

8-1-2009

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### Recommended Citation

Katherine A. Swanson, Comment, *The Cost of Doing Business: Corporate Vicarious Criminal Liability for the Negligent Discharge of Oil under the Clean Water Act*, 84 Wash. L. Rev. 555 (2009).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol84/iss3/6>

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## THE COST OF DOING BUSINESS: CORPORATE VICARIOUS CRIMINAL LIABILITY FOR THE NEGLIGENT DISCHARGE OF OIL UNDER THE CLEAN WATER ACT

Katherine A. Swanson

*Abstract:* In response to massive oil spills that damaged America's waters, devastated local economies, killed wildlife, and cost taxpayers millions in clean-up costs, Congress passed the Oil Pollution Act of 1990. The Act amended the Federal Water Pollution Control Act to allow for criminal prosecution of negligent oil discharges. This Comment argues that although the plain language of the Federal Water Pollution Control Act's negligent discharge provision is silent regarding corporate vicarious criminal liability, courts should give full effect to Congress's intent—to protect the health and safety of the public and the environment and to stop corporations from accepting oils spills as just another cost of doing business—and construe the negligent discharge provision to allow for vicarious liability. Doing so will not violate the due process rights of corporations because they are on notice of the stringent regulations surrounding oil pollution. Moreover, corporations are in the best position to prevent and deter negligent employee behavior that leads to oils spills in the first place.

### INTRODUCTION

A thick layer of fog covered the San Francisco Bay area<sup>1</sup> on November 7, 2007<sup>2</sup> when a bay pilot, Captain John Cota, boarded the *Cosco Busan*, a container ship operated by Fleet Management, Limited (Fleet).<sup>3</sup> Cota and Fleet allegedly failed to prepare and review a passage plan prior to departure<sup>4</sup> and guided the vessel out of the bay in visibility of less than a quarter mile.<sup>5</sup> According to the third superseding indictment, the ship proceeded too quickly, and Cota and Fleet, in addition to making other navigational errors, failed to use the vessel's

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1. Kirsten B. Mitchell, *Fog Seemingly Baffled Pilot in Bay Oil Spill*, N.Y. TIMES, Apr. 9, 2008, at A16.

2. Carolyn Marshall, *Head of Oil Spill Cleanup is Retiring*, N.Y. TIMES, Dec. 1, 2007, at A12.

3. Mitchell, *supra* note 1, at A16.

4. Third Superseding Indictment at 5, *United States v. Cota*, No. 08-00160 (N.D. Cal. filed May 26, 2009); *see* Information at 4, *Cota*, No. 08-00160 (filed Mar. 17, 2008); Press Release, Dep't of Justice, *Company that Managed Cosco Busan Indicted on New Charges* (July 23, 2008), <http://www.usdoj.gov/opa/pr/2008/July/08-enrd-642.html> [hereinafter Indictment Press Release].

5. Mitchell, *supra* note 1, at A16.

radar and electronic chart system properly.<sup>6</sup> As a result, they “failed to navigate an allision free course,”<sup>7</sup> and the vessel allided with a tower of the San Francisco–Oakland Bay Bridge,<sup>8</sup> splitting open fuel tanks and spilling more than 50,000 gallons of diesel fuel and oil into the bay.<sup>9</sup> The spill killed thousands of birds<sup>10</sup> and left forty miles of beaches and shore contaminated.<sup>11</sup> The National Transportation Safety Board estimated the cost of clean up at \$70 million, ship repairs at \$2.1 million and bridge repairs at \$1.5 million.<sup>12</sup>

As a result of the spill, both Cota and Fleet were charged with negligent discharge of oil into navigable waters of the United States under the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA).<sup>13</sup> In prosecuting Fleet, the U.S. Government has relied on the civil negligence standard—failure to take due care—applicable under the CWA negligent discharge provision in order to incorporate the agency principle of negligent supervision.<sup>14</sup> Trial is

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6. Third Superseding Indictment, *supra* note 4, at 5; Information, *supra* note 4, at 4.

7. Third Superseding Indictment, *supra* note 4, at 5.

8. Mitchell, *supra* note 1, at A16.

9. Felicity Barringer, *Oil Spill Fouls Shores in San Francisco Area*, N.Y. TIMES, Nov. 9, 2007, at A18.

10. *San Francisco to Receive Spill Money*, N.Y. TIMES, Mar. 3, 2008, at A15.

11. Marshall, *supra* note 2, at A12.

12. NAT’L TRANSP. SAFETY BD., NTSB/MAR-09/01, MARINE ACCIDENT REPORT: ALLISION OF HONG KONG-REGISTERED CONTAINERSHIP *M/V COSCO BUSAN* WITH THE DELTA TOWER OF THE SAN FRANCISCO–OAKLAND BAY BRIDGE, at XI (2009), available at <http://www.nts.gov/Publictn/2009/MAR0901.pdf>.

13. Federal Water Pollution Control Act, 33 U.S.C. §§ 1319(c)(1)(A), 1321(b)(3) (2006); Third Superseding Indictment, *supra* note 4, at 5–6. Captain Cota pleaded guilty to negligent discharge of oil and to a violation of the Migratory Bird Treaty Act. Press Release, Dep’t of Justice, Guilty Plea in Case of *Cosco Busan* Ship Pilot (Mar. 6, 2009), <http://www.usdoj.gov/opa/pr/2009/March/09-enrd-201.html> [hereinafter Guilty Plea Press Release]. The plea agreement proposed a sentence between two and ten months’ incarceration, a fine between \$3,000 and \$30,000, and government agreement to dismiss false statement charges. *Id.* Cota was sentenced on July 17, 2009 to ten months in federal prison. Press Release, Dep’t of Justice, Prison Sentence for *Cosco Busan* Pilot (July 17, 2009), <http://www.usdoj.gov/opa/pr/2009/July/09-enrd-698.html>.

14. See Government’s Opposition to Defendant Fleet’s Motion to Plead Nolo Contendere at 3, *Cota*, No. 08-00160 (filed Sept. 16, 2008) [hereinafter Government’s Opposition Brief] (“It was a corporate decision to forgo adequate training and supervision.”); see also *United States v. Hanousek*, 176 F.3d 1116, 1120–21 (9th Cir. 1999) (holding that the plain language of the Clean Water Act (CWA) negligent discharge provision requires only ordinary negligence); RESTATEMENT (THIRD) OF AGENCY §§ 7.03, 7.05 (2006) (asserting that principals are liable for negligently selecting and supervising agents).

scheduled for September 2009.<sup>15</sup> Fleet originally faced a maximum \$200,000 fine for its CWA violations or twice the gross gain or loss caused by the violations under the Alternative Fines Act.<sup>16</sup> Now, after a third superseding indictment alleging “approximately \$20 million in pecuniary losses,” Fleet faces a \$40 million fine.<sup>17</sup>

Although the Government proceeded under a direct liability theory against Fleet, courts should also recognize a respondeat superior theory, which would hold corporations vicariously criminally liable for negligent oil discharges by their employees. The negligent discharge provision does not explicitly call for vicarious liability. However, the legislative intent behind the Oil Pollution Act of 1990 (OPA 90),<sup>18</sup> which amended the CWA, and the public welfare nature of the legislation support such an interpretation.<sup>19</sup> Allowing prosecution under vicarious criminal liability would mean that when employees, such as crew members, are found guilty of negligent discharge of oil under the CWA, corporations, such as ship management corporations, vessel owners, and demise charterers, could also be subject to liability.<sup>20</sup>

Part I of this Comment briefly describes the CWA negligent discharge provision and examines the legislative history of the provision, as amended by OPA 90, including its public welfare nature and Congress’s interest in holding corporations liable for oil spills. Part II further

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15. Guilty Plea Press Release, *supra* note 13.

16. Indictment Press Release, *supra* note 4; *see* 18 U.S.C. § 3571(d) (2006) (alternative fine based on twice pecuniary gain or loss).

17. *Cota*, No. 08-00160, slip op. at 2–3, 2009 WL 1765647, at \*1 (June 22, 2009) (denying Fleet’s motion to plead guilty to negligent discharge violations under the second superseding indictment); Third Superseding Indictment, *supra* note 4, at 6 (alleging negligent discharge of oil “resulted in at least approximately \$20 million in pecuniary losses to persons”).

18. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended in scattered sections of 33 U.S.C.).

19. *See* discussion *infra* Parts II and IV.A.

20. Although vessel owners and operators, which are typically corporate entities, are strictly liable for civil damages and clean-up costs under the CWA and OPA 90, such corporations are generally in the best position to limit negligent employee conduct that injures third parties. *See* 33 U.S.C. § 2702 (2006). Corporations involved in the shipping industry and oil-related industries are heavily insured, and protection and indemnity agreements frequently allow corporations to escape large portions of civil liability for oil spills. *See Cota*, No. 08-00160, slip op. at 4, 2008 WL 4531804, at \*2 (Oct. 7, 2008) (denying Fleet’s motion to enter a plea of nolo contendere) (“The possibility that Fleet’s civil penalties will be covered by its insurers suggests that civil sanctions alone are an insufficient deterrent.”); Government’s Opposition Brief, *supra* note 14, at 4 n.2. *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 17.2 (4th ed. 2001) (discussing marine insurance).

explores the public welfare status of the CWA and how it affects statutory interpretation. Part III explains how the civil justifications for vicarious liability also apply in the criminal context and discusses how courts apply such principles, specifically when environmental statutes are at issue. Part IV argues that although the plain language of the CWA negligent discharge provision is silent regarding corporate vicarious liability, Congress's intent and the public welfare nature of the CWA should guide courts in interpreting the statute to permit the prosecution of corporations under such a theory.

#### I. CONGRESS PASSED OPA 90 TO HOLD CORPORATIONS CRIMINALLY LIABLE AND PROTECT THE PUBLIC AND ENVIRONMENT FROM MASSIVE OIL SPILLS

Congress adopted the CWA and its amendments to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by eliminating discharges of pollutants.<sup>21</sup> Congress included different administrative, civil, and criminal penalties to encourage and enforce compliance.<sup>22</sup>

When Congress passed OPA 90, it amended the CWA’s list of substantive criminal violations to include negligent discharge of oil.<sup>23</sup> As a result, section 1321(b)(3)(i) of the CWA, which prohibits unauthorized discharge of oil into the navigable waters of the United States,<sup>24</sup> works with the enforcement provision of section 1319(c)(1)(A)<sup>25</sup> to prohibit the

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21. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (current version at 33 U.S.C. § 1251(a)(1) (2006)).

22. See 33 U.S.C. § 1319 (2006).

23. Oil Pollution Act of 1990, Pub. L. No. 101-380, § 4301(c), 104 Stat. 534 (1990) (codified as amended at 33 U.S.C. §§ 1319(c)(1)(A), 1321(b)(3) (2006)).

24. 33 U.S.C. § 1321(b)(3)(i) (“[Oil discharge] into or upon the navigable waters of the United States, adjoining shorelines, [unless authorized by permit] . . . in such quantities as may be harmful . . . is prohibited.”). Congress defined “oil” as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.” *Id.* § 1321(a)(1). “[D]ischarge’ includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping . . . [unless otherwise permitted by law].” *Id.* § 1321(a)(2). The Environmental Protection Agency determined that a quantity that may be harmful includes “a film or sheen upon or discoloration of the surface of the water or adjoining shorelines.” 40 C.F.R. § 110.3(b) (2008); see also *Chevron, U.S.A., Inc. v. United States*, 919 F.2d 27, 29–30 (5th Cir. 1990) (discussing “sheen test”).

25. 33 U.S.C. § 1319(c)(1) (providing that “[a]ny person who . . . negligently violates” title 33, section 1321(b)(3) “shall be punished”).

negligent discharge of oil by any “person.” “Person” includes individuals, corporations, partnerships, associations,<sup>26</sup> and responsible corporate officers.<sup>27</sup> Corporations found guilty of negligent discharge face fines between \$2,500 and \$25,000 for each day of violation,<sup>28</sup> and those fines may increase under the Alternative Fines Act.<sup>29</sup> Courts can also place corporations on probation and mandate restitution to victims or substitute restitution in lieu of criminal sanctions.<sup>30</sup>

Although Congress did not address the issue of vicarious liability in relation to the negligent discharge provision in the text of the statute, the legislative history of OPA 90 provides some guidance. First, Congress passed OPA 90 and amended the CWA in response to massive oil spills, such as the *Exxon Valdez* spill, because such spills threaten the health and safety of the public as well as the environment.<sup>31</sup> Second, Congress expressed particular concern that corporations were failing to take sufficient measures to prevent oil spills in the first place, and when spills did occur, corporations failed to adequately clean up and to compensate

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26. *Id.* § 1362(5).

27. *Id.* § 1319(c)(6) (“For the purpose of this subsection, the term ‘person’ means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.”).

28. *Id.* § 1319(c)(1) (“[Persons found guilty] shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.”).

29. 18 U.S.C. § 3571(c)–(d) (2006); *United States v. Hong*, 242 F.3d 528, 529, 533 (4th Cir. 2001) (holding Alternative Fines Act applies to CWA violation). Under the Alternative Fines Act, class A misdemeanors for negligent discharge violations committed by corporations allow for a \$200,000 fine when the offense “does not result in death,” a \$500,000 fine when the offense does result in death, or a fine of “not more than the greater of twice the gross gain or twice the gross loss.” 18 U.S.C. § 3571(c)–(d).

30. 18 U.S.C. § 3556 (“The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders or restitution under this section.”). In addition, convicted corporations may lose government contracts until the Environmental Protection Agency determines the conditions that caused the spill are corrected. 33 U.S.C. § 1368 (“No Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected.”).

31. S. REP. NO. 101-94, at 2–3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723–24.

victims, including the government.<sup>32</sup>

A. *Congress Expressed Deep Concern that Oil Spills Posed a Significant Danger to the Public and Environment*

On March 24, 1989, the *Exxon Valdez* ran aground and spilled over 11 million gallons of oil into Prince William Sound, Alaska.<sup>33</sup> It was the largest oil spill in the history of the United States.<sup>34</sup> Crude oil covered hundreds of miles of coastline, killed over 26,000 birds, and harmed other sea life.<sup>35</sup> The company's and the government's slow and inadequate response to the spill only worsened the problem.<sup>36</sup> Later that year, three more oil spills occurred: one off the coast of Rhode Island, one in the Delaware River, and one in the Houston Ship Channel in Texas.<sup>37</sup> While the response to these spills proved better than the response to the *Exxon Valdez*, Congress did not find them "unqualified success[es]."<sup>38</sup>

To protect the public from the consequences of such spills, Congress passed the Oil Pollution Act of 1990.<sup>39</sup> The Senate Committee on Environment and Public Works (Public Works Committee) found that "oil pollution from accidental tanker spills [was] a real and continuing threat to the public health and welfare and the environment."<sup>40</sup> Congress adopted the legislation to prevent oil spills, improve clean-up responses, and increase liability for those causing spills.<sup>41</sup> Congress explicitly stated its policy to allow "no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."<sup>42</sup>

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32. *Id.* at 2, reprinted in 1990 U.S.C.C.A.N. 722, 723–24.

33. S. REP. NO. 101-99, at 1 (1989) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 750, 750.

34. *Id.*; S. REP. NO. 101-94, at 2, reprinted in 1990 U.S.C.C.A.N. 722, 723–24.

35. S. REP. NO. 101-99, at 1–2, reprinted in 1990 U.S.C.C.A.N. 750, 750.

36. S. REP. NO. 101-94, at 2, reprinted in 1990 U.S.C.C.A.N. 722, 723.

37. *Id.*; S. REP. NO. 101-99, at 2, reprinted in 1990 U.S.C.C.A.N. 750, 750.

38. S. REP. NO. 101-94, at 2, reprinted in 1990 U.S.C.C.A.N. 722, 724.

39. *See id.* at 2, reprinted in 1990 U.S.C.C.A.N. 722, 723.

40. *Id.*

41. *Id.* at 2–5, reprinted in 1990 U.S.C.C.A.N. 722, 723–27.

42. 33 U.S.C. § 1321(b) (2006).

*B. Congress Expressed Particular Concern that Corporations Involved in Oil Spills Evaded Their Responsibilities to Prevent Them and to Participate in Clean-Up Efforts*

Congressional reports and debate surrounding the passage of OPA 90 focused heavily on corporations' failure to pay for oil spills, both in terms of prevention and clean up. The Public Works Committee stated in a report,<sup>43</sup> and Senator Baucus said in a statement from the floor, that companies accepted oil spills as part of the normal course of business.<sup>44</sup> The report noted:

[S]pills are still too much of an accepted cost of doing business for the oil shipping industry. At the present time, the costs of spilling and paying for its clean-up and damage is not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain them. Sound public policy requires reversal of these relative costs.<sup>45</sup>

The Public Works Committee also found the regulatory system governed by federal and state law inadequate to cover clean-up costs and damages because owners and operators of vessels faced low liability limits.<sup>46</sup> In addition, many parties, including the government, found it impossible to receive full compensation for damages because courts interpreted the CWA to preempt common law maritime tort and nuisance claims.<sup>47</sup> Representative Lipinski noted that the Exxon Corporation wrote off clean-up expenses on its taxes as "ordinary and necessary business expenses."<sup>48</sup> Similarly, the Public Works Committee report noted that taxpayers regularly subsidize clean-up efforts.<sup>49</sup> The United States General Accounting Office reported to Congress that

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43. S. REP. NO. 101-94, at 3, *reprinted in* 1990 U.S.C.C.A.N. 722, 724.

44. 136 CONG. REC. 21,716 (1990) (statement of Sen. Baucus) ("[Oil] spills are too much an accepted cost of doing business for the oil shipping industry. Many in the industry seem to have decided that it is cheaper to spill and pay for its cleanup than it is to prevent spils [sic] and develop effective techniques to contain them.").

45. S. REP. NO. 101-94, at 3, *reprinted in* 1990 U.S.C.C.A.N. 722, 724; *see also* S. REP. NO. 101-99, at 33-34 (1989) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 750, 776-77 (statement of Sen. Gorton) (noting that Exxon representatives were arrogant in committee hearings, stressing the need for a stricter liability regime, and emphasizing the need to penalize negligent corporations).

46. S. REP. NO. 101-94, at 2-3, *reprinted in* 1990 U.S.C.C.A.N. 722, 723-24.

47. *Id.* at 3, *reprinted in* 1990 U.S.C.C.A.N. 722, 725.

48. 135 CONG. REC. 5793 (1989) (extension of remarks by Rep. William O. Lipinski).

49. S. REP. NO. 101-94, at 2, *reprinted in* 1990 U.S.C.C.A.N. 722, 723.

between 1971 and 1982, under the pre-OPA 90 statutory provisions, the United States Government paid out \$124 million for oil-spill clean up but recovered only \$49 million.<sup>50</sup> As a result, taxpayers subsidized over \$75 million to clean up oil spills.<sup>51</sup>

In other words, Congress needed to find new ways to deter corporations from engaging in behavior that would lead to oil spills. One method of deterrence Congress employed was to increase criminal penalties by amending the CWA to establish criminal sanctions for negligent and knowing discharges of oil.<sup>52</sup>

In a statement on the Senate floor in support of OPA 90, Senator Lieberman indicated it was his “intent in writing the penalty provisions . . . [that] the Government apply the penalty provisions in a manner which will punish the violator and deter and prevent future violations.”<sup>53</sup> He also said that:

The strong civil and criminal penalty provisions of this bill are designed to ensure that companies will act in a manner which protects our fragile environment . . . . [and] the most effective way to ensure that companies act in a manner which will prevent the spill in the first place is to spell out the consequences of their failure to do so.<sup>54</sup>

The Public Works Committee also identified other barriers to an effective oil spill regulation regime including “the corporate form, and the burdens of proof that favor those responsible for the spill.”<sup>55</sup> In other words, it is difficult to detect, investigate, and prosecute corporate crimes. Thus, OPA 90 allows prosecutors to seek a wide variety of criminal penalties because Congress provided that the legislation should not be construed to affect the government’s ability to “impose additional liability or additional requirements, or to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law, relating to the discharge . . . of oil.”<sup>56</sup> Therefore,

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50. *Id.* at 3, reprinted in 1990 U.S.C.C.A.N. 722, 724.

51. *Id.*

52. Oil Pollution Control Act 1990, Pub. L. No. 101-380, § 4301(c), 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 1319(c), 1321(b)(3) (2006)); H.R. REP. NO. 101-653, at 154 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 779, 833.

53. 136 CONG. REC. 21,724 (1990).

54. *Id.*

55. S. REP. NO. 101-94, at 2, reprinted in 1990 U.S.C.C.A.N. 722, 723.

56. *Id.* at 17–18, reprinted in 1990 U.S.C.C.A.N. 722, 739; H.R. REP. NO. 101-653, at 122,

prosecutors can use other laws to attach additional liability to violators and often do so. For example, in the case of Fleet, a grand jury indicted the company for making false statements and violating the Migratory Bird Treaty Act in addition to negligent discharge.<sup>57</sup>

In sum, the *Exxon Valdez* oil spill motivated Congress to strengthen the CWA and other statutes through OPA 90. Congress's concern was for the health and safety of the public as well as the failure of corporations to prevent and adequately pay for oil-spill clean up. As a result, Congress adopted provisions to strengthen corporate civil and criminal liability.

## II. THE CLEAN WATER ACT CONSTITUTES PUBLIC WELFARE LEGISLATION SO COURTS CAN CONSTRUE IT BROADLY

Public welfare legislation is designed to protect the health, safety, and welfare of the public.<sup>58</sup> Under such legislation, Congress imposes a heavier responsibility on individuals and corporations because they “stand[] in responsible relation to a public danger” and are in the best position to protect the public at large.<sup>59</sup> In essence, public welfare legislation helps “ease the prosecution’s path to conviction.”<sup>60</sup> For example, in *United States v. Dotterweich*,<sup>61</sup> the Supreme Court determined that, in order to regulate behavior, Congress has authority to criminalize conduct and eliminate the common law mens rea requirement that defendants know they are violating the law.<sup>62</sup> In such cases, the lowering of mens rea does not violate due process because “a reasonable person should know [one] is subject to stringent public regulation and may seriously threaten the community’s health or safety.”<sup>63</sup>

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reprinted in 1990 U.S.C.C.A.N. 779, 800.

57. Third Superseding Indictment, *supra* note 4, at 7–10.

58. *See, e.g.*, *United States v. Dotterweich*, 320 U.S. 277, 278, 280–81, 284 (1943) (holding Federal Food, Drug, and Cosmetic Act permitted vicarious criminal liability for shipments of misbranded pharmaceuticals because Congress intended to protect the health and welfare of the public).

59. *Id.* at 281 (citing *United States v. Balint*, 258 U.S. 250 (1922)).

60. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

61. 320 U.S. 277 (1943).

62. *Id.* at 280–81.

63. *Liparota v. United States*, 471 U.S. 419, 432–33 (1985).

Typically, public welfare legislation regulates hazardous or “injurious items”<sup>64</sup> and only imposes “light penalties,” such as fines or short terms of incarceration.<sup>65</sup> Although the government need not prove a defendant knew or had actual knowledge that he or she violated a particular regulation, the government must still prove the defendant actually handled the regulated substance.<sup>66</sup> When substances are “dangerous or deleterious,” courts can presume a corporation is aware of the regulation because the probability that the substances are regulated is so high.<sup>67</sup>

Determining whether a statute is public welfare legislation is an issue of statutory construction that turns on legislative intent.<sup>68</sup> First, courts look to the plain meaning of the statute.<sup>69</sup> If the meaning is unclear, criminal statutes are traditionally construed in light of the common law, which requires *mens rea*,<sup>70</sup> and in the light most favorable to the defendant under the rule of lenity.<sup>71</sup> The policy behind the rule of lenity is that it is unfair and a violation of procedural due process to convict a defendant of a crime without providing fair warning.<sup>72</sup> However, a court need only apply the rule of lenity if, after reviewing congressional intent, the statute is still ambiguous.<sup>73</sup> As a result, most courts never reach the rule of lenity in the public welfare context because they find Congress’s intent unambiguously established a public welfare statute.<sup>74</sup> Moreover, many courts apply the remedial purpose doctrine to environmental statutes, which requires courts to avoid construing environmental criminal statutes narrowly because they are intended to protect the

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64. *Staples v. United States*, 511 U.S. 600, 607 (1994).

65. *Id.* at 616.

66. *See id.* at 607 n.3 (citing *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558 (1971)).

67. *Int’l Minerals*, 402 U.S. at 565.

68. *See Staples*, 511 U.S. at 604–05.

69. *Id.*

70. *Id.* at 605–06.

71. *Liparota v. United States*, 471 U.S. 419, 427 (1985); *see generally* NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 65A:11–12 (7th ed. 2008) (arguing for and against applying the rule of lenity in the environmental context).

72. SINGER & SHAMBIE SINGER, *supra* note 71, § 59:4, at 187–88.

73. *Chapman v. United States*, 500 U.S. 453, 463 (1991) (reasoning that if the intent of Congress is clear and does not create a “grievous ambiguity or uncertainty,” then the rule of lenity does not apply (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974))); *Liparota*, 471 U.S. at 427; *see* SINGER & SHAMBIE SINGER, *supra* note 71, § 59:4, at 191–95.

74. *E.g.*, *United States v. Hanousek*, 176 F.3d 1116, 1121 n.3 (9th Cir. 1999).

environment and, in turn, human health.<sup>75</sup>

The Supreme Court has yet to determine explicitly whether the CWA is public welfare legislation and, thus, whether due process demands the remedial purpose doctrine or the rule of lenity to apply to ambiguous CWA criminal provisions. However, when the Supreme Court declined to grant a writ of certiorari in *United States v. Hanousek*,<sup>76</sup> a case challenging the ordinary negligence standard used under the negligent discharge provision,<sup>77</sup> Justice Thomas dissented.<sup>78</sup> He found it “erroneous to rely, even in small part, on the notion that the CWA is a public welfare statute” in addressing Hanousek’s due process claim, as the Ninth Circuit Court of Appeals had done.<sup>79</sup> Thus, he called into question what law Congress actually passed and whether the CWA would meet constitutional due process standards if it were in fact public welfare legislation.<sup>80</sup> Justice Thomas pointed out that while “dangerous and deleterious devices” that actually alert individuals to a public danger fall into the category of public welfare legislation, the CWA can also impose criminal liability in cases where ordinary equipment is used for ordinary purposes.<sup>81</sup> He also indicated that crimes committed under public welfare legislation are “relatively small, and conviction does no grave damage to an offender’s reputation,” while the fines and imprisonment under the CWA are much more serious.<sup>82</sup>

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75. *E.g.*, *United States v. Self*, 2 F.3d 1071, 1091 (10th Cir. 1993) (reasoning that courts should not construe the Resource Conservation Recovery Act narrowly because it is a public welfare statute designed to protect the public); SINGER & SHAMBIE SINGER, *supra* note 71, § 65A:11, at 761.

76. 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000). Hanousek contested the negligent discharge jury instruction because it set the culpability standard at ordinary negligence, or failure to use reasonable care, instead of a criminal negligence standard, or gross deviation from due care, used under the common law and Model Penal Code. Brief of Appellant at \*20–24, *Hanousek*, 176 F.3d 1116 (No. 97-30185). *See generally* MODEL PENAL CODE § 2.02(d) (1962) (“A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”).

77. *Hanousek*, 176 F.3d at 1120–22.

78. *Hanousek v. United States*, 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting).

79. *Id.* at 1103. *Contra Hanousek*, 176 F.3d at 1121–22 (relying on *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), which determined that the CWA constituted public welfare legislation).

80. *Hanousek*, 528 U.S. at 1102–03.

81. *Id.* at 1103 (quoting *Staples v. United States*, 511 U.S. 600, 613 n.6 (1994)).

82. *Id.* at 1104 (quoting *Morrisette v. United States*, 342 U.S. 246, 256 (1952)).

Nevertheless, the majority of federal circuit courts of appeals that have addressed the issue still hold that the CWA is public welfare legislation.<sup>83</sup> The courts look to the purpose of the CWA—to protect the nation’s water from hazardous pollution—and Congress’s legislative intent.<sup>84</sup> In *United States v. Weitzenhoff*,<sup>85</sup> the Ninth Circuit summarized the public welfare nature of the CWA:

[T]he dumping of sewage and other pollutants into our nation’s waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger. Like other public welfare offenses that regulate the discharge of pollutants into the air, the disposal of hazardous wastes, the undocumented shipping of acids, and the use of pesticides on our food, the improper and excessive discharge of sewage causes cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare.

The criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution.<sup>86</sup>

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83. *Hanousek*, 176 F.3d at 1121 n.3; *United States v. Sinksy*, 119 F.3d 712, 715–16 (8th Cir. 1997) (holding the “knowingly discharge” provision did not require proof the defendant knew he violated the CWA and knew the CWA regulated hazardous waste and relying, in part, on the nature of “the CWA, which regulates discharge into the public’s water”); *United States v. Hopkins*, 53 F.3d 533, 540 (2d Cir. 1995) (citing *Weitzenhoff*, 35 F.3d 1275, and determining that the legislative history and public welfare purpose of the CWA knowing discharge provision did not require knowledge of a CWA violation); *Weitzenhoff*, 35 F.3d at 1286; *see also* *United States v. Ortiz*, 427 F.3d 1278, 1280, 1283 (10th Cir. 2005) (citing *Hanousek* and holding no heightened level of mens rea for negligent discharge of propylene glycol). *But see* *United States v. Ahmad*, 101 F.3d 386, 388, 391 (5th Cir. 1996) (holding the CWA did not constitute public welfare legislation, requiring knowledge for knowing discharge conviction because the gas at issue was sufficiently commonplace, and finding that the criminal penalties imposed were too high).

84. *E.g.*, *Sinksy*, 119 F.3d at 716.

85. 35 F.3d 1275 (9th Cir. 1993).

86. *Id.* at 1286 (citations and footnote omitted).

### III. COURTS RELY ON AGENCY LAW TO HOLD CORPORATIONS VICARIOUSLY CRIMINALLY LIABLE FOR THE TORTIOUS ACTS OF THEIR AGENTS

The law of agency applies in the civil as well as the criminal context. The doctrine of respondeat superior, which provides the basis for vicarious liability, can be applied to criminal statutes to hold corporations liable for the acts of their employees.<sup>87</sup> When Congress does not expressly allow for vicarious liability, courts must look to the intent behind the legislation.<sup>88</sup> Often courts will look to statutes with similar provisions and interpret them *in pari materia*, or construe similar statutes consistently, particularly when interpreting environmental statutes.<sup>89</sup> Moreover, courts tend to rely on the public welfare nature of environmental statutes and construe them to allow for corporate vicarious criminal liability.<sup>90</sup>

#### A. *Agency Principles Behind Respondeat Superior Liability Support Holding Corporations Vicariously Criminally Liable for the Acts of Their Agents*

The doctrine of respondeat superior provides the basis for holding principals vicariously liable for the acts of their agents, done within the scope of their employment, that injure third parties.<sup>91</sup> The law developed

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87. *E.g.*, N.Y. Central & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493–94 (1909).

88. *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (“Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.”).

89. *E.g.*, Nat’l Envtl. Found. v. ABC Rail Corp., 926 F.2d 1096, 1097 (11th Cir. 1991) (construing a CWA provision consistent with a similar provision in the Resource Conservation and Recovery Act); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”).

90. *E.g.*, *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6, 8–10 (E.D. Ark. 1978) (holding city sewer committee vicariously criminally liable under the CWA for knowingly making false reports, based on the actions of a sewer plant employee). While this Comment discusses vicarious liability, one may also proceed under a direct negligence liability theory. See RESTATEMENT (THIRD) OF AGENCY § 7.04 (2006) (principal liable when agent has acted with authority or principal ratified action); *id.* § 7.05 (principal liable for negligent hiring and supervising); *id.* § 7.06 (principal cannot avoid liability by delegating a duty to protect another).

91. RESTATEMENT (THIRD) OF AGENCY §§ 2.04 cmt. b, 7.07 cmt. b; *see also id.* § 7.07(2) (“An employee acts within the scope of employment when performing work assigned by the employer or

to encourage employers to reduce tortious conduct.<sup>92</sup> The law dispenses with the culpable conduct requirement of liability and imposes vicarious liability on the employer because of the nature of the corporate form, the need to deter tortious conduct, and society's determination that corporations should bear the cost of such conduct.<sup>93</sup>

Because organizations can only act through their agents<sup>94</sup> and are often in the best position to protect third parties, the theories of respondeat superior and vicarious liability allow victims of tortious conduct to hold corporations liable.<sup>95</sup> It is often difficult to identify an employer's direct negligence.<sup>96</sup> For instance, the corporate form can prevent an individual from knowing which employees actually committed the tortious act.<sup>97</sup> Frequently it is also unclear which employees took action or where "[l]ines of authority and responsibility" lie within the corporation.<sup>98</sup> Records and personnel are often located across the United States or in different countries, making it difficult for

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engaging in a course of conduct subject to the employer's control."). Most courts also require proof that the agent acted to further the interest of the employer in order to show the agent acted within the scope of employment. *E.g.*, *United States v. Koppers*, 652 F.2d 290, 298 (2d Cir. 1981). However, many courts will still hold an employer vicariously liable even if the employee is only partially acting to further the employer's interest and even if the employer expressly forbade the activity. *E.g.*, *United States v. Cincotta*, 698 F.2d 238, 241-42 (1st Cir. 1982); *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979); *Moecker v. Honeywell*, 144 F. Supp. 2d 1291, 1312 (M.D. Fla. 2001).

92. RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b.

93. *See id.* §§ 2.04 cmt. b, 7.04 cmt. b. Although corporations are generally not liable for general contractors, some duties, as a matter of policy, cannot be transferred and are non-delegable. DAN B. DOBBS, *THE LAW OF TORTS* § 337 (2000). In such cases, courts will assert an employer/agent relationship for the purposes of vicarious liability because the corporation still benefits from the work of the contractor and because the corporation has a duty to hire competent contractors. *Id.*

94. *N.Y. Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. c.

95. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b.

96. *Id.*; WAYNE R. LAFAVE, *CRIMINAL LAW* §13.4(d), at 700 (4th ed. 2003). *See generally* DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL: PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS § 9-28.300 (1997) [hereinafter *BUSINESS ORGANIZATIONS MANUAL*], available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm) (requiring United States Attorneys to look at additional factors when deciding to charge corporations because the corporate form creates unique challenges).

97. Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1755 (1996) (citing STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 170-75 (1987)).

98. *BUSINESS ORGANIZATIONS MANUAL*, *supra* note 96, § 9-28.700.

prosecutors to gather evidence and determine what exactly occurred.<sup>99</sup>

Employers can also structure the work of employees to limit “discretion and individual action,” thereby minimizing opportunities for “unreasonable decisions.”<sup>100</sup> Because the employer has control over “how work is done,”<sup>101</sup> it can deter tortious and criminal behavior. Even in cases where control over an employee is attenuated, corporations still influence the actions of their employees through threats of disciplinary measures.<sup>102</sup> Moreover, the corporate entity traditionally acts “more rationally and reasonably” than individuals because the corporation assigns different parties different tasks, which leads to mutual supervision of other employees’ actions and helps avoid and deter tortious conduct.<sup>103</sup> Although failing to supervise an employee or negligently hiring an employee is a direct source of liability for corporations, some courts also find that vicarious liability incentivizes corporations to hire the right employees and to “structure work within the organization so as to reduce the incidence of tortious conduct.”<sup>104</sup>

Vicarious liability is also justified by risk distribution principles.<sup>105</sup> Corporations should bear the risk of becoming vicariously liable because they have control over their business, manage “the work of employees,” and “stand[] to profit from the employee’s services.”<sup>106</sup> Corporations may gain significantly if things go as planned, so to avoid unjust enrichment they must bear the risk of harm posed by employees.<sup>107</sup> In addition, individual employees are not frequently in a position to pay the total cost of real damages.<sup>108</sup>

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99. *Id.*

100. RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b.

101. *Id.*

102. See Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness*, 69 S. CAL. L. REV. 1705, 1736 (1996).

103. RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b.

104. *CEH Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995) (affirming trial court’s imposition of vicarious liability for punitive damages on shipowner because it “encourages shipowners to hire qualified and responsible captains and to exercise supervisory power over them” (quoting *CEH, Inc. v. F/V Seafarer*, 880 F. Supp. 940, 956 (D.R.I. 1995))).

105. Tony Honoré, *The Morality of Tort Law—Questions and Answers*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73, 85 (David G. Owen ed., 1995).

106. *Id.*

107. See *id.*

108. See Schwartz, *supra* note 97, at 1756.

B. *Courts Rely on the Public Welfare Nature of Environmental Legislation to Construe Statutes and Hold Corporations Vicariously Liable for the Criminal Acts of Their Employees*

In order to hold corporations vicariously criminally liable, courts apply agency principles similar to those used in the civil context.<sup>109</sup> Congress frequently fails to specify whether vicarious liability applies, so courts must engage in statutory construction.<sup>110</sup> Courts should not presume that statutes imposing strict liability, which dispenses with the mental fault criminal element, also automatically impose vicarious liability, which dispenses with the guilty act criminal element.<sup>111</sup> However, in cases involving Congress's regulation of dangerous materials, such an interpretation is usually justified because it is unlikely Congress would want corporations to escape liability.<sup>112</sup> Moreover, if a statute only imposes a light misdemeanor penalty, such as a fine, courts are more likely to construe the statute to allow vicarious liability.<sup>113</sup>

In the environmental context, many courts provide little if any

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109. See, e.g., *N.Y. Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493–94 (expanding the civil vicarious liability principle used in torts to the criminal context “in the interest of public policy”). To impose vicarious criminal liability courts generally require: 1) the corporation's agent or employee committed the offense; 2) in committing the offense the agent acted, “at least in part, to benefit” the corporation; and 3) the agent acted within his/her authority or within the scope of employment, which requires that the act “must deal with a matter whose performance is generally entrusted to the agent or employee.” PATTERN CRIMINAL FED. JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 5.03 (1998), available at <http://www.ca7.uscourts.gov/pjury.pdf>. Employers are not relieved of liability by having a policy against tortious conduct in place, but such policies can be used to determine whether the agent was acting to benefit the employer or acting within the scope of employment. *Id.*

110. See LAFAVE, *supra* note 96, § 13.4(b), at 695–96.

111. See *id.* § 13.4(b), at 697–98. In cases where Congress requires “knowing” or “willful” intent, “it will not be presumed that the legislature intended that the fault of the employee should suffice for conviction of the employer.” *Id.* § 13.4(b), at 696. However, the Seventh Circuit pattern jury instruction's commentary asserts that the majority of courts impose vicarious liability unless Congress specifically indicates otherwise. PATTERN CRIMINAL FED. JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 5.03 (1998).

112. See LAFAVE, *supra* note 96, § 13.4(b), at 698 (citing *Groff v. State*, 85 N.E. 769 (1908)).

113. See *id.* § 13.4(b), at 696 (citations omitted). It is unclear if courts will consider the augmentation of fines under the Alternative Fines Act (AFA) when they evaluate the severity of penalties in order to construe the CWA because the issue has not been argued. In *United States v. Hong*, the Fourth Circuit held the AFA applied to the negligent discharge of wastewater under section 1319(c)(1)(A) of the CWA. 242 F.3d 528, 530, 533 (4th Cir. 2001). As a result, the magistrate judge imposed fines of \$100,000 for each count instead of the \$25,000 maximum under the CWA. *Id.* at 533. However, Hong did not challenge the fines based on a due process theory; instead, he argued that the CWA maximum fines provision limited the application of the AFA. *Id.*

analysis on the matter of vicarious criminal liability.<sup>114</sup> Most likely this is because many environmental criminal matters are settled prior to trial<sup>115</sup> or defendants do not raise the issue.<sup>116</sup> For example, in *United States v. Hayes International Corp.*,<sup>117</sup> an employee gave drainage from fuel tanks along with mixtures of paints and solvents to a third party, knowing the wastes were not being recycled.<sup>118</sup> Although the company had an express policy against such activities, the Eleventh Circuit reinstated a conviction for unlawful transportation of hazardous waste under the Resource Conservation and Recovery Act, stating simply that “Hayes’ liability is based on the actions of [the employee].”<sup>119</sup>

In *United States v. Ionia Management, S.A.*,<sup>120</sup> the Second Circuit affirmed a criminal conviction of a ship operating company based on corporate vicarious liability under the Act to Prevent Pollution from Ships (APPS).<sup>121</sup> A number of crew members discharged oily waste through a “magic hose” that bypassed “the vessel’s Oily Water

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114. *E.g.*, *United States v. Hayes Int’l Corp.*, 786 F.2d 1499, 1501 (11th Cir. 1986).

115. *See* COLIN DE LA RUE & CHARLES B. ANDERSON, *SHIPPING AND THE ENVIRONMENT* 909 (1998).

116. *E.g.*, *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 309 (2d Cir. 2009). The defendant in *Ionia* did not challenge the vicarious liability jury instruction at the district court level. *Id.* However, in *United States v. Hanousek*, the Ninth Circuit rejected Hanousek’s appeal for a vicarious liability jury instruction after a jury convicted him of negligent discharge of oil. 176 F.3d 1116, 1123 (9th Cir. 1999). Hanousek argued he was not directly liable because a backhoe operator actually struck the heating oil pipeline that caused the spill. *Id.* at 1119, 1122. The court of appeals held the failure of the district court to offer a vicarious liability jury instruction did not constitute reversible error because the instruction sufficiently required the jury to find direct negligence. *Id.* at 1123. Hanousek’s employer, Pacific & Arctic Railway and Navigation Company, did not face charges. *Id.* at 1119.

117. 786 F.2d 1499 (11th Cir. 1986).

118. *Id.* at 1500–01.

119. *Id.* at 1501, 1506–07. The Resource Conservation and Recovery Act or Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992 (2006), includes corporations and partnerships under its definition of a “person” and imposes criminal sanctions on persons for knowingly transporting hazardous waste. 42 U.S.C. §§ 6903(15), 6928(d).

120. 555 F.3d 303 (2d Cir. 2009).

121. *Id.* at 309, 311. The Act to Prevent Pollution from Ships (APPS) is structured similarly to the CWA. The APPS includes corporations and partnerships under its definition of “person” and imposes criminal penalties on “[a] person who knowingly violates the MARPOL Protocol, [sic] Annex IV to the Antarctic Protocol, this chapter, or the regulations issued thereunder.” 33 U.S.C. §§ 1901(a)(8), 1908(a) (footnote omitted). Although the court did not specify that the APPS constituted public welfare legislation, it did note that Congress adopted the APPS in order to effectuate international treaties aimed at eliminating oil pollution. *Ionia*, 555 F.3d at 306.

Separator” and made false entries in the oil record book.<sup>122</sup> In addition to conspiracy, falsifying records in a federal investigation, and obstructing justice, the jury also found Ionia guilty of violating APPS provisions, including failure to maintain oil record books.<sup>123</sup>

On appeal, Ionia did not challenge the imposition of vicarious liability based on the statutory meaning of the APPS, but instead argued that the prosecution failed to provide sufficient evidence to prove respondeat superior criminal liability.<sup>124</sup> Ionia also argued that the district court provided an erroneous vicarious liability jury instruction because it did not require the jury to find that managerial employees committed the culpable acts.<sup>125</sup> The Second Circuit found the record included sufficient evidence to prove that the employees were authorized to act, acted within the scope of employment, and did so to benefit Ionia.<sup>126</sup> In addition, the court noted that its precedent did not require managerial actions to impute liability to the corporation, and regardless, the managers approved the crew’s use of the “magic hose.”<sup>127</sup>

The Second Circuit also rejected a novel argument presented by a group of business organizations, bar associations, and a conservative public interest group in an amicus brief.<sup>128</sup> The amici urged the court to adopt an additional element to corporate vicarious criminal liability: a finding that the corporation lacked “effective policies and procedures to deter and detect criminal actions by its employees.”<sup>129</sup> The amici asserted that courts continually misinterpret *New York Central & Hudson River Railroad Co. v. United States*<sup>130</sup> to impose a lower

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122. *Ionia*, 555 F.3d at 305.

123. *Id.* at 305–06.

124. *Id.* at 309–10 (noting that the corporate criminal liability claim did “not require the [c]ourt to interpret new areas of law and, hence, [could] be addressed summarily”).

125. *Id.*

126. *Id.* at 309.

127. *Id.* at 309–10.

128. *See id.* at 310; Brief for the Ass’n of Corp. Counsel et al. as *Amici Curiae* in Support of Appellant Urging Reversal at 23, *Ionia*, 555 F.3d 303 (No. 07–5801) [hereinafter Brief for the Ass’n of Corp. Counsel].

129. Brief for the Ass’n of Corp. Counsel, *supra* note 128, at 23 (quoting Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 411 (2007)); *id.* at 9–15 (urging the court to look to respondeat superior principles in civil cases, such as in Title VII sexual harassment cases, where employers can use an affirmative defense of an existing corporate policy).

130. 212 U.S. 481 (1909); *see supra* notes 87, 109, and accompanying text.

standard of corporate vicarious criminal liability.<sup>131</sup> Although the court noted that a compliance program may indicate whether an employee acted within the scope of employment, it refused to adopt the amici's proposed additional element "regardless of asserted new Supreme Court cases in other areas of the law."<sup>132</sup> The court upheld the \$4.9 million fine.<sup>133</sup>

In *United States v. Little Rock Sewer Committee*,<sup>134</sup> the Federal District Court for the Eastern District of Arkansas directly addressed the permissibility of criminal vicarious liability under the CWA prior to the passage of OPA 90.<sup>135</sup> The court held a city sewer committee vicariously criminally liable under the CWA for knowingly making false reports, based on the actions of a sewer plant employee.<sup>136</sup> The sewer committee argued that vicarious liability should not apply because the individual committee members lacked knowledge of the employee's activities, but the court found individual knowledge irrelevant because the entity itself was the defendant.<sup>137</sup> To reach its decision the court engaged in statutory interpretation of the CWA. Finding the statute's text unclear, the court looked to legislative history, but found it provided little insight.<sup>138</sup> As a result, the court looked to the public welfare nature of the statute and analogous precedent.<sup>139</sup>

Ultimately, the district court incorporated agency principles and held the sewer committee vicariously criminally liable for negligent discharge.<sup>140</sup> It concluded that "the public interest protected by [the CWA] is like, and is as important in its area of concern as, the public interest protected under the Sherman Act."<sup>141</sup> Furthermore, the

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131. Brief for the Ass'n of Corp. Counsel, *supra* note 128, at 15–17.

132. *Ionia*, 555 F.3d at 310 (referencing amici's reliance on Title VII sexual harassment cases).

133. *Id.* at 311.

134. 460 F. Supp. 6 (E.D. Ark. 1978).

135. *Id.* at 8–10.

136. *Id.* at 9–10.

137. *Id.* at 8.

138. *Id.*

139. *Id.* at 8–9 (relying on *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1973) (holding a business vicariously liable for the crimes committed by an employee under the Sherman Act because of "[t]he breadth and critical character of the public interests protected" and because Congress intended for employers to regulate the conduct of employees under the Act)).

140. *Id.* at 10.

141. *Id.* at 8.

enforcement provisions of the CWA “should be construed and applied with a view toward achieving the same kind of ‘maximum adherence.’”<sup>142</sup> Thus, imputing the employee’s culpability to the sewer committee proved “consistent with normal agency rules.”<sup>143</sup>

In the statutes at issue in *International Hayes, Ionia*, and *Little Rock Sewer Committee*, Congress failed to state explicitly whether courts could impose corporate vicarious criminal liability. The courts each addressed different types of criminal convictions, but all upheld the imposition of corporate criminal vicarious liability as long as the employee was an agent of the corporation and acting within the scope of employment.

#### IV. COURTS SHOULD CONSTRUE THE CWA’S NEGLIGENT DISCHARGE PROVISION TO PERMIT CORPORATE VICARIOUS CRIMINAL LIABILITY

Typically, United States Attorneys do not prosecute corporations vicariously for violations of the CWA negligent discharge of oil provision. However, in cases where direct liability is difficult to prove due to the nature of the corporate form, such as an inability to gather certain types of evidence, prosecutors may wish to pursue vicarious liability.<sup>144</sup> Although the negligent discharge provision does not expressly direct courts to apply vicarious liability, such an interpretation is warranted in light of Congress’s intent and the public welfare nature of the CWA and OPA 90. Construing the CWA to allow vicarious criminal liability does not violate due process rights of corporations because they are on notice of the stringent regulations surrounding oil pollution. In addition, corporations are in the best position to prevent spills and aggressive prosecution will encourage responsible corporate conduct and deter future negligent acts that lead to oil spills. Although

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142. *Id.*

143. *Id.* at 9.

144. See BUSINESS ORGANIZATIONS MANUAL, *supra* note 96, § 9-28.700(B). The government is unlikely to prosecute corporations that are completely faultless because the prosecutorial guidelines advise United States Attorneys to weigh the same factors that they would for individual criminal prosecutions. Attorneys are advised to consider the likelihood of success at trial as well as the general purposes behind criminal law—deterrence, rehabilitation, restitution for victims, and protection of the public. *Id.* § 9-28.300. Among other factors, United States Attorneys should look to the sufficiency of evidence, consequences of conviction, “adequacy of noncriminal approaches,” a corporation’s disclosure of the wrongdoing, and previous misconduct. *Id.*

the Government proceeded against Fleet under a direct liability theory in the *Cusco Busan* case,<sup>145</sup> the case helps illustrate why courts can and should construe the negligent discharge provision to allow for vicarious liability.

A. *The Legislative Intent Behind OPA 90 and the CWA Directs Courts to Allow Charges of Corporate Vicarious Criminal Liability*

The CWA negligent discharge provision does not explicitly provide for vicarious liability. However, a plain language argument that the statute is unambiguous and only attaches liability to the specific “person who negligently” discharged oil<sup>146</sup> does not apply to corporations because, although they are persons under the CWA, they can only act through their agents. Thus, such a reading would provide no opportunity to charge a corporation with negligent discharge when Congress clearly intended otherwise. Courts must look to the legislative history and intent of the discharge provision as well as the public welfare status of the statute to resolve this ambiguity.<sup>147</sup>

In adopting OPA 90, Congress responded to the failure of corporations to prevent and clean up oil spills.<sup>148</sup> Congress also found that corporations viewed oil spills as just another cost of doing business.<sup>149</sup> Consequently, Congress added oil to the negligent discharge provision and increased criminal penalties under the CWA to deter, as well as punish, such corporate misbehavior.<sup>150</sup>

Congress also expressed concern over the danger oil spills posed to “the public health and welfare and the environment.”<sup>151</sup> The public welfare nature of the CWA, as amended by OPA 90, permits a broad reading of the statute. In other words, just as public welfare statutes

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145. Third Superseding Indictment, *supra* note 4, at 2 (citing Fleet’s responsibility to select, train and supervise the vessel’s crew).

146. See Brief of Appellant, *supra* note 76, at \*44.

147. See *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United States v. Balint*, 258 U.S. 250, 252 (1922).

148. S. REP. NO. 101-94, at 2–3 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 723–24.

149. *Id.* at 3, reprinted in 1990 U.S.C.C.A.N. 722, 724.

150. Oil Pollution Control Act 1990, Pub. L. No. 101-380, § 4301(c), 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 1319(c), 1321(b)(3) (2006)); H.R. REP. NO. 101-653, at 154 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 779, 833.

151. S. REP. NO. 101-94, at 2, reprinted in 1990 U.S.C.C.A.N. 722, 723.

lower the mens rea for a particular crime, so too should they allow for vicarious liability.<sup>152</sup> Moreover, the rule of lenity is not applicable because Congress's intent is clear and no grievous ambiguity exists.<sup>153</sup> Thus, courts should give full effect to Congress's intent by allowing the government to impute liability to a corporation for negligent discharge by an employee under the CWA.

Furthermore, holding corporations vicariously criminally liable under the negligent discharge provision does not violate due process. First, shipowners, ship operators, and land-based corporations handling oil have fair warning that oil discharges are heavily regulated and may result in criminal prosecutions. Thus, corporations and their employees, unlike the ordinary individuals Justice Thomas discussed in his dissent to the denial of certiorari in *Hanousek*, are using specialized devices for specialized purposes and are not ignorant that such activities are regulated.<sup>154</sup> Second, because corporations only face probation and fines for punishment of criminal conduct, the severe penalties that concerned Justice Thomas are similarly not applicable to corporations.<sup>155</sup> Although fines can prove substantial under the Alternative Fines Act, by their nature they are less severe and pose a less substantial threat to due process.<sup>156</sup>

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152. See, e.g., *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6, 8 (E.D. Ark. 1978) (citing *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1973)); see LAFAVE, *supra* note 96, § 13.5(c), at 705 (“[I]t is fair to say that generally the imposition of criminal liability on corporations for any and all employees which constitute violations of strict-liability regulatory offenses are sound . . . [and such liability] impose[s] a duty upon the corporation not to act in such a way as to endanger the health, safety or welfare of the general public, and thus the corporation is quite properly held for such acts by any employee.”).

153. See *Liparota v. United States*, 471 U.S. 419, 427 (1985); *supra* note 73 and accompanying text.

154. See *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting) (“[W]e should be hesitant to expose . . . construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.”); see also LAFAVE, *supra* note 96, § 13.4(c), at 699 (asserting that corporate vicarious criminal liability is typically only found unconstitutional when the employer did not have any control over the employee or the corporation tried to stop the tortious conduct).

155. See *Hanousek*, 528 U.S. at 1103–04 (Thomas, J., dissenting).

156. See LAFAVE, *supra* note 96, § 13.4(b), at 697.

B. *Based on the Cosco Busan Facts, a Court Could Find Fleet Vicariously Criminally Liable*

In the case of the *Cosco Busan*, the government alleges Fleet is directly liable for negligently training and supervising its agents, the crew;<sup>157</sup> however, the case illustrates why courts should permit United States Attorneys to pursue vicarious liability. Fleet's crew traveled, with little sleep, from Beijing, China to Pusan, Korea, boarded the *Cosco Busan*, and then stayed up through the night to run safety drills.<sup>158</sup> "With minimal training and preparation," the crew set sail to the United States.<sup>159</sup> Later, when the vessel left the San Francisco Bay, Fleet failed to develop a passage plan,<sup>160</sup> failed to ensure the vessel's safety by allowing it to depart in heavy fog,<sup>161</sup> and failed to properly instruct crewmembers of their responsibilities aboard the ship, among other allegations.<sup>162</sup> After the allision and resulting oil spill, Fleet also allegedly tried to cover up its negligence by concealing ship records and creating false and forged documents, including passage plans.<sup>163</sup>

In a motion to plead *nolo contendere*, Fleet asserted that the charges were "purely vicarious," the crew consisted of only "temporary agents," and the corporation's officers "had no direct participation in the circumstances leading to the allision."<sup>164</sup>

Although the federal district court agreed with the government that this is a case of direct liability,<sup>165</sup> the CWA, as amended by OPA, would allow the government to proceed against Fleet under a theory of corporate vicarious criminal liability. Regardless of the pilot's negligence, the justifications for vicarious liability apply.<sup>166</sup> Not only did

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157. Government's Opposition Brief, *supra* note 14, at 2–3.

158. *Id.* at 8.

159. *Id.*

160. *Id.* at 9–11.

161. *Id.* at 11–12.

162. *Id.* at 12–14.

163. *Id.* at 16.

164. Defendant Fleet Mgmt. Ltd.'s Notice of Motion and Motion for Consent to Enter Plea of *Nolo Contendere* at 20, *United States v. Cota*, No. 08-00160 (N.D. Cal. filed Sept. 4, 2008) [hereinafter Fleet Brief].

165. *See Cota*, No. 08-00160, slip op. at 2–3, 2008 WL 4531804, at \*1–2 (Oct. 7, 2008).

166. Fleet asserts in its briefing that the government is pursuing vicarious liability and that it should escape liability because its crew consisted of "temporary agents." Fleet Brief, *supra* note 164, at 20. This is similar to Hanousek's argument that the backhoe driver was an independent

Fleet choose to “delegate the conduct of [its] affairs,”<sup>167</sup> but it was also in the best position to protect third parties from the negligent conduct of its employees. Fleet failed to structure the work of its employees properly to ensure that tortious conduct would not likely occur. Moreover, because Fleet stands to make substantial profits due to the work of its employees, Fleet should bear the risk of its employees’ tortious conduct.

Holding Fleet vicariously liable would also serve the deterrent function underlying the principle of respondeat superior and criminal law. The threat of liability would deter Fleet from repeating mistakes that led to the oil spill and encourage Fleet to change employee behavior and corporate culture.<sup>168</sup> It would also provide general deterrence “on a broad scale” by putting other corporations in the shipping industry on notice and incentivizing them to take actions to reduce tortious conduct.<sup>169</sup> In the shipping industry, criminal penalties are often central to deterring tortious conduct because corporations, such as Fleet, hold protection and indemnity insurance which covers legal expenses, civil claims, and sometimes even portions of criminal fines.<sup>170</sup> Thus, allowing corporations to escape liability essentially allows corporations to continue calculating oil spills as a cost of doing business, which Congress explicitly legislated against.<sup>171</sup>

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contractor, and thus, not his agent. Brief of Appellant, *supra* note 76 at \*44. However, the legislative intent behind OPA 90 coupled with the public welfare nature of the CWA may justify, as a matter of public policy, finding a non-delegable duty of due care in matters involving oil spills. Congress wanted to punish and deter corporations for negligent discharge. Allowing corporations to escape liability, even if it is criminal, by claiming their workers are independent contractors and not agents would only incentivize corporations to use contractors. In Fleet’s case, it would prove difficult to argue that the crew was not carrying out the work of the corporation. Moreover, a non-delegable duty theory may allow the imputation of liability from a compulsory pilot, who is traditionally not an agent, to a shipowner or ship management company. *See, e.g.*, *United States v. S.S. President Van Buren*, 490 F.2d 504, 506 (9th Cir. 1973) (holding shipowners are liable under theory of respondeat superior for negligence of voluntary pilot but compulsory pilots are not agents).

167. *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6, 8 (E.D. Ark. 1978) (quoting *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1973)).

168. *See* BUSINESS ORGANIZATIONS MANUAL, *supra* note 96, § 9-28.200 (citing factors for United States Attorneys to consider when deciding whether to prosecute corporations including: the response to the incident, effectiveness of programs in place, and history of wrongdoing, among others).

169. *Id.* § 9-28.200(B).

170. *See Cota*, No. 08-00160, slip op. at 4, 2008 WL 4531804, at \*2.

171. S. REP. NO. 101-94, at 2–3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723–24.

## CONCLUSION

Although the plain language of the CWA, as amended by OPA 90, does not expressly call for holding corporations vicariously criminally liable for the negligent discharge violations of employees, the legislative intent and public welfare nature of the CWA support construing the statute to allow for such liability. Doing so will not violate the due process rights of corporations, and holding corporations liable is important because it will deter future negligent conduct that may result in oil spills, which damage not only America's waters but also harm America's environment, economy, and general welfare.