (West 2023) (pointing to "Section 7.187(1)(C) or Section 7.187(2)(D) or both" to set these specific penalties for individuals). Note that these offenses carry different penalties if they result in "death or serious bodily injury to another person," or if they are committed by "a person other than an individual." *See, e.g.*, TEX. WATER CODE ANN. § 7.154 (West 2023). The Texas Penal Code specifies the punishments for each classification of felonies and misdemeanors. The highest level of misdemeanor (Class A misdemeanor) is punishable by a fine not to exceed $4,000 and/or confinement in jail for a term not to exceed one year. TEX. PENAL CODE ANN. § 12.21 (West 2023). The severity of the penalties imposed by the water pollution violations thus indicates that all of them could be prosecuted as felonies.

198. Virginia's felony penalties correspond with the CWA's monetary range but establish imprisonment of "not more than twelve months" rather than a sentence of up to three years. VA. CODE ANN. § 62.1-44.32(b) (2024). Thus, Virginia applies penalties less stringent than the felony penalties outlined in Section 309(c)(1) of the CWA. *See* 33 U.S.C. § 1319(c)(2).

West Virginia	W. VA. CODE § 22-11-24(d) (2024)	No[199]
Wisconsin	WIS. STAT. § 283.91 (2024)	No[200]
Wyoming	WYO. STAT. ANN. § 35-11-901 (2024)	No[201]

Table 2

Felony Provisions for State Section 404 Program Violations[202]

A. State	B. Relevant Section of the State Code	C. Authorizes Appropriate Felony Penalties for All "Knowing" Violations?
Michigan	MICH. COMP. LAWS § 324.30112 (2024)	No
New Jersey	N.J. STAT. ANN. § 13:9A-9(f) (West 2024); *id.* § 13:9B-21(f)	Yes[203]

These 34 states are violating the CWA. EPA, by not requiring these 34 states to implement appropriate felony provisions for their authorized permit programs, is also violating the CWA: As discussed in Part I.B.2, the CWA imposes a nondiscretionary duty on EPA to withdraw approval for any state programs that fall out of compliance with the CWA.[204]

In addition to violating the CWA, the absence of appropriate felony provisions for all knowing violations significantly weakens CWA enforcement. Because felony penalties are more severe than misdemeanor penalties,[205] the potential for felony charges likely exerts a greater deterrent effect on polluters. Thus, the absence of felony provisions at least as stringent

199. West Virginia authorizes felony penalties for violations committed "knowingly and willfully," not just "knowingly or willfully." W. VA. CODE § 22-11-24(d).

200. Wisconsin has a felony provision only for repeated violations. WIS. STAT. § 283.91(3) (2024).

201. Wyoming has a felony provision only for repeated violations. WYO. STAT. ANN. § 35-11-901(j) (2024).

202. The structure of Table 2 is exactly parallel to that of Table 1, *see supra* note 174, except it refers to state programs authorized under Section 404 instead of under Section 402.

203. N.J. STAT. ANN. § 13:9A-9(f) (West 2008) governs coastal wetlands, while N.J. STAT. ANN. § 13:9B-21(f) (West 2008) governs freshwater wetlands. Both authorize felony penalties for reckless violations, which is a lower intent standard than "knowing."

204. *See supra* notes 88-95 and accompanying text.

205. *See supra* notes 161, 168-69 and accompanying text.

as those of the CWA for all knowing violations may directly increase the frequency of CWA violations. Furthermore, felony penalties may be especially likely to deter egregious violations (rather than minor violations), insofar as polluters believe prosecutors are more likely to bring felony charges for egregious violations which have significant effects on human health and the environment.[206]

IV. "Negligent" Misdemeanors

Part IV explores the second way in which EPA has been undermining CWA criminal enforcement: by approving numerous state programs with criminal intent standards higher than ordinary negligence. Part IV.A explains how courts have defined "negligence" in the CWA as ordinary negligence, and Part IV.B shows that 33 state programs currently fail to authorize criminal penalties for ordinary negligence violations. Part IV.C discusses *Idaho Conservation League v. EPA*, the 2020 case that revealed EPA had been approving state programs with less stringent intent standards than ordinary negligence, and Part IV.D discusses *Center for Biological Diversity v. Regan*, a 2024 case where the issue of inadequate criminal intent standards recently arose for a second time. Finally, Part IV.E argues that EPA's new rule violates the CWA by allowing states to apply a criminal intent standard greater than ordinary negligence—specifically, gross negligence.

A. The Meaning of Negligence in the Clean Water Act

The CWA establishes that negligent violations under Section 402 and Section 404 are misdemeanors.[207] However, there exist multiple types of negligence, including ordinary negligence and criminal negligence.[208] Ordinary/simple negligence, the lowest criminal intent standard apart from strict liability, refers to "the failure to use reasonable care," while criminal/gross negligence refers to a heightened standard, such as "a gross deviation from the standard of care that a reasonable person would observe in the situation."[209] The bar for showing the latter is higher, so authorizing

206. *See generally supra* note 134 (describing significant prosecutorial discretion in environmental enforcement); *supra* note 136 (describing how environmental criminal enforcement is generally reserved for egregious violations).

207. 33 U.S.C. § 1319(c)(1); *see* Roth et al., *supra* note 21, at 5; Carol Clayton, H. David Gold, Brent Gurney, Mark Kalpin & Alexander White, *Minimizing Risk Under the Clean Water Act*, 36 ENERGY L.J. 69, 76.

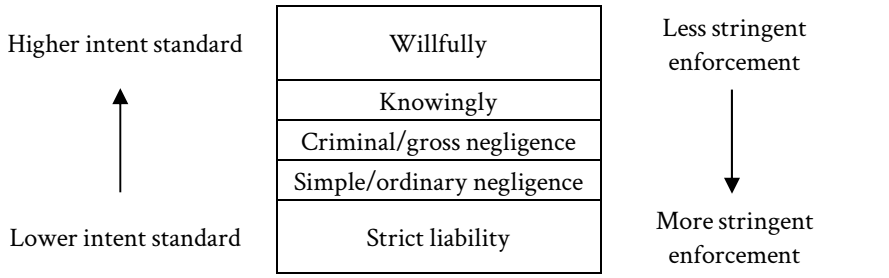
208. *See generally Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing definitions for different types of negligence); *Degree of Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (discussing "varying levels of negligence").

209. *See* United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999).

penalties based on gross negligence rather than ordinary negligence results in less stringent enforcement.[210] Thus, as shown in Figure 1, a lower intent standard is more stringent, while a higher intent standard is less stringent.

Figure 1

Criminal Intent Standards



The text of the CWA has never specified which definition of "negligence" applies to its misdemeanor provision.[211] As a result, EPA approved numerous state programs with misdemeanor provisions specifying "criminal negligence" or "gross negligence"[212]—higher standards that are less stringent than ordinary negligence and make it more difficult to prosecute violations under Sections 402 and 404.

But nearly three decades after Congress passed the CWA, the meaning of "negligence" in the CWA finally arose in the 1999 case *United States v. Hanousek*, after Edward Hanousek Jr. was convicted for negligently discharging up to 5,000 gallons of oil into the Skagway River.[213] Hanousek argued that the CWA imposed criminal penalties only for criminal negligence, but the Ninth Circuit disagreed, reasoning that "[i]f Congress intended to prescribe a heightened

210. *See, e.g.*, *supra* note 18 and accompanying text (discussing how Captain Hazelwood may not have faced criminal liability for the *Exxon Valdez* oil spill if the Alaska Supreme Court had decided that Hazelwood could be convicted only for the higher mens rea standard of gross negligence, rather than ordinary negligence).

211. *See* 33 U.S.C. § 1319(c)(1) (discussing "negligent violations" without defining negligence or specifying a particular type of negligence).

212. *See infra* Table 3.

213. *See Hanousek*, 176 F.3d at 1118-19. Two years earlier, in 1997, the Alaska Supreme Court had discussed the same issue and concluded that "negligence" in the CWA referred only to ordinary negligence. State v. Hazelwood, 946 P.2d 875, 878, 885 (Alaska 1997); *see supra* notes 15-18. But *Hanousek* was the first federal case to address this question.

negligence standard, it could have done so explicitly."[214] The U.S. Supreme Court denied certiorari in *Hanousek*,[215] and in the absence of a U.S. Supreme Court ruling to the contrary, federal courts have agreed with the Ninth Circuit that "negligence" in the CWA refers to ordinary negligence.[216]

Some have criticized *Hanousek* for allowing prosecutors to attach criminal liability to ordinary negligence violations of the CWA.[217] Proponents of a gross negligence standard argue that criminal penalties have "no deterrent impact on those engaged in accidental, as opposed to intentional, knowing, or reckless conduct."[218] Furthermore, there are due process concerns with imposing criminal liability on "hard-working employees who . . . made an honest mistake."[219] Even though a purely negligent violation of the CWA can result only in a misdemeanor rather than a felony, "[a misdemeanor] is still a . . . criminal conviction that can result in severe consequences, including a sentence of up to one year in prison."[220] Indeed, the "potential reach of [the CWA's] criminal negligence provisions is extremely broad."[221]

Others have defended the decision in *Hanousek*. Although authorizing criminal liability for ordinary negligence may seem harsh, "any other standard risks failing to capture significant environmental harms and deprives the

214. *See Hanousek*, 176 F.3d at 1120-21 ("We conclude from the plain language of 33 U.S.C. § 1319(c)(1)(A) that Congress intended that a person who acts with ordinary negligence in violating 33 U.S.C. § 1321(b)(3) may be subject to criminal penalties.").

215. Hanousek v. United States, 528 U.S. 1102 (2000).

216. *See* United States v. Maury, 695 F.3d 227, 257 (3d Cir. 2012) ("Indeed, other Circuits have since concluded that simple, rather than gross, negligence is the appropriate mens rea for a misdemeanor violation of the CWA under § 1319(c)(1)."); United States v. Ortiz, 427 F.3d 1278, 1282-83 (10th Cir. 2005); United State v. Pruett, 681 F.3d 232, 242 (5th Cir. 2012); *see also* Clayton et al., *supra* note 207, at 82-83 ("[B]ecause *Hanousek* was the leading appellate case 'interpreting the definition of negligence' under section 309(c) of the [CWA], criminal penalties could be imposed based on a 'civil or ordinary negligence definition.'").

217. *See, e.g.*, Bruce Pasfield & Sarah Babcock, *Simple Negligence and Clean Water Act Criminal Liability: A Troublesome Mix*, 12 A.B.A ENV'T ENF'T & CRIMES COMM. NEWSL. 3, 3-4, 11-12 (2011) (arguing that criminalizing simple negligence may be unconstitutional). In response to *Hanousek*, the Senate Subcommittee on Fisheries and Wildlife even debated amending the CWA to require a showing of human endangerment before finding a negligent CWA violation. Brigid Harrington, *A Proposed Narrowing of the Clean Water Act's Criminal Negligence Provisions: It's Only Human?*, 32 B.C. ENV'T AFFS. L. REV. 643, 643-44 (2005).

218. Pasfield & Babcock, *supra* note 217, at 3.

219. *See id.*

220. Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and Evaluation of the Impact of* Hanousek *and* Hong, 32 ENV'T L. REP. 11153, 11153-54 (2002).

221. *Id.* at 11153.

system of prosecutorial discretion."[222] Ordinary negligence should be sufficient to establish criminal liability because a CWA violation is a public welfare offense, and "[i]t is well established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process."[223] Due process concerns are overblown because true accidents would not meet the standard of ordinary negligence, which requires a failure to "exercise reasonable care."[224] Concerns that low-level, hard-working employees will be unjustly punished are also overblown, because "in the context of environmental crime prosecutions (as in other white-collar crime offenses)," prosecutors generally only "seek to hold liable the highest level culpable officials of an entity that commits criminal violations."[225]

B. EPA's Failure to Require Ordinary Negligence

Regardless of whether the CWA misdemeanor intent standard should be ordinary negligence or a higher standard, courts have held that it is now ordinary negligence.[226] Thus, state programs should also apply misdemeanor intent standards at least as stringent as ordinary negligence, because the plain language of the CWA and EPA's own regulations establish that state programs must be at least as stringent as the federal program.[227] In other words, federal circuit court decisions on the federal intent standard clearly are not directly binding on states, but they are binding on the federal program—and the CWA requires that the federal program function as a stringency floor for state programs.[228] Thus, given this consensus in the courts of appeals after *Hanousek*, EPA had a nondiscretionary duty to go back and require states to update the misdemeanor intent standards for their Section 402 and 404 state programs.[229]

But EPA never fulfilled this duty, in violation of the CWA and its own implementing regulations. As Table 3 shows, at least 32 out of the 47 states with authorized NPDES programs still apply misdemeanor intent standards

222. Harrington, *supra* note 217, at 644.

223. United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999); *see* Harrington, *supra* note 217, at 644-51.

224. Harrington, *supra* note 217, at 670-71.

225. Solow & Sarachan, *supra* note 220, at 11155. Also, even under the responsible corporate officer doctrine, "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." Harrington, *supra* note 217, at 671.

226. *See supra* note 216 and accompanying text.

227. *See supra* Part II.B.

228. *See supra* Parts II.A.-.B.

229. As discussed in Part I.B.2, the CWA imposes a nondiscretionary duty on EPA to withdraw approval for any state programs that fall out of compliance with the CWA. *See supra* notes 88-95 and accompanying text.

higher than ordinary negligence. In fact, Kentucky, Minnesota, Nebraska, Ohio, Washington, and Wyoming currently apply intent standards above gross negligence.[230] Thus, even gross negligence could never result in criminal liability for Section 402 violations in those states. Furthermore, Table 4 shows that one of the two states with authorized Section 404 programs does not authorize any criminal penalties for ordinary or gross negligence.

Table 3

Lowest Criminal Intent Standards for State NPDES Programs[231]

A. State	B. Relevant Section(s) of the State Code	C. Lowest Intent Standard for Criminal Penalty	D. Compliant with CWA?
Alabama	ALA. CODE § 22-22-14(a) (2024)	Gross negligence	No

230. *See infra* Table 3.

231. In Table 3, each row is a state with its own authorized NPDES program. Column B cites the section of the state code that criminalizes NPDES violations. Where a different section establishes the applicable mens rea, Column B also cites that other section. For some states, I also cite caselaw in a footnote to support my categorization of the intent standard.

Column C provides the lowest intent standard obtained from the state code section(s) in Column B. For instance, if a state code applies the intent standard "willfully or negligently," then the lowest intent standard would simply be negligence.

Column D indicates "yes" if Column C is ordinary negligence or strict liability and "no" if the state intent standard is above ordinary negligence. This is because a lower intent standard is still compliant with the CWA, as state programs are free to exceed the floor set by federal standards; only a higher intent standard would violate the CWA. *See supra* Part II.A.

Alaska	ALASKA STAT. § 46.03.790(h) (2024)	Ordinary negligence[232]	Yes
Arizona	ARIZ. REV. STAT. ANN. § 49-263.01(D) (2024)	Criminal negligence	No
Arkansas	ARK. CODE ANN. § 8-4-103(a)(1) (2024)	Strict liability[233]	Yes
California	CAL. WATER CODE § 13387(b) (West 2024); CAL. PENAL CODE. § 7(2) (West 2024)	Ordinary negligence[234]	Yes
Colorado	COLO. REV. STAT. § 25-8-609(3)(a) (2024)	Criminal negligence	No
Connecticut	CONN. GEN. STAT. § 22a-438(b) (2024)	Criminal negligence	No

232. ALASKA STAT. § 46.03.790(h) (2024) simply states "negligently," without further elaboration. In the absence of a different Alaska state code section defining negligence, I interpret that to mean ordinary negligence, because the state code says "gross negligence" or "criminal negligence" elsewhere: ALASKA STAT. § 46.03.790(a) (2024) applies a criminal negligence intent standard, and ALASKA STAT. § 46.03.790(i)(2) (2024) refers to the specific definition of "criminal negligence" in ALASKA STAT. §11.81.900 (2024).

In doing so, I follow the Ninth Circuit's reasoning in interpreting the CWA:

> Neither section defines the term "negligently," nor is that term defined elsewhere in the CWA. . . . The ordinary meaning of "negligently" is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. . . . If Congress intended to prescribe a heightened negligence standard, it could have done so explicitly, as it did in 33 U.S.C. § 1321(b)(7)(D). . . . "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

United States v. Hanousek, 176 F.3d 1116, 1120-21 (9th Cir. 1999) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

233. ARK. CODE ANN. § 8-4-103(a)(1) (1987) does not provide an intent standard for misdemeanor violations, suggesting strict liability. Furthermore, ARK. CODE ANN. § 5-2-204(c)(2) (1987) states that "a culpable mental state is not required if . . . [a]n offense defined by a statute not a part of the Arkansas Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any element of the offense."

234. CAL. WATER CODE § 13387(b) (West 2024) simply says "negligently," and CAL. PENAL CODE § 7(2) (West 2024) defines "negligently" as "import[ing] a want of the attention to the nature or probable consequences of the act or omission that a prudent person ordinarily bestows in acting in their own concerns."

Delaware	DEL. CODE ANN. tit. 7, § 6013(a) (2024); *id.* § 231(d)	Ordinary negligence[235]	Yes
Florida	FLA. STAT. § 403.161(4) (2024)	Gross negligence[236]	No
Georgia	GA. CODE ANN. § 12-5-53(a) (2024); *id.* § 16-2-1(a)	Criminal negligence[237]	No
Hawaii	HAW. REV. STAT. § 342D-32 (2023); *id.* § 702-206(4)(d)	Gross negligence[238]	No
Idaho	IDAHO CODE § 39-117 (2024); *id.* § 18-101 statutory note (Negligence)	Gross negligence[239]	No

235. DEL. CODE ANN. tit. 7, § 6013(a) (2024) simply says "wilfully or negligently" without specifying the type of negligence, and DEL. CODE ANN. tit. 7, § 231(d) (2024) defines "negligence" as "fail[ing] to exercise the standard of care which a reasonable person would observe in the situation."

236. FLA. STAT. § 403.161(4) (2024) applies an intent standard of "reckless indifference or gross careless disregard" for misdemeanors of the second degree. FLA. STAT. § 403.161(5) (2024) applies an intent standard of "willfully" for misdemeanors of the first degree.

237. GA. CODE ANN. § 12-5-53(a) (2024) does not specify an intent standard, but GA. CODE ANN. § 16-2-1(a) (2024) states that criminal liability in Georgia requires "intention or criminal negligence."

238. HAW. REV. STAT. § 342D-32 (2023) simply says "negligently," but HAW. REV. STAT. § 702-206(4)(d) (2023) defines negligence as involving a "gross deviation from the standard of care that a law-abiding person would observe in the same situation."

239. Idaho Conservation League v. U.S. EPA, 820 F. App'x 627, 628 (9th Cir. 2020) ("Because EPA approved the [Idaho Pollutant Discharge Elimination System] even though it used a standard greater than simple negligence, 'gross negligence,' we grant the petition with respect to invocation of the improper mens rea standard."); *see infra* Part IV.C.

IDAHO CODE § 39-117 (2024) simply says "willfully or negligently" without specifying the type of negligence, and IDAHO CODE § 18-101 (2024) appears to define negligence as ordinary negligence. But the statutory note for IDAHO CODE § 18-101 (2024) states that "[t]his section, read in connection with § 18-114, qualifies the definition of negligence, it being apparent from the context of the latter section that criminal negligence is not ordinary negligence as defined in this section" (citing State v. McMahan, 65 P.2d 156 (1937)). And IDAHO CODE § 18-114 (2024) states that criminal liability in Idaho requires either intent or criminal negligence.

Illinois	415 ILL. COMP. STAT. 5/44(j)(3) (2024); 720 ILL. COMP. STAT. 5/4-7 (2024)	Gross negligence[240]	No
Indiana	IND. CODE § 13-30-10-1.5(e) (2023); *id.* § 35-41-2-2(c)	Gross negligence[241]	No
Iowa	IOWA CODE § 455B.191(3) (2024)	Ordinary negligence[242]	Yes
Kansas	KAN. STAT. ANN. § 65-167 (2024); *id.* § 21-5202	Negligence[243]	Unclear
Kentucky	KY. REV. STAT. ANN. § 224.99-010(4) (West 2024)	Knowingly	No
Louisiana	LA. STAT. ANN. § 30:2076.2(A) (2024); *id.* § 14:12	Gross negligence[244]	No

240. 415 ILL. COMP. STAT. ANN. 5/44(j)(3) simply says "negligently," but 720 ILL. COMP. STAT. ANN. 5/4-7 defines negligence as "a *substantial* deviation from the standard of care that a reasonable person would exercise in the situation" (emphasis added).

241. IND. CODE § 13-30-10-1.5(e) (2024) simply says "willfully or negligently" without specifying the type of negligence, but IND. CODE § 13-11-2-138.5 (2024) defines "negligently" as gross negligence.

242. IOWA CODE § 455B.191(3) (2024) simply says "negligently or knowingly" without specifying the type of negligence. The Iowa Supreme Court has ruled that negligence in Iowa always means ordinary negligence. Werthman v. Cath. Ord. of Foresters, 133 N.W.2d 104, 109 (Iowa 1965) ("There are no degrees of care or of negligence in Iowa. . . . The standard is always the care which an ordinarily prudent person would use under the circumstances."); Sechler v. State, 340 N.W.2d 759, 762 (Iowa 1983) ("[T]here are no degrees of negligence in Iowa.").

243. KAN. STAT. ANN. § 65-167 (2024) simply says "willful or negligent" without specifying the type of negligence, and KAN. STAT. ANN. § 21-5202 (2024) does not define negligence. I cannot apply the same reasoning as I did for Alaska, *see supra* note 232, because I am unsure if another section of the state code uses "gross negligence" or "criminal negligence."

244. LA. STAT. ANN. § 30:2076.2(A) (2024) simply states "negligently," but LA. STAT. ANN. § 30:2076.2(I) (2024) defines negligence by referring the reader to the definition of criminal negligence in LA. STAT. ANN. § 14:12 (2024): "a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances."

Maine	ME. STAT. tit. 38, § 349 (2023); ME. STAT. tit. 17-A, § 35(4) (2023)	Criminal negligence	No
Maryland	MD. CODE ANN., ENV'T § 9-343(a)(1) (LexisNexis 2024)	Unclear[245]	Unclear
Michigan	MICH. COMP. LAWS § 324.3115a(2) (2024)	Strict liability[246]	Yes
Minnesota	MINN. STAT. § 609.671(8)(d)-(e) (2024)	Knowingly[247]	No
Mississippi	MISS. CODE ANN. § 49-17-43(5) (2024)	Strict liability	Yes
Missouri	MO. REV. STAT. § 644.076(3) (2024); *id.* § 562.016(5)	Gross negligence[248]	No
Montana	MONT. CODE ANN. § 75-5-632 (2023); *id.* § 45-2-101(43)	Gross negligence[249]	No

245. MD. CODE ANN., ENV'T § 9-343(a)(1) (LexisNexis 2024) does not specify an intent standard, potentially suggesting that strict liability applies. But Maryland courts have held that "[t]he absence of such language in a statute . . . does not necessarily make it a strict liability offense." State of Md. Cent. Collection Unit v. Jordan, 952 A.2d 266, 272 (2008).

246. MICH. COMP. LAWS § 324.3115a(2) (1995) applies a strict liability intent standard for "misdemeanor[s] punishable by a fine of not more than $500.00 for each violation." However, note that this penalty is significantly lower than that of the CWA. *See supra* note 168. With regard to "misdemeanor[s] punishable by a fine of not more than $2,500.00 per day," MICH. COMP. LAWS § 324.3115a(3) (1995) applies a willful or reckless intent standard. Thus, one could argue that Michigan is not compliant with the CWA.

247. Note that MINN. STAT. § 609.671(6) discusses "[n]egligent violation as gross misdemeanor," but that is only with respect to the "acts set forth in subdivision 4, 5, or 12."

248. MO. REV. STAT. § 644.076(3) (2005) simply says "willfully or negligently" without specifying the type of negligence, but MO. REV. STAT. § 562.016 (2005) says "a person is not guilty of an offense unless he or she acts with a culpable mental state, that is, unless he or she acts purposely or knowingly or recklessly or with criminal negligence." *See also* MO. REV. STAT. § 562.016(5) (2005).

249. MONT. CODE ANN. § 75-5-632 (2023) simply says "willfully or negligently" without specifying the type of negligence, but MONT. CODE ANN. § 45-2-101(43) defines "negligently" as "a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."

Nebraska	NEB. REV. STAT. § 81-1508.01(1) (2024)	Knowingly and willfully[250]	No
Nevada	NEV. REV. STAT. § 445A.705(1) (2024)	Criminal negligence[251]	No
New Jersey	N.J. STAT. ANN. § 58:10A-10(f)(3) (West 2023); *id.* § 2C:2-2(b)(4)	Gross negligence[252]	No
New York	N.Y. ENV'T CONSERV. LAW § 71-1933(3) (McKinney 2024)	Gross negligence[253]	No
North Carolina	N.C. GEN. STAT. § 143-215.6B(f) (2024)	Gross negligence[254]	No
North Dakota	N.D. CENT. CODE § 61-28-08(2) (2023); *id.* § 12.1-02-02(1)(d)	Criminal negligence	No

250. NEB. REV. STAT. § 81-1508.01(1) (2024); *see supra* note 188. For violations of "any water pollution control law, rule, or regulation adopted pursuant to the National Pollutant Discharge Elimination System," Nebraska authorizes only felony penalties. NEB. REV. STAT. § 81-1508.01(1) (2024). Nebraska does not authorize misdemeanor penalties. *Id.*

251. NEV. REV. STAT. § 445A.705(1) (2024) applies the standard of "intentionally or with criminal negligence." Interestingly, however, NEV. REV. STAT. § 193.018 (2024) does not define "criminal negligence," only "negligence," which it appears to define as ordinary negligence.

252. N.J. STAT. ANN. § 58:10A-10(f)(3) (West 2023) simply says "negligently," but N.J. STAT. ANN. § 2C:2-2(b)(4) (West 2024) defines "negligently" as "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

253. *See also* N.Y. PENAL LAW § 15.05(4) (McKinney 2014) (defining criminal negligence as gross negligence).

254. N.C. GEN. STAT. § 143-215.6B(f) (2024) simply says "negligently," but the North Carolina Supreme Court has held that "[c]ulpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort." State v. Everhart, 231 S.E.2d 604, 606 (N.C. 1977). Instead, "for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others." *Id.*

Ohio	OHIO REV. CODE ANN. § 6111.99(B) (West 2023)	Knowingly[255]	No
Oklahoma	OKLA. STAT. ANN. tit. 27a, § 2-6-206(G)(1) (West 2024); *id.* tit. 21, § 93	Ordinary negligence[256]	Yes
Oregon	OR. REV. STAT. § 468.943 (2024); *id.* § 161.085(10)	Criminal negligence	No

255. Two different sections of Ohio's state code govern Ohio's NPDES program: (1) Title 61, Chapter 6111 and (2) Title 9, Chapter 903.

The first section concerns everything regulated under Ohio's NPDES program except for concentrated animal feeding operations (CAFOs). OHIO REV. CODE ANN. §§ 6111.01-99 (West 2023). From 1994 to 2014, that section did not specify an intent standard. *Compare* OHIO REV. CODE ANN. § 6111.99(B) (West 1994), and OHIO REV. CODE ANN. § 6111.99(B) (West 2014), *with* OHIO REV. CODE ANN. § 6111.99(B) (West 2023) (effective Sept. 29, 2015). But a different section of the state code established that if no mental state is specified, then the intent standard is recklessness. OHIO REV. CODE ANN. § 2901.21(B) (West 2014) ("When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."); OHIO REV. CODE ANN. § 2901.21(B) (West 1994) (identical language). Thus, from 1994 to 2015, the intent standard was recklessness. Then, in March 2015, the legislature established that criminal offenses enacted on or after March 2015 must specify the degree of mental culpability. *See* OHIO REV. CODE ANN. § 2901.20 (West 2023) (effective March 23, 2015). Of course, criminal liability for NPDES violations had existed prior to March 2015. But perhaps to ensure consistency with the spirit of this new requirement, in 2015 the Ohio legislature amended OHIO REV. CODE ANN. § 6111.99 (West 2023) (effective Sept. 23, 2015) to add intent standards. Now, only knowing violations are subject to misdemeanor penalties. *Id.* § 6111.99(B) (West 2023).

The second section, titled "Concentrated Animal Feeding Facilities," concerns only CAFOs regulated under Ohio's NPDES program. *See generally* OHIO REV. CODE ANN. § 903.08 (West 2023) (authorizing the Ohio Department of Agriculture to participate in the NPDES program and discussing NPDES permits for CAFOs). In that section, Ohio applies an ordinary negligence standard for CAFO-related violations. *See* OHIO REV. CODE ANN. § 903.99(A) (West 2023); OHIO REV. CODE ANN. § 903.30 (West 2023).

256. OKLA. STAT. ANN. tit. 27A, § 2-6-206(G)(1) (West 2024) simply says "negligently," and OKLA. STAT. ANN. tit. 21, § 93 (West 2024) defines "negligently" as "import[ing] a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns."

Pennsylvania	35 PA. STAT. AND CONS. STAT. ANN. § 691.602(b) (West 2024); 18 PA. STAT. AND CONS. STAT. ANN. § 302(b)(4) (West 2024)	Gross negligence[257]	No
Rhode Island	46 R.I. GEN. LAWS § 46-12-14 (2024)	Criminal negligence	No
South Carolina	S.C. CODE ANN. § 48-1-320 (2024)	Gross negligence	No
South Dakota	S.D. CODIFIED LAWS § 34A-12-1(4) (2025); *id.* § 34A-2-75	Strict liability[258]	Yes
Tennessee	TENN. CODE ANN. § 69-3-115(b) (2024); *id.* § 39-11-301 (1995)	Criminal negligence[259]	No
Texas	TEX. WATER CODE ANN. § 7.147 (West 2023)	Strict liability	Yes

257. 35 PA. STAT. AND CONS. STAT. ANN. § 691.602(b) (West 2024) simply says "negligently," but 18 PA. STAT. AND CONS. STAT. ANN. § 302(b)(4) (West 2024) defines negligence as "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

258. S.D. CODIFIED LAWS § 34A-12-1(4) (2025) states that discharges may be "intentional or unintentional." Note that S.D. CODIFIED LAWS § 34A-2-13 (2025) also says "[t]he state standards shall be at least as stringent as the standards adopted by the federal government."

259. TENN. CODE ANN. § 69-3-115(b) (2024) does not specify an intent standard, but TENN. CODE ANN. § 39-11-301(b) (2024) states that "[a] culpable mental state is required within this title unless the definition of an offense plainly dispenses with a mental element." Then, Section (a)(1) of the same statute states that "[a] person commits an offense who acts intentionally, knowingly, recklessly or with criminal negligence, as the definition of the offense requires, with respect to each element of the offense." TENN. CODE ANN. § 39-11-301(a)(1); *see also* Claybrook v. State, 51 S.W.2d 499, 499 (Tenn. 1932) ("[T]he kind of negligence required to impose criminal liability 'must be of a higher degree than is required to establish negligence upon a mere civil issue.'" (quoting Copeland v. State, 285 S.W. 565, 566 (Tenn. 1926))).

Utah	UTAH CODE ANN. § 19-5-115(3) (West 2024)	Gross negligence[260]	No
Vermont	VT. STAT. ANN. tit. 10, § 1275(a) (2025)	Unclear[261]	Unclear
Virginia	VA. CODE ANN. § 62.1-44.32(b) (2024)	Gross negligence[262]	No
Washington	WASH. REV. CODE § 80.50.150(4) (2024)	Criminal Negligence[263]	No
West Virginia	W. VA. CODE § 22-11-24(a) (2024)	Strict liability[264]	Yes

260. *See also* UTAH CODE ANN. § 76-2-103(4) (West 2024) (defining criminal negligence as gross negligence).

261. VT. STAT. ANN. tit. 10, § 1275(a) (2025) imposes misdemeanor penalties for "[a]ny person who violates any provision of this subchapter or who fails, neglects, or refuses to obey or comply with any order or the terms of any permit issued in accordance with this subchapter." This seems to mix in at least three different mens rea standards. "Fails" suggests strict liability, "neglects" suggests negligence, and "refuses" suggests willfulness. One might argue that the lowest intent standard is thus strict liability, but given the lack of clarity, I put "unclear" in Column C.

262. VA. CODE ANN. § 62.1-44.32(b) simply says "willfully or negligently" without specifying the type of negligence, but the Virginia Court of Appeals has held that "[t]he negligence required in a criminal proceeding must be more than the lack of ordinary care and precaution. It must be something more than mere inadvertence or misadventure. It is a recklessness or indifference incompatible with a proper regard for human life." Mosby v. Commonwealth, 473 S.E.2d 732, 735 (Va. Ct. App. 1996) (quoting Bell v. Commonwealth, 195 S.E. 675, 681 (Va. 1938)).

263. WASH. REV. CODE §§ 80.50.150(3), 90.48.140 (2024) apply a willful standard for all violations of their respective chapters. But WASH. REV. CODE § 80.50.150(4) (2024) applies a "willful or criminally negligent" standard to criminalize "violation[s] of any provision of a NPDES permit."

264. Though the misdemeanor intent standard is strict liability, the penalty is only "a fine of not less than $100 nor more than $1,000, or by imprisonment in county jail for a period not exceeding six months, or by both fine and imprisonment." W. VA. CODE § 22-11-24(a) (2024). This penalty is significantly lower than that of the CWA, *see supra* note 168, so the penalty is not in compliance with the CWA even though the intent standard is. W. VA. CODE § 22-11-24(c) (2024) imposes the CWA misdemeanor penalties ("a fine of not less than $2,500 nor more than $25,000 per day of violation or by imprisonment in jail not exceeding one year or by both fine and imprisonment") for willful or negligent violations, but does not specify the type of negligence required.

Wisconsin	WIS. STAT. § 283.91 (2024)	Unclear[265]	Unclear
Wyoming	WYO. STAT. ANN. § 35-11-901(j) (2024)	Willfully and knowingly[266]	No

Table 4

Lowest Criminal Intent Standards for State Section 404 Programs[267]

A. State	B. Relevant Section(s) of the State Code	C. Lowest Intent Standard for Criminal Penalty	D. Compliant with CWA?
Michigan	MICH. COMP. LAWS § 324.30112 (2024)	Strict liability[268]	Yes

265. WIS. STAT. § 283.91(2) (2024) does not provide any intent standard. But the Wisconsin Supreme Court has stated that "[e]ven when a criminal statute contains no explicit words denoting scienter, the court has on occasion interpreted the statute to require the state to prove criminal intent." State v. Stoehr, 396 N.W.2d 177, 181 (Wis. 1986). WIS. STAT. § 283.91(3) (2024) simply says "willfully or negligently" without specifying the type of negligence.

266. WYO. STAT. ANN. § 35-11-901(j) (2024) authorizes criminal penalties, including imprisonment; in contrast, subsection (a) authorizes only civil penalties. WYO. STAT. ANN. § 35-11-901(a)(ii) (2024); *cf.* Snodgrass v. Rissler & McMurry Co., 903 P.2d 1015, 1016 (Wyo. 1995) (discussing "*civil* damages . . . pursuant to W.S. 35-11-901(a) (1988)" (emphasis added)).

Interestingly, subsection (a) seems to apply strict liability for "any person" but a "willfully and knowingly" standard for "any director, officer or agent of a corporate permittee." WYO. STAT. ANN. § 35-11-901(a) (2024).

267. The structure of Table 4 is exactly parallel to that of Table 3, *see supra* note 231, except it refers to state programs authorized under Section 404 instead of under Section 402.

268. As stated in a letter from the Michigan Attorney General's office:

> [T]he relevant provisions of Parts 303 and 301 impose strict criminal liability and require no showing of a specific intent to violate those statutes in order to impose criminal penalties. . . . Nothing in either statute requires any specific knowledge that the resource being impacted is regulated or that the activity undertaken is unlawful. If you undertake the prohibited activities without a permit, you are in violation of the statute. And if you are in violation of the statute, you are guilty of a misdemeanor. This unambiguous language imposes strict criminal liability. This is supported by the fact that both statutes have enhanced misdemeanor penalties for knowing or willful violations. Numerous Michigan cases have recognized the State's ability to create strict criminal liability offenses.

Letter from S. Peter Manning, Div. Chief, Env't, Nat. Res. & Agric. Div., Mich. Dep't of Att'y Gen., to Sue Elston, U.S. EPA (Apr. 21, 2008) (citation omitted) (on file with author).

New Jersey	N.J. STAT. ANN. § 13:9A-9(f) (West 2024); *id.* § 13:9B-21(f) (West 2024)	Recklessness[269]	No

This Note's review of state water codes also finds that many are unclear or poorly written.[270] Some even contradict themselves. For instance, New Jersey does not authorize criminal penalties for ordinary negligence violations of its Section 404 program,[271] but given that EPA *does* authorize criminal penalties for ordinary negligence violations,[272] this contradicts the portion of New Jersey's state code which states that "[t]he burden of proof and degree of knowledge or intent required to establish a violation . . . *shall be no greater than* the burden of proof or degree of knowledge or intent which the [EPA] must meet in establishing a violation of the [CWA]."[273] Furthermore, as discussed in the footnotes in Table 3, some states simply do not specify what type of negligence is sufficient to result in criminal liability. Thus, for Kansas, Maryland, Vermont, and Wisconsin, it is unclear whether their lowest intent standard for a criminal penalty is compliant with the CWA.[274]

Many states still retain intent standards of "willfully or negligently,"[275] a relic of the pre-1987 CWA's exact language.[276] Today, the word "willfully" does not appear anywhere in Section 309 of the CWA.[277] In other words, these states simply have not updated their criminal enforcement provisions to conform to the 1987 Amendments.

As with EPA's failure to require states to include felony provisions for their Section 402 and 404 programs,[278] EPA's failure to require these 33 states to establish an ordinary negligence intent standard has real consequences for the environment. By shielding ordinary negligence violations from criminal prosecution, states "exclude an entire class of permit violations that are subject

269. New Jersey does not authorize any misdemeanor penalties, but it does authorize felony penalties for purposeful, knowing, and reckless violations. *See* N.J. Stat. Ann. § 13:9A-9(f) (West 2024); *id.* § 13:9B-21(f) (West 2024); *see also supra* note 203.

270. Tables 1-4 include many footnotes because many state codes required additional interpretation and/or additional references to court cases or other state code sections.

271. *See supra* note 269.

272. *See supra* Part IV.A.

273. N.J. STAT. ANN. § 13:9B-21(i) (West 2024) (emphasis added).

274. *See supra* Table 3.

275. *See, e.g.*, IDAHO CODE § 39-117 (2024); MO. ANN. STAT. § 644.076(3) (West 2024).

276. *See supra* note 162 and accompanying text.

277. 33 U.S.C. § 1319.

278. *See supra* Part III.

to criminal penalty under federal law,"[279] thereby hamstringing CWA enforcement and undermining deterrence.

Specifically, higher intent standards may contribute to environmental degradation by reducing the frequency and/or impact of enforcement actions.[280] If prosecutors know they must meet a higher bar to establish criminal liability, they may be less likely to bring criminal charges.[281] Even if prosecutors do bring criminal charges, they may offer more lenient guilty pleas because defendants likely have greater leverage in negotiations when prosecutors face an elevated intent requirement. Indeed, for cases which go to trial, a higher intent standard may result in fewer convictions.[282] In sum, CWA criminal intent standards above ordinary negligence may weaken the deterrent effect of environmental criminal liability in a variety of ways.

C. Bringing the Mens Rea Issue to Light: *Idaho Conservation League v. EPA*

Roughly twenty years after *Hanousek* established that ordinary negligence should result in criminal liability under the CWA,[283] it finally came to light that EPA had been approving state programs with higher (and thus less stringent) intent standards than ordinary negligence.

In 2016, Idaho applied for its own state NPDES program—the Idaho Pollutant Discharge Elimination System (IPDES) Program.[284] In 2017, EPA

279. Burkhardt et al., *supra* note 57, at 4.

280. *Cf. id.* at 3 ("A lower mens rea standard provides for more robust criminal enforcement of permit violations—and therefore greater environmental protections—because it sets a lower bar the government must meet to bring and prevail in an enforcement action and promotes compliance through deterrence.").

281. Furthermore, it is also possible that a higher bar to establish criminal liability could affect which alleged violations EPA's Criminal Investigation Division chooses to investigate. Specifically, investigators may concentrate their limited resources on cases that are more likely to meet the heightened intent threshold, thereby narrowing the scope of enforcement to a smaller subset of violations.

282. It is true that many juries may find it difficult to parse the subtle differences between gross negligence and ordinary negligence. *See* J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 80 (1990) ("[A] mens rea instruction on intent did not improve their subjects' comprehension of that element of the substantive law."). On the other hand, recent research has shown that "specific variations in the phrases used to define and to communicate criminal mental states can significantly increase an individual's ability to accurately classify mental states." Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327, 1363 (2014). Thus, in the aggregate, jury instructions on gross negligence rather than ordinary negligence may well result in fewer convictions.

283. *See supra* Part IV.A.

284. *Idaho NPDES Program Authorization*, EPA, https://perma.cc/GA3P-5AZF (last updated Dec. 20, 2024).

opened a two-month public comment period on Idaho's IPDES application,[285] during which EPA received comments from various entities, including a nonprofit environmental organization called the Idaho Conservation League (ICL).[286] ICL's comment revealed various flaws in the IPDES program, including the fact that the IPDES program would apply an intent standard of criminal negligence for violations, rather than ordinary negligence.[287]

ICL also pointed out that EPA had itself identified this flaw in its letters to the Idaho Department of Environmental Quality (IDEQ) in 2016.[288] Indeed, EPA had sent a letter to the IDEQ, unambiguously stating:

> Since the CWA and federal courts have defined the CWA's negligence standard as ordinary or simple negligence, an approvable State NPDES program must have a criminal negligence standard that does not require a greater burden of proof than this intent standard. A gross negligence standard does not meet this requirement. As such, Idaho will need to adequately address this criminal negligence standard issue in order for EPA to approve the IPDES program.[289]

But after the change in presidential administrations, EPA backtracked in May 2018, declaring that "upon further consideration . . . the EPA agrees with IDEQ's conclusion that Idaho's gross negligence standard meets applicable requirements in 40 CFR § 123.27 without any further changes."[290]

To support this claim, EPA asserted that its "regulations are ambiguous regarding the exact negligence standard States must have to obtain NPDES program authorization."[291] However, as discussed in Part II.B, EPA's own longstanding regulations for Sections 402 and 404 plainly state that the "burden of proof and degree of knowledge or intent required under State law for establishing violations . . . shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action."[292]

EPA also cited a Note in its Section 402 regulations establishing that "[s]tates which provide the criminal remedies based on 'criminal negligence,' 'gross negligence' or strict liability satisfy the requirement of

285. *Id.*

286. *IPDES Public Comments September 2017*, EPA, at 18, https://perma.cc/TB6K-TYGR (archived Feb. 20, 2025).

287. *Id.* at 19.

288. *Id.*

289. Letter from Dennis J. McLerran, Reg'l Adm'r, EPA, to John Trippets, Dir., Idaho Dep't of Env't Quality 3 (Sept. 30, 2016), https://perma.cc/GLD8-VS2M.

290. *Response to Comments and Testimony: Idaho NPDES Program Application*, EPA, at 12 (May 2018), https://perma.cc/N2ZM-C9A2.

291. *Id.*

292. 40 C.F.R. § 123.32(h)(2) (1979); *see supra* note 34.

paragraph (a)(3)(ii) of this section."[293] However, as ICL had already pointed out in its original comment, using "the Note in 40 C.F.R. §§ 123.27(a)(3)(ii) to justify the heightened standard is misplaced because the note refers to remedies, not the mental state required to establish a criminal violation."[294] In fact, a different Note "specifically addresses the standard of proof for mental state of a violator."[295]

In 2018, EPA authorized the IPDES program.[296] ICL sued EPA, and in 2020, the Ninth Circuit sided with ICL, ruling that "EPA abused its discretion in approving a mens rea standard 'greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action.'"[297] The court then remanded without vacatur "for EPA to promptly address the IPDES's deficiency with respect to the mens rea standard."[298]

This was a win for CWA enforcement and ICL, but there was one problem. The Ninth Circuit had only discussed how EPA had violated its own implementing regulations;[299] the court failed to address how EPA had also violated the CWA itself.[300] Thus, as I discuss in Part IV.D, the Ninth Circuit left the door open for EPA to simply modify its own regulations. Nevertheless, *Idaho Conservation League v. U.S. EPA* was a crucial development: This 2020 case finally alerted environmental groups to EPA's decades-long deficiency, laying the groundwork for future litigation.[301]

D. Recent Litigation on the Mens Rea Issue: *Center for Biological Diversity v. Regan*

The issue of inadequate criminal intent standards recently arose for a second time, in *Center for Biological Diversity v. Regan*.[302] In December 2020, EPA

293. *Response to Comments and Testimony: Idaho NPDES Program Application*, *supra* note 290, at 12; 40 C.F.R. § 123.27(a)(3)(ii) (2023).

294. *IPDES Public Comments September 2017*, *supra* note 286, at 19.

295. *Id.*

296. *Idaho NPDES Program Authorization*, *supra* note 284.

297. Idaho Conservation League v. U.S. EPA, 820 F. App'x 627, 628 (9th Cir. 2020) (quoting 40 C.F.R. §123.27(b)(2) (2023)).

298. *Id.*

299. *Id.*

300. *See generally supra* Parts II.B, IV.B (showing how EPA violated the CWA itself).

301. *See infra* Part IV.D.

302. *See* Plaintiffs' Motion for Summary Judgment at 44-46, Ctr. for Biological Diversity v. Regan, 734 F. Supp. 3d 1 (D.D.C. 2023) (No. 21-119) (discussing inadequate criminal intent standards). *See generally* Ctr. for Biological Diversity v. Regan, No. 21-CV-119, 2024 WL 1740078, at *1 (D.D.C. Apr. 23, 2024) (explaining how "[o]ver the past two years, the Court has issued four decisions resolving all but one of Plaintiffs' claims in this case"); Ctr. for Biological Diversity v. Regan, 734 F. Supp. 3d 1, 22 (D.D.C. 2024)
footnote continued on next page

authorized Florida's Section 404 program, making Florida the third state in nearly 30 years to have its own 404 program.[303] However, environmental organizations filed suit in January 2021, alleging that "[t]he EPA's actions failed to effectuate a lawful transfer of [Section 404 permitting] authority" to Florida.[304] Plaintiffs brought numerous claims,[305] including claims that EPA and the U.S. Fish and Wildlife Service (FWS) had violated the Endangered Species Act (ESA) by approving Florida's program.[306] In April 2024, the D.C. District Court ruled in favor of Plaintiffs on the ESA claims and vacated EPA's approval of the Florida program.[307] EPA has appealed the decision.[308]

However, in addition to the ESA claims, Plaintiffs had also argued that EPA "abused its discretion in approving Florida's program" because Florida's mens rea requirement for CWA violations is "gross or culpable (criminal) negligence," rather than ordinary negligence.[309] Florida's program "thus exclude[d] an entire class of violators from criminal liability, rendering its program less stringent than the federal program and undermining the deterrent effect of the Clean Water Act's enforcement mechanisms."[310]

Unfortunately, after ruling on the ESA claims, the D.C. District Court mooted the issues relating to criminal intent standards.[311] If the D.C. District Court had ruled against EPA on the criminal intent standard issue, that would have allowed future litigants to cite to *Regan* for the proposition that state programs under Sections 402 and 404 cannot apply criminal intent standards

(ruling on plaintiffs' Endangered Species Act claims); Ctr. for Biological Diversity v. Regan, 729 F. Supp. 3d 37, 43 (D.D.C. 2024) (dismissing plaintiffs' other claims as prudentially moot).

303. Ctr. for Biological Diversity v. Regan, 734 F. Supp. 3d, 1 22 (D.D.C. 2024).

304. *Id.* at 28.

305. *See id.* at 28-29.

306. *Id.* at 41-56 (discussing Plaintiffs' ESA claims against the FWS); *id.* at 56-61 (discussing Plaintiffs' ESA claims against EPA).

307. *Id.* at 58, 65 ("[T]he Court concludes that the appropriate remedy is to VACATE the EPA's approval of Florida's assumption application.").

308. Federal Defendants' Notice of Appeal at 1, Ctr. for Biological Diversity v. U.S. EPA, (2024) (No. 1:21-CV-0019).

309. Plaintiffs' Motion for Summary Judgment, *supra* note 302, at 46.

310. *Id.* at 44-45.

311. *See* Ctr. for Biological Diversity v. Regan, 729 F. Supp. 3d 37, 43 (D.D.C. 2024) ("dismiss[ing] as prudentially moot Counts 1, 2 and 5 of the Amended Complaint"). The criminal intent standard issue was in Count 2 of the Amended Complaint. *See* Complaint for Declaratory & Injunctive Relief at 31, Ctr. for Biological Diversity v. Regan, 729 F. Supp. 3d 37 (D.D.C. 2024) (No. 21-119) ("The state application also failed to demonstrate adequate criminal enforcement authority.").

above ordinary negligence. On June 10, 2024, plaintiff environmental groups appealed the dismissal of issues relating to criminal intent standards.[312]

To date, *Regan* is only the second case where the issue of inadequate CWA criminal intent standards has arisen, but more litigation is likely on the horizon now that *Idaho Conservation League* has alerted environmental groups to EPA's decades-long deficiency.[313] Furthermore, given the discussion in Part III, environmental organizations may also begin to challenge EPA authorizations of state programs which do not authorize felony penalties at least as stringent as those of the CWA for all knowing violations.

E. EPA's New Rule

On December 18, 2024, EPA finalized a rule allowing state programs to apply criminal intent standards higher than ordinary negligence[314]—despite the CWA's requirement that state programs must be at least as stringent as the federal program.[315] Part IV.E.1 traces the development of this rule, and Part IV.E.2 responds to EPA's arguments in favor of the rule. Part IV.E.3 briefly discusses how EPA can no longer rely on *Chevron* deference to support its rulemaking.

1. Tracing the rule's development

After the Ninth Circuit's September 2020 decision in *Idaho Conservation League*, EPA knew that it had to promulgate a new rule to bring itself into compliance with its own regulations. Otherwise, it would likely face litigation or petitions for rulemaking due to the various state programs that it had approved with misdemeanor intent standards above ordinary negligence.[316] Accordingly, in December 2020, just three months after *Idaho Conservation League*, EPA proposed a rule stating that "EPA may approve state or tribal

312. Notice of Appeal at 1, Ctr. for Biological Diversity v. U.S. EPA, No. 21-CV-00119, (D.D.C. June 10, 2024), ECF No. 2059317, https://perma.cc/C3ND-KFT3 (appealing "from the judgment on Claims 1, 2, and 5 entered on April 12, 2024").

313. *See supra* Part IV.C.

314. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. 103454, 103454 (Dec. 18, 2024) (to be codified at 40 C.F.R. pts. 123-24, 232-33).

315. *Supra* Part II.B.

316. *See supra* Part IV.B; Doug Hicks, *Not My Negligence: New EPA Rule Would Allow States to Have Disparate Negligence Standards in CWA Enforcement Programs*, GEO. ENV'T L. REV. (Feb. 26, 2023), https://perma.cc/6W8V-CY74 (describing how "the administrative stakes are high for EPA," because "[i]f other federal appellate courts weigh in and follow the Ninth Circuit, EPA might have to reevaluate its approval of CWA permit enforcement programs for each non-compliant state").

programs that allow for prosecution based on any negligence standard, including gross negligence or recklessness."[317]

Various environmental groups submitted comments on EPA's proposed rule. ICL argued that "[t]his last-minute attempt by the outgoing administration . . . is inconsistent with prior EPA interpretations of the state authorization regulations and the CWA," and that "[s]ince 1984, the EPA standard for reviewing approved state programs under the section 402 and 404 programs has been that state *mens rea* standards cannot be less strict than the standards EPA must meet."[318] Earthjustice, writing on behalf of various conservation organizations, pointed out that "[b]ecause Congress has spoken directly to the standard of negligence required for a violation of section 402 and 404 permits, EPA is not authorized to promulgate a regulation contrary to the statute."[319]

EPA did not finalize its 2020 proposed rule. Though the 2020 proposed rule appears to still be pending,[320] EPA proposed a new rule in 2023 that would also allow states to apply criminal intent standards greater than ordinary negligence.[321] EPA finalized this rule in December 2024, and the final rule went into effect on January 17, 2025.[322] While the 2020 proposed rule was aimed entirely at rectifying the mens rea deficiency identified by *Idaho Conservation League*,[323] the new rule reforms the Section 404 program more broadly.[324] However, subsection IV.D of the proposed rule amends EPA's criminal enforcement requirements for both Section 402 and Section 404.[325]

Specifically, subsection IV.D establishes that states "are required to authorize prosecution based on a *mens rea*, or criminal intent, of any form of

317. Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs, 85 Fed. Reg. 80713, 80713 (Dec. 14, 2020) (to be codified at 40 C.F.R. pts. 123, 233).

318. Letter from Marie Callaway Kellner, Conservation Program Dir., Idaho Conservation League, to Nizanna Batherfsfield, Off. Wastewater Mgmt., EPA 2 (Jan. 13, 2021), https://perma.cc/N3ZJ-3ZXW.

319. Burkhardt et al., *supra* note 57, at 4.

320. *See Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs*, OFF. MGMT. & BUDGET, https://perma.cc/JRU3-ZM9B (archived Feb. 20, 2025) (setting a final rule date for June 2025).

321. Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55276, 55306-08 (Aug. 14, 2023) (to be codified at 40 C.F.R. pts. 123-24, 232-33).

322. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. 103454, 103454 (Dec. 18, 2024) (to be codified at 40 C.F.R. pts. 123-24, 232-33).

323. *See* Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs, 85 Fed. Reg. 80713, 80713, 80715 (Dec. 14, 2020) (to be codified at 40 C.F.R. pts. 123, 233).

324. *See* Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103454-509.

325. *Id.* at 103484-88.

negligence, which may include gross negligence."[326] In other words, the new rule correctly prohibits states from applying misdemeanor intent standards higher than negligence (such as a "knowing" intent standard),[327] but it expressly allows states to apply gross negligence as the highest criminal intent standard. Since it does not require states to apply ordinary negligence as the highest criminal intent standard,[328] this rule undermines criminal enforcement of the CWA for the reasons discussed in Parts IV.A and IV.B.

The rule recognizes that multiple circuits have held "criminal negligence under CWA Section 309(c)(1) is 'ordinary negligence' rather than gross negligence or any other form of negligence,"[329] but it goes on to state that "CWA sections 402 and 404 allow for approved Tribal and State programs to have a somewhat different approach to criminal enforcement than the Federal Government's approach."[330]

EPA characterizes the rule as a mere "regulatory clarification,"[331] but it is much more than that. This rule would officially reverse EPA's longstanding position that the "burden of proof and degree of knowledge or intent required under State law for establishing violations . . . shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action."[332] The fact that EPA has been violating its own regulations for decades does not make this new rule any less of a sea change.

2. Responding to EPA's arguments for the rule

First, EPA argues that the CWA grants it discretion to authorize state programs with criminal intent standards greater than ordinary negligence.[333] EPA takes the position that it *must* approve a state program if EPA determines that the state has demonstrated "authority to 'abate violations of the permit or the permit program, including civil and criminal penalties and other ways and

326. *Id.* at 103485.

327. Table 3 shows that Kentucky, Minnesota, Nebraska, Ohio, Washington, and Wyoming apply criminal intent standards higher than even gross negligence for Section 402 violations. Table 4 shows that New Jersey applies a criminal intent standard higher than even gross negligence for Section 404 violations. Thus, the new rule would strengthen CWA enforcement in these states by requiring criminal penalties for negligent violations.

328. *See supra* Part IV.A-.B.

329. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103485 (quoting United States v. Hanousek, 176 F.3d 116, 1121 (9th Cir. 1999)).

330. *Id.* at 103486.

331. *Id.* at 103488.

332. 40 C.F.R. § 123.32(h)(2) (1979); *see supra* note 34.

333. *See* Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103485.

means of enforcement.'"[334] EPA then notes that the CWA grants EPA "broad authority . . . to determine whether Tribes and States have demonstrated adequate authority to abate violations."[335]

But that broad grant of authority notwithstanding, EPA's determination cannot be entirely up to the whims of the EPA Administrator. EPA's determination of state authority to abate violations must be grounded in some provision of the CWA, and that provision is Section 309(c).[336] As discussed in Part II.B, Section 309(c) establishes the same baseline intent standards and penalties for federal *and* state enforcement—contrary to EPA's assertion that "Congress did not require Tribes and States to have identical enforcement authority to EPA's."[337] Thus, the statutory language of Section 309(c) implies that states *lack* the requisite authority to abate violations if they apply intent standards that are less stringent than the ones applied by EPA. If EPA's determinations are not required to consider the enforcement standards of Section 309(c), then EPA would enjoy unlimited discretion to approve state enforcement programs with less protective standards.[338]

Second, EPA supports its claim of broad authority by noting that Sections 402(b)(7) and 404(h)(1)(G)—the provisions discussing state authority to

334. *Id.* at 103486 (quoting 33 U.S.C. §§ 1342(b)(7), 1344(h)(1)(G)).

335. *Id.*

336. *See supra* Part II.B.

337. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103486.

338. As one environmental organization warned in its comment on the proposed rule:

> If states are not required to implement the statutory enforcement standards of § 309 there would be no objective criminal enforcement standards. Rather, all that would be left would be a reliance on the current EPA Administrator's discretion. Of even greater concern, in this rulemaking, EPA identifies no limit on the Administrator's authority in this respect, and, "while the current EPA might be rigorous in its evaluation of any state's application to assume responsibility for Section 404 permits, one can easily imagine an Administration in which that rigor might be relaxed."

Charles River Watershed Association, Comment Letter on EPA's Proposed Clean Water Act Section 404 Tribal and State Program Regulations, at 3 (Oct. 13, 2023), https://perma.cc/D4TT-4KW7 (quoting Jeffrey Porter, *Surprising to See EPA Now Taking Steps to Make It Easier for States to Take Over the Federal Government's Dredge and Fill Permit Responsibilities*, MINTZ (July 20, 2023), https://perma.cc/6MGY-WP5R). Indeed, the current Trump Administration may very well be one in which "that rigor might be relaxed." *Id.*; *cf.* Lisa Friedman, Hiroko Tabuchi & Coral Davenport, *Trump Stocks E.P.A. With Oil, Gas and Chemical Lobbyists*, N.Y. TIMES (Jan. 25, 2025), https://perma.cc/WWS6-UWAC ("President Trump is stocking [EPA] with officials who have served as lawyers and lobbyists for the oil and chemical industries, many of whom worked in his first administration to weaken climate and pollution protections.").

Alternatively, EPA's reasoning that it has essentially limitless discretion, see notes 346-47 below, could also authorize a future EPA to require states to impose *draconian* criminal intent standards and sanctions.

abate violations—do "not use the words 'all applicable,' 'same,' or any phrase specific to any *mens rea* standard."[339] But narrowly focusing on these two subsections is misguided, as other CWA provisions require state intent standards to be at least as stringent as the federal intent standard. Most importantly, Section 309(c) indicates that the mens rea requirement should be the same for federal programs and for state programs under Sections 402 and 404.[340] Also, Section 402(a)(3) expressly states that the federal NPDES permit program "shall be subject to the *same* terms, conditions, and requirements as apply to a State permit program."[341]

Third, EPA briefly suggests that Section 309(c) establishes only the *federal* enforcement standards for violations of federal and state permits,[342] since EPA retains the authority to federally enforce violations of state permits.[343] In this reading, Section 309(c) does not establish the *state* enforcement standards for violations of state permits. However, Section 309(c) does not support this reading, as it neither specifies that these are only the federal intent standards and penalties, nor does it go on to separately discuss state enforcement requirements.[344] Instead, Section 309(c)'s parallel language subjects the state permitting authority to the same enforcement requirements as the federal permitting authority.[345] EPA then suggests that the requirements for state programs in Sections 402(b) and 404(h)(1) "prevail over the CWA's general enforcement provision in section 309(c),"[346] but Sections 402(b) and 404(h)(1) do not contain any alternative enforcement provisions.[347]

339. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103486. EPA also notes that Sections 402(b)(7) and 404(h)(1)(G) use "more general language" than other subsections of 402(b) and 404(h). *Id.*

340. *See supra* Part II.B.

341. 33 U.S.C. § 1342(a)(3) (emphasis added); *see supra* note 153 and accompanying text.

342. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103486 ("While EPA acknowledges that CWA section 309(c)(1) does mention negligent violations of State permits, that provision provides authority for *Federal* prosecutions, including enforcement of State permit requirements; it does not require or address *State or Tribal* enforcement programs or the standard for approval or assumption for Tribal and State programs.").

343. *See* 33 U.S.C. §§ 1342(i), 1344(n). However, given resource constraints, see note 114 above, it is unclear how often EPA actually enforces state permits, making it all more important to empower state enforcement.

344. 33 U.S.C. § 1319(c).

345. *See supra* notes 146-51 and accompanying text.

346. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103486.

347. *See* 33 U.S.C. §§ 1342(b), 1344(h)(1). If EPA is referring simply to the phrase, "[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement," found in Sections 402(b)(7) and 404(h)(1)(G), that is not an alternative enforcement provision. It does not specify any

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Furthermore, this alternative reading does not make sense in the context of the CWA as a whole and its cooperative federalism structure discussed above in Part II.A. If Section 309(c) does not apply to the states, then the CWA would not impose *any* requirements on state criminal enforcement, because Section 309(c) is the only part of the CWA that imposes criminal enforcement requirements.[348] In fact, if Section 309(c) did not apply to the states, then there would be no reason that any of the civil or administrative enforcement provisions of Section 309 would apply to the states either. States would enjoy carte blanche to enforce as they please, which is contrary to the very purpose of the CWA.[349] Given that the CWA's cooperative federalism structure is meant to serve as a "floor" for environmental protection,[350] Section 309(c) should be read as establishing the same baseline intent standards and penalties for federal *and* state enforcement.

Fourth, EPA cites two cases to support its interpretation.[351] EPA first cites to *Natural Resources Defense Council, Inc. v. U.S. EPA*, a D.C. Circuit case where

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requirements for enforcement; it merely mentions enforcement. Relying entirely on this phrase to impose enforcement requirements for state programs would, as discussed above, grant EPA unlimited discretion to approve state enforcement programs with less protective standards. *See supra* notes 334-36, 338 and accompanying text.

348. "If states are not required to implement the statutory enforcement standards of § 309 there would be no objective criminal enforcement standards." Charles River Watershed Association, *supra* note 338, at 3.

349. *Cf. supra* Parts I.A, II.A (discussing how the purpose of the CWA was for federal standards to set a floor for states).

350. *Supra* note 54.

351. In the proposed rule, EPA also cited a third case to support its interpretation: *Idaho Conservation League v. U.S. EPA.*, 820 F. App'x 627, 628 (9th Cir. 2020). *See* Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55276, 55307 (Aug. 14, 2023) (to be codified at 40 C.F.R. pts. 123-24, 232-33). The final rule does not cite that case, except in the background section and then once later to briefly reference its previous argument in that case. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103485, 103487.

Specifically, the proposed rule cited the portion of *Idaho Conservation League* where the Ninth Circuit states that "a state program need not mirror the burden of proof and degree of knowledge or intent EPA must meet to bring an enforcement action." Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. at 55307 (quoting *Idaho Conservation League*, 820 F. App'x at 628).

However, as Earthjustice pointed out in its comments on the proposed rule, "the Ninth Circuit expressly rejected that argument as authorizing EPA to approve a state 402 program with a heightened mens rea requirement . . . . As the Ninth Circuit recognized, the issue is not one of mirroring, but of meeting the minimum Clean Water Act standard." Earthjustice et al., Comments on EPA's Proposed Clean Water Act Section 404 Tribal and State Program Regulations, at 35 (Oct. 13, 2023), https://perma.cc/3U3Z-KP7H.

In other words, the Ninth Circuit engaged in reasoning akin to that of *Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F.2d 156, 180 (D.C. Cir. 1988), where this notion of

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the court held that states are not required to "mirror" the federal government's criminal penalty requirements.[352] However, this indicates a misunderstanding or misinterpretation of that case (and the very purpose of the CWA). In *Natural Resources Defense Council*, the D.C. Circuit criticized the idea that "the penalties states are empowered to impose would implicitly be limited to the statutory maxima," calling that result "at odds with the precept of state freedom to impose more rigorous requirements."[353] In other words, the D.C. Circuit's language about states not being required to "mirror" the federal government's criminal penalty requirements referred to giving states the freedom to *exceed* the floor set by federal standards.[354] Using that case to allow states to impose *weaker* standards would be inconsistent with the logic of the holding.[355]

EPA then points to *Akiak Native Community v. U.S. EPA*,[356] a Ninth Circuit case where the court "declined to require that States have authority to impose administrative penalties identical to Federal authority."[357] However, civil administrative *penalties* are wholly different from criminal *intent standards*.[358] Indeed, as EPA itself concedes, both *Akiak Native Community* and *Natural Resources Defense Council* involved penalties rather than intent standards.[359] In response, EPA asserts that "this precedent is highly germane to these revisions, even if the precise authorities at issue in those cases were not criminal intent standards."[360] But a holding about penalties cannot be extrapolated to intent standards; intent standards define what conduct is criminal,[361] whereas

states not being required to "mirror" the federal government referred to giving states the freedom to *exceed* the floor set by federal standards. *See infra* text accompanying note 352. Indeed, the Ninth Circuit ultimately concluded in *Idaho Conservation League* that a state plan must employ a standard "no greater than" simple negligence. *Idaho Conservation League*, 820 F. App'x at 628.

352. *See* Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103486 (quoting *Nat. Res. Def. Council, Inc.*, 859 F.2d at 180).

353. *Nat. Res. Def. Council, Inc.*, 859 F.2d at 179 n.75.

354. *See generally supra* Part II.A (discussing how federal standards set the floor, not the ceiling).

355. Regardless, *Natural Resources Defense Council* is inapplicable "because it addresses penalties, not liability," and "therefore presumes successful prosecution of a violation in the first place." Burkhardt et al., *supra* note 57, at 6; *see Nat. Res. Def. Council*, 859 F.2d at 173.

356. Akiak Native Cmty. v. U.S. EPA, 625 F.3d 1162, 1171-72 (9th Cir. 2010).

357. Clean Water Act Section 404 Tribal and State Program Regulation, 89 Fed. Reg. at 103486-87 (citing *Akiak Native Cmty.*, 625 F. 3d at 1171-72).

358. *See* Plaintiffs' Motion for Summary Judgment at 48-49, Ctr. for Biological Diversity v. Regan, 734 F. Supp. 3d 1 (D.D.C. 2023) (No. 21-119).

359. *See* Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103486-87.

360. *Id.* at 103487.

361. *See* text accompanying *infra* notes 419-21.

penalties simply establish the repercussions for criminal conduct. In fact, *Akiak* simply addressed whether it was appropriate that state officials had to "initiate a legal proceeding to impose a civil penalty" rather than "assess civil penalties administratively."[362] This issue is much narrower than the question of what conduct is criminal. Indeed, the rule adds new language to indicate that "States must have the authority to 'establish violations.'"[363] Finally, the Ninth Circuit upheld the delegation of Section 402 permitting authority to Alaska partly because it found that "Alaska law enables the State to sue permit violators," and thus "there is no reason to conclude that Alaska lacks adequate enforcement remedies."[364] As a result, *Akiak* still "reinforces the principle that a state program must be at least as stringent as its federal counterpart."[365]

Fifth, EPA responds to the argument that Section 402(a)(3) expressly requires federal NPDES permit programs to be "subject to the same terms, conditions, and requirements as apply to a State permit program."[366] EPA argues that "the criminal negligence mens rea that States are authorized to prosecute" is not directly included in this list; thus, "Section 402(a)(3) is most clearly read to address the permitting process, not the state of mind of criminal violators."[367] But as discussed in Part II.B, enforcement requirements (including those for intent standards) should be read as included under the broad language of "terms, conditions, and requirements."[368]

Sixth, EPA argues that other requirements on state enforcement authorities are sufficient to ensure that state programs remain adequate to abate violations.[369] For instance, EPA points to its regulations requiring states to "engage in inspections and information gathering."[370] But properly enforcing requirements in one area cannot make up for failing to enforce requirements established by the CWA in another area—especially when that latter area is as consequential as defining the very scope of criminal liability.

Seventh, EPA makes a policy argument in favor of giving "States flexibility in the degree of negligence for which they are authorized to bring

362. *Akiak Native Cmty.*, 625 F. 3d at 1171.

363. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103488.

364. *See Akiak Native Cmty.*, 625 F. 3d at 1172.

365. Burkhardt et al., *supra* note 57, at 7.

366. 33 U.S.C. § 1342(a)(3); Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103487.

367. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103487.

368. 33 U.S.C. § 1342(a)(3); *see supra* Part II.B.

369. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103487.

370. *Id.*

criminal cases," pointing to the importance of balancing "State autonomy with adherence to the purposes of the Act."[371] However, the purpose of the CWA was precisely for federal standards to set a floor that states could not dip below.[372] Allowing states the "autonomy" to implement less robust standards that supplant the federal standard would create pollution havens—the very harm the CWA was designed to cure when it amended the Federal Water Pollution Control Act of 1948.[373]

Eighth, EPA claims that "[t]his variability does not detract from the obligation for Tribes and States to operate meaningful programs to abate permit program violations," and that the absence of an ordinary negligence intent standard does not "serve[] as a bar to effective State enforcement programs."[374] But as discussed in Part IV.B above, this variability *would* reduce the effectiveness of state enforcement.[375]

Ninth, EPA asserts that "States may certainly continue to authorize criminal prosecutions based on a simple negligence *mens rea*."[376] But states do not enjoy discretion to decide whether to establish a simple negligence mens rea; they are *required* to under the CWA and existing caselaw.[377] EPA then goes on to say that "States with that authority may describe it in their program submissions to demonstrate the adequacy of their criminal enforcement programs."[378] Of course, the notion that this authority helps to "demonstrate the adequacy of their criminal enforcement programs" seems to contradict EPA's earlier argument that the absence of an ordinary negligence intent standard does not "serve[] as a bar to effective State enforcement programs."[379]

371. *Id.*

372. *See supra* Part II.

373. *See supra* Parts I.A, II.A.

374. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103487-88.

375. *See supra* Part IV.B; *see also* Burkhardt et al., *supra* note 57, at 3 ("A lower mens rea standard provides for more robust criminal enforcement of permit violations—and therefore greater environmental protections—because it sets a lower bar the government must meet to bring and prevail in an enforcement action and promotes compliance through deterrence.").

376. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103487-88.

377. *See supra* Parts II.B, IV.B.

378. Clean Water Act Section 404 Tribal and State Program Regulation, 89 Fed. Reg. at 103488. The proposed rule used slightly different wording, stating that "EPA may consider the presence of that authority as one factor when comprehensively assessing the adequacy of the . . . State's enforcement program in its program submission." Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55276, 55308 (Aug. 14, 2023) (to be codified at 40 C.F.R. pts. 123-24, 232-33).

379. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103488.

Finally, EPA suggests that requiring states to authorize a simple negligence mens rea for criminal violations could "dissuade [them] from seeking to administer these programs in the future or potentially motivate States to return their approved programs to EPA."[380] It is true that "the burden of issuing NPDES permits is enormous and would be impractical for the EPA to take on alone,"[381] and fully withdrawing approval of a state program would be a drastic step.[382] But the solution is for EPA to notify noncompliant states and bring them into compliance using the proceedings set out in the CWA,[383] not to look the other way. Threatening one state with withdrawal may very well motivate other states to come into compliance with the CWA; as a result, EPA would not be forced to actually withdraw a number of state programs.[384]

But if multiple states do simply refuse to update their criminal enforcement provisions and instead seek to return their approved programs to EPA, EPA must let them. After all, the CWA imposes a nondiscretionary duty on EPA to actively *withdraw* authorization for any state programs which fall out of compliance with the CWA.[385] EPA's reluctance to shoulder the administrative burden of implementing NPDES programs cannot justify allowing states to violate the CWA. Indeed, in 1988, the Fourth Circuit heard a case about EPA's assumption of permitting authority for an NPDES permit.[386] In deciding that EPA properly exercised its oversight authority, the Fourth Circuit quoted a 1977 Senate report stating:

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380. *Id.*

381. Marley Kimelman, Note, *Treading Water: How Citizens, States, and the Environmental Protection Agency Can Restore Proper Criminal Enforcement of the Clean Water Act's National Pollutant Discharge Elimination System*, 11 WASH. J. ENV'T L. & POL'Y 173, 183 (2021); *see also* Nat. Res. Def. Council, Inc. v. EPA, 859 F.2d 156, 181 (D.C. Cir. 1988) ("Because of the administrative burden on EPA and the increased state-federal friction, the remedy [of withdrawing authorization] is so drastic that EPA cannot be expected to use it except in egregious cases.").

382. EPA's authority to withdraw approval of a state program is limited to withdrawing approval as to the entire program; EPA is not permitted to withdraw approval as to categories or classes of sources. *See* EPA v. California *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 226 n.39 (1976). In addition to full withdrawal of program authorization, EPA may also exercise control over state permit programs by requiring states to submit proposed permits for preissuance review. *See* Nat. Res. Def. Council, Inc. v. U.S. EPA, 859 F.2d 156, 181 (D.C. Cir. 1988). However, this remedy would address only issues with individual permits; it would not address the structural issues with criminal enforcement of the entire permit program that this Note discusses.

383. *See supra* notes 88-95 and accompanying text.

384. *See* Lehtinen, *supra* note 93, at 630.

385. *See id.*; *supra* notes 88-95 and accompanying text; *see also* Plaintiffs' Motion for Summary Judgment at 48-49, Ctr. for Biological Diversity v. Regan, 734 F. Supp 3d 1 (D.D.C. 2023) (No. 21-119) ("[T]hese failures rendered the program non-approvable, and it was an abuse of discretion for EPA to approve the program anyway.").

386. Champion Int'l Corp. v. U.S. EPA, 850 F.2d 182, 183-85 (4th Cir. 1988).

> EPA has been much too hesitant to take any actions where States have approved permit programs. The result might well be the creation of "pollution havens" in some of those States which have approved permit programs. This result is exactly what the 1972 amendments were designed to avoid. Lack of a strong EPA oversight of State programs is neither fair to industry nor to States that are vigorously pursuing the act's requirements.[387]

That Senate report then reminded EPA that the agency was expected to "withdraw programs in states where widespread violations . . . are occurring."[388]

3. EPA can no longer rely on *Chevron* deference

EPA cited *Chevron* deference in its 2023 proposed rule.[389] This was a dubious choice given that even then, *Chevron* deference was already "increasingly maligned precedent."[390] Indeed, on June 28, 2024, the U.S. Supreme Court decision in *Loper Bright Enterprises v. Raimondo* overruled

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387. *Id.* at 186 (quoting S. REP. NO. 95-370, at 73 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4398).

388. Lehtinen, *supra* note 93, at 630 (quoting S. REP. NO. 95-370, at 73, *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4398).

389. Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55276, 55307 (Aug. 14, 2023) (to be codified at 40 C.F.R. pts. 123-24, 232-33).

Commentators often described this legal doctrine as beneficial for the environment, because it meant that courts deferred to expert agencies' interpretations of ambiguous statutes. *See, e.g.*, Jeff Turrentine, *The Supreme Court Ends Chevron Deference—What Now?*, NAT. RES. DEF. COUNCIL (June 28, 2024), https://perma.cc/YGK4-7B7D (discussing how "expert agencies, accountable to an elected president, are better suited than federal judges to make the policy choices that Congress left open"). *See generally* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 941-43 (2018) (defending *Chevron* deference).

Of course, this is a simplification. Environmentalists' views towards *Chevron* deference often depended substantially on the politics of the administration that happened to control EPA. In fact, environmental organizations using statutes such as the National Environmental Policy Act to challenge agencies' environmental reviews as inadequate generally encountered *Chevron* deference as a hurdle to overcome. Indeed, even Democratic administrations often make decisions opposed by environmental organizations: For instance, the Biden Administration pushed the criminal intent standard rule that Earthjustice and other environmental organizations have opposed. *See* Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. 103454, 103484-88 (Dec. 18, 2024) (to be codified at 40 C.F.R. pts. 123-24, 232-33); Earthjustice et al., *supra* note 351, at 1.

390. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting); *see* Kristin E. Hickman & Aaron L. Nielson, *The Future of Chevron Deference*, 70 DUKE L.J. 1015, 1015-16 (2021).

Chevron deference,[391] and EPA removed its reference to *Chevron* deference in the final rule.[392]

The demise of *Chevron* strengthens the argument against EPA's rulemaking. Even if a court finds that there is ambiguity in the CWA—which, as Part II.B argues, there is not—EPA will not be afforded deference in its interpretation of the CWA.[393] And fundamentally, the issues raised in Parts III and IV are ones of statutory interpretation.

V. Bringing State Programs into Compliance

This Note has discussed two ways in which EPA has been undermining CWA criminal enforcement for decades. To restore Congress's intended level of deterrence from CWA criminal liability,[394] EPA should require all states with authorized NPDES or Section 404 programs to (1) establish felony provisions at least as stringent as those of the CWA for all knowing CWA violations, and (2) implement ordinary negligence intent standards for CWA misdemeanors.[395] If states do not comply, EPA must "remedy this issue using the process prescribed in the Clean Water Act by initiating . . . proceedings" to withdraw approval of the noncompliant state program.[396] After all, Congress designed these proceedings precisely "to give EPA the tools to ensure that states remain in compliance with the Clean Water Act."[397]

391. 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled.").

392. Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. at 103484-88.

393. But even before *Loper Bright*, EPA likely could not have relied on *Chevron* deference, because Sections 309(c) and 402(a)(3) are unambiguous. *See supra* Part II.B. Furthermore, *Chevron* deference did not apply "when the statutory language of the law at issue . . . implicates criminal penalties." West Virginia v. U.S. EPA, 669 F. Supp. 3d 781, 799 (D.N.D. 2023); *see also* United States v. Apel, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); Abramski v. United States, 573 U.S. 169, 191 (2014) ("The critical point is that criminal laws are for courts, not for the Government, to construe."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("The Supreme Court has expressly instructed us not to apply *Chevron* deference when an agency seeks to interpret a criminal statute." (emphasis omitted)); Cargill v. Garland, 57 F.4th 447, 466 (5th Cir. 2023). Though the CWA is not a criminal statute, EPA sought to apply *Chevron* deference to the CWA's criminal enforcement provisions, which clearly implicate criminal penalties. *See* 33 U.S.C. § 1319(c); Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. at 55307.

394. *See generally supra* notes 122-29 (discussing the deterrent effect of environmental criminal liability).

395. Strict liability would also be permissible because state programs are free to exceed the floor set by federal standards. *See supra* Part II; *supra* Figure 1.

396. Earthjustice et al., *supra* note 351, at 36.

397. *Id.*; *see supra* notes 88-95.

A. The Role of States After *Sackett*

Although states have failed for decades to comply with the CWA,[398] it is especially crucial now that EPA bring state programs into compliance. In what the National Resources Defense Council called "the most important water-related Supreme Court decision in a generation,"[399] the 2023 U.S. Supreme Court decision in *Sackett v. EPA* substantially curtailed the jurisdiction of federal CWA programs by limiting the definition of WOTUS.[400] Since EPA enforcement is constrained by *Sackett*'s federal jurisdictional standard,[401] stronger state enforcement of the CWA is now essential for protecting our nation's water resources.[402]

Although state programs applying the federal jurisdictional standard would also use *Sackett*'s limited definition of WOTUS, states are free to implement their own broader jurisdictional standards—and some already do.[403] Moreover, some states may decide to expand their jurisdictional

398. *See supra* Parts III, IV.

399. Jeff Turrentine, *What the Supreme Court's* Sackett v. EPA *Ruling Means for Wetlands and Other Waterways*, NAT. RES. DEF. COUNCIL (June 5, 2023), https://perma.cc/SG9Q-TPX7.

400. *Id.*; *see* Lazarus, *supra* note 51, at *1; *Supreme Court Catastrophically Undermines Clean Water Protections*, EARTHJUSTICE (May 25, 2023), https://perma.cc/79B2-LJBH. Specifically, *Sackett* held that "the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right.'" Sackett v. EPA, 143 S. Ct. 1322, 1344 (2023) (quoting Rapanos v. United States, 547 U.S. 715, 742 (2006)). EPA recently amended its definition of WOTUS to conform with *Sackett*. *See Amendments to the 2023 Rule*, EPA, https://perma.cc/XDA4-9GZ5 (last updated Sept. 25, 2024).

401. *Amendments to the 2023 Rule*, *supra* note 400; *supra* notes 62-63 and accompanying text.

402. *See* Cale Jaffe, Sackett *and the Unraveling of Federal Environmental Law*, 53 ENV'T L. REP. 10801, 10802 (2023) (stating that "experts have begun looking to state water control laws," given that "a massive retrenchment of federal regulatory authority over wetlands seems unavoidable" after *Sackett*); *see also* Julian Gonzalez, *When the Supreme Court Gutted Clean Water Protections, Local Champions Stepped Up*, EARTHJUSTICE (May 22, 2024), https://perma.cc/YYZ2-RKK3. *But see* Michael P. Vandenbergh, Elodie O. Currier Stoffel & Steph Tai, *Filling the* Sackett *Gap: The Private Governance Option*, 109 MINN. L. REV. (forthcoming 2025) (manuscript at 4), https://perma.cc/65M8-MHY9 ("[T]his new hole in regulatory protections for wetlands—which we call the Sackett Gap—is unlikely to be filled solely by government measures at the federal, state, and local levels."); *infra* note 411 and accompanying text.

403. For example, California broadly defines "waters of the state" as "any surface water or groundwater, including saline waters, within the boundaries of the state." CAL. WATER CODE § 13050(e) (West 2024); *see also* STATE WATER RESOURCES CONTROL BOARD, STATE WETLAND DEFINITION AND PROCEDURES FOR DISCHARGES OF DREDGED OR FILL MATERIAL TO WATERS OF THE STATE 2 n.2, https://perma.cc/8MND-YJ4S ("Therefore, wetlands that meet the current definition, or any historic definition, of waters of the U.S. are waters of the state."). Note, however, that a state may enact a broad definition of WOTUS without actually requiring that its permit program protect all waters encompassed under that broad definition. James McElfish, *State Protection of Nonfederal Waters: Turbidity Continues*, 52 ENV'T L. REP. 10679, 10681 (2022).

standards in response to *Sackett*. For instance, the New Mexico Environment Department has expressly stated that part of its rationale for seeking to assume Section 402 permitting authority is "to fill the gaps left by the U.S. Supreme Court's decision in *Sackett v. EPA*."[404] And states with broader CWA jurisdiction under state law can bring state enforcement actions that would not be available to EPA.

But EPA's new rule expressly allows states to exercise weaker enforcement authority than the federal CWA allows. As Earthjustice stated in its comment on the proposed rule:

> EPA is attempting to set the floor for enforcement actions below what is required by CWA; that is, to allow a state program that is *harder* to enforce because of a higher mens rea standard is *below* the floor of minimum enforcement requirements and therefore contrary to legislative intent for state-assumed programs. EPA would allow states to pull the floor out from Clean Water Act enforcement by allowing states to exclude an entire class of criminal violations from criminal enforcement, and in doing so, undermining deterrence, compliance with, and enforcement of the Act. . . . [A] state program that is less effective than a federally administered program runs counter to the Act and is, in a word, pointless.[405]

Thus, requiring state enforcement programs to adopt a baseline level of stringency is especially important because *Sackett* reduced EPA's jurisdictional authority. Although EPA retains the ability to pursue water pollution violations at the federal level,[406] *Sackett* made it much more difficult for EPA to pick up the slack created by state programs with inadequate enforcement authority. Indeed, scarce resources had always constrained EPA's ability to make up for deficiencies in state enforcement.[407]

On the other hand, one might argue that any states seeking to implement broader jurisdictional standards would already be the very states seeking to implement more aggressive enforcement standards. For such states, the argument goes, EPA would not need to mandate the enforcement standards of the federal CWA.

But broader jurisdictional standards do not necessarily imply that a state has adequate enforcement standards. First, this argument assumes that state legislatures enjoy a nuanced understanding of environmental criminal law, and the content of many state codes suggests otherwise.[408] Even if a state supports stringent water protections, and even if that state implements a

404. *Surface Water Quality State Permitting Program*, *supra* note 84.

405. Burkhardt et al., *supra* note 57, at 6.

406. 33 U.S.C. §§ 1342(i), 1344(n).

407. *See generally supra* note 114 (describing how resource scarcity has contributed to federal underenforcement).

408. *See supra* notes 268-74 and accompanying text.

broader jurisdictional standard in pursuit of that goal, it may still apply inadequate criminal enforcement standards simply because it lacks expertise on environmental criminal enforcement. Second, industry lobbyists may simply have pushed more effectively for weaker enforcement standards than for weaker jurisdictional standards. In both of these scenarios, EPA would still need to step in and require states to implement the appropriate enforcement standards. Indeed, after the Trump Administration limited the definition of WOTUS in 2020, North Carolina and Arizona both took steps to protect state waters that lost coverage;[409] however, as shown in Table 3, both states nevertheless apply inadequate criminal intent standards.[410]

One might also argue that requiring all states to adopt enforcement provisions at least as stringent as the federal CWA may deter some industry-friendly states from adopting broader jurisdictional standards than the CWA provides. After all, many states are reluctant to empower their own agencies to punish CWA violations, as evinced by the 28 states which "have laws that could operate to either prohibit state agencies from regulating waters more stringently than the federal Clean Water Act, or limit their authority to do so."[411]

But this argument is speculation. Absent evidence showing that states would refuse to adopt broader jurisdictional standards if EPA required them to implement appropriate enforcement standards, it is more likely that strengthening state enforcement would simply increase overall clean water protection. Furthermore, this Note shows that EPA has a nondiscretionary duty to bring state programs into compliance regardless of how certain states might backlash.[412]

Finally, EPA's rule also undermines environmental justice. Environmental justice requires ensuring equal access to environmental protections regardless of race, color, national origin or income;[413] thus, a meaningful commitment to environmental justice necessarily involves addressing disparities in environmental harms.[414] Allowing states to apply less stringent criminal

409. McElfish, *supra* note 403, at 10682-83.

410. *Supra* Table 3. And as shown in Table 1 above, North Carolina also fails to authorize appropriate felony penalties for all "knowing" violations.

411. ENV'T L. INST., *supra* note 54, at 1.

412. *See supra* notes 88-95 and accompanying text.

413. *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Aug. 22, 2023), https://perma.cc/DN36-BSEW.

414. *See generally* Paul Mohai, David Pellow & J. Timmons Roberts, *Environmental Justice*, 34 ANN. REV. ENV'T RES. 405, 406-08 (2009) (discussing the large literature on how exposure to pollution and other environmental risks fall more heavily on certain communities and populations than others); *supra* notes 117-18 and accompanying text (discussing how water pollution in the United States is an environmental justice issue).

enforcement standards may create pollution havens and leave some communities more vulnerable to water pollution under state law than federal law allows.[415] EPA administrators must recall the "fundamental tenet" of the CWA: "States retain only the flexibility to be more, but never less, protective than the [CWA]'s foundational protections."[416]

B. The Nondelegation Doctrine and Criminal Law

On most environmental issues, empowering expert agencies to make decisions may help achieve public health goals.[417] For instance, Congress lacks the requisite scientific and technical expertise to set effluent guidelines or ambient air quality standards. But criminal penalties and intent standards may be a different matter, because agencies such as EPA do not have special technical knowledge with regard to those issues.[418]

Furthermore, defining crimes is a role reserved for Congress,[419] so to delegate this power to an agency may violate the separation of powers.[420] EPA is arguably "defining crimes" by unilaterally changing the applicable criminal intent standards for state CWA programs: Determining which criminal intent standards apply to which violations is an essential element of defining crimes, as it demarcates criminal from noncriminal conduct. One might also argue that EPA is impermissibly "defining crimes" by allowing states to strip themselves of the authority to impose felony penalties for knowing violations.[421]

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415. *See supra* notes 373, 387 and accompanying text.

416. Burkhardt et al., *supra* note 57, at 2 (emphasis omitted) (citing 33 U.S.C. § 1311(b)(1)(C); and PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 705-07 (1994)); *see supra* Part II.A.

417. *See supra* note 389. "Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not." Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting).

418. *See* Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1, 13 (1996) ("If courts defer to agencies in other contexts because of agency expertise, that rationale allegedly does not operate in the criminal arena . . . .").

419. *See* Whitman v. United States, 574 U.S. 1003, 1004 (2014) (Scalia, J., respecting the denial of certiorari) ("[L]egislatures, not executive officers, define crimes."); United States v. Evans, 333 U.S. 483, 486 (1948) ("[D]efining crimes and fixing penalties are legislative, not judicial, functions.").

420. *See* Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855, 856-57, 868-69 (2020); Greenberg, *supra* note 418, at 18-21.

421. EPA briefly responds to this argument in its new rule by simply stating that "EPA disagrees with the premise of this comment." Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. 103454, 103486 (Dec. 18, 2024) (to be codified at 40 C.F.R. pts. 123-24, 232-33). In EPA's view, it is not modifying Congressionally-

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A thorough treatment of the topic is beyond the scope of this Note, but future research should explore whether an advocate of the nondelegation doctrine (or an environmentalist seeking to use this doctrine to strengthen environmental enforcement) may argue that modifying CWA criminal intent standards is a legislative power which cannot be delegated to the executive branch without an intelligible principle. In the context of CWA enforcement, Congress never delegated that power to EPA (nor is EPA arguing in its rule that Congress has[422]). Thus, there may be constitutional as well as statutory reasons for EPA to bring state programs into compliance with the federal standards set by Congress.

Even more broadly, some scholars have argued that "the vast and growing body of administrative crimes is illegitimate because agencies are an illegitimate source of criminal law."[423] In their view, "criminalization must be democratic in its origins," given that criminal enforcement constitutes "the state's power to express community condemnation and to deprive individuals of their liberty."[424] This argument is not necessarily at odds with this Note's position in favor of robust environmental criminal enforcement—the question of whether agencies should *create* new criminal law is distinct from whether agencies should properly authorize *enforcement* of existing criminal laws.

In sum, EPA's authorizations of noncompliant state programs raise timely questions about the reach of the administrative state and the nondelegation doctrine as applied to criminal law. These questions are largely unexplored, as *Gundy* did not discuss "the importance of the criminal consequences flowing from the Attorney General's regulations," and "[n]one of the opinions in [*Gundy*] asked whether Congress's ability to delegate policy decisions ought to be assessed differently when the power being delegated is the power to determine the scope of criminal laws."[425] Perhaps "criminal law delegations *are* different from other delegations," and thus there should be a "stricter nondelegation doctrine for criminal laws."[426]

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established intent standards because Congress does not require states to apply a simple negligence intent standard. *Id.* But as discussed in Parts II.B and IV.E above, Congress required states to apply an intent standard as stringent as the federal intent standard; EPA is now allowing states to apply an intent standard less stringent than the federal intent standard.

422. *See id.* at 103484-88.

423. *E.g.*, Fissell, *supra* note 420, at 857.

424. *See id.* at 858, 860.

425. F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 283 (2021) (discussing *Gundy v. United States*, 138 S. Ct. 1260 (2019)).

426. *Id.* at 286-87. In fact, some scholars have even gone so far as to question "the use of the criminal law to enforce a regulatory regime." Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 746 (2014). As discussed above, however, criminal liability plays an important

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Again, it is beyond the scope of this Note to take a position on this larger topic, but the issues discussed in Parts III and IV may offer valuable insights or a novel case study for those considering the appropriate extent of agency authority on criminal matters.

Conclusion

Environmental criminal liability safeguards human health and the environment by deterring polluters and motivating compliance with environmental statutes and regulations. Criminal enforcement is necessary because large corporate polluters may view civil penalties as a mere cost of doing business.[427] Congress established the appropriate level of criminal liability for CWA violations when it authorized felony penalties for knowing violations and misdemeanor penalties for ordinary negligence violations.[428]

However, EPA has been undermining CWA criminal enforcement for decades by approving state permit programs with inadequate criminal liability provisions. This Note surveys the state codes of all states with authorized NDPES or Section 404 programs and finds that 34 state programs lack appropriate felony provisions for CWA violations, and at least 33 state programs fail to authorize misdemeanor penalties for ordinary negligence CWA violations.[429] With EPA's express approval, these states are compromising the deterrent effect of environmental criminal liability. Because the text of the CWA requires state programs to be at least as stringent as the federal program,[430] these states are also violating the CWA.

The CWA imposes a nondiscretionary duty on EPA to withdraw its authorization of any state program that falls out of compliance with the CWA.[431] However, EPA has never withdrawn approval of a state program authorized under Section 402 or Section 404.[432] Instead, EPA has now promulgated a rule expressly allowing states to apply a gross negligence intent standard—even though the federal standard is ordinary negligence.[433] This rule reverses EPA's longstanding position, codified in its own regulations since

role in motivating compliance with environmental regulations. *Supra* notes 122-33 and accompanying text.

427. *See supra* Part I.C.2.

428. *See supra* Part III.A.

429. *See supra* Parts III.B, IV.B.

430. *See supra* Part II.B.

431. *Supra* notes 88-95 and accompanying text.

432. *See supra* note 95.

433. *See supra* Part IV.E.

1979, that states must apply criminal intent standards at least as stringent as the federal standards.[434]

Although the issue of inadequate criminal intent standards recently came to light following *Idaho Conservation League, Inc. v. U.S. EPA* in 2020 and *Center for Biological Diversity v. Regan* in 2024,[435] environmental organizations have yet to challenge EPA for approving state programs which lack appropriate felony provisions. Of course, the reasoning for why state programs must establish appropriate felony provisions is the same as the reasoning for why state programs must apply criminal intent standards lower than gross negligence: Only then will state programs comply with the CWA by being at least as stringent as the federal program.[436]

In fact, inadequate felony provisions and criminal intent standards may not be the only areas where EPA has been lax in overseeing state CWA programs. For instance, Florida applies statutes of limitation between one and three years,[437] whereas criminal violations of the CWA are subject to a five-year statute of limitations.[438] Courts have noted that allowing some states to apply inadequate statutes of limitations "would frustrate several policies of the [CWA]," as "[s]ome states could choose to have a very brief statute of limitations, and thus be very hospitable to industries that violate the [CWA]."[439] Additionally, this Note's review of state codes finds that multiple states establish only maximum but not minimum penalties for CWA violations,[440] even though the CWA clearly establishes both maximum and

434. *Supra* note 34.

435. *See supra* Parts IV.C-.D.

436. If anything, the argument that state programs must establish appropriate felony provisions is stronger, as the text of the CWA itself establishes specific felony penalties—whereas the mens rea argument relies on federal circuit courts interpreting "negligence" in the CWA to mean ordinary negligence.

437. FLA. STAT. § 775.15 (2023) (establishing a three-year statute of limitations for non-first-degree felonies, a two-year statute of limitations for first-degree misdemeanors, and a one-year statute of limitations for second-degree misdemeanors); *see id.* § 373.430 (2023) (stating that convictions for water pollution violations include third-degree felonies, first-degree misdemeanors, and second-degree misdemeanors); Plaintiffs' Motion for Summary Judgment at 48, Ctr. for Biological Diversity v. Regan, 734 F. Supp. 3d 1 (D.D.C. 2023) (No. 21-119).

438. *See* 18 U.S.C. § 3282(a); *see, e.g.*, United States v. Ursitti, 543 F. Supp. 2d 971, 974 (C.D. Ill. 2008) (citing 18 U.S.C. § 3282(a)).

439. Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 447 (D. Md. 1985) ("By simply adjusting their statutes of limitations, states could frustrate the aims of the NPDES program."); *cf.* Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1522 (9th Cir. 1987) ("Sierra Club correctly contends that application of [California's] three-year statute of limitations to [CWA] citizen enforcement suits would frustrate federal policy . . . .").

440. *See, e.g.*, TENN. CODE ANN. § 69-3-115(a)(1) (2024); WYO. STAT. ANN. § 35-11-901 (West 2024).

minimum penalties.[441] Future research should explore these and other potential deficiencies in state CWA programs. As discussed in Part I.B.2, future research should also explore whether EPA must hold a public hearing once it learns that a state program may be noncompliant.[442]

This Note additionally raises important questions about the nondelegation doctrine and the appropriate scope of agency authority on criminal matters. Though courts should generally defer to expert agencies on technical issues,[443] allowing unelected administrators to modify criminal intent standards without congressional authorization may be in tension with principles of democratic accountability and the separation of powers.[444]

Finally, this Note comes at a crucial time. Even as climate change continues to exacerbate water stress in myriad ways,[445] *Sackett* substantially reduced the reach of the federal CWA.[446] In fact, federal environmental enforcement generally has been gutted by political barriers and inadequate resources.[447] It is thus more important than ever for state enforcement programs to serve as a backstop against water pollution.[448] EPA must act now and require states to enact criminal liability provisions that comply with the CWA. Otherwise, future environmental crimes similar to the *Exxon Valdez* oil spill may go unchecked, compromising the deterrent effect of environmental criminal liability.

441. *See supra* Part III.A.

442. *See supra* notes 96-100.

443. *See supra* notes 389, 417.

444. *See supra* Part V.B.

445. *See, e.g.*, Anil Kumar Misra, *Climate Change and Challenges of Water and Food Security*, 3 INT'L J. SUSTAINABLE BUILT ENV'T 153, 163 (2014); Simon N. Gosling & Nigel W. Arnell, *A Global Assessment of the Impact of Climate Change on Water Scarcity*, 134 CLIMATIC CHANGE 371, 371 (2016); Margaret A. Palmer, Dennis P. Lettenmaier, N. LeRoy Poff, Sandra L. Postel, Brian Richter & Richard Warner, *Climate Change and River Ecosystems: Protection and Adaptation Options*, 44 ENV'T MGMT. 1053, 1054 (2009).

446. *See supra* Part V.A.

447. *See supra* Part I.C.1.

448. *See supra* Part V.A.