OFFICERS BEWARE:
THE SNOWBALLING EXPANSION OF THE
RESPONSIBLE CORPORATE OFFICER DOCTRINE
INTO CIVIL LIABILITY UNDER THE CLEAN WATER ACT

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Disclaimer

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Abstract


The expansion of the responsible corporate officer doctrine into civil liability has been rapid and persistent since the decision in United States v. Hodges X-Ray in 1986 bridged the gap between the doctrine’s creation to circumvent the mens rea requirement in criminal violations of public health and welfare statutes and civil liability where scienter is not required. Courts have since applied the doctrine to civil liability under various federal and state environmental statutes. Recently, courts have applied the doctrine to impose civil liability against corporate officers under the Clean Water Act. In doing so, these courts have misapplied earlier case law, confused the doctrine with “individual” liability under the act, and blindly relied upon similarly flawed decisions. In the process, the clear intent of Congress is ignored as set forth in the unique, deliberate, and precise language of the enforcement provision of the act.
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I. INTRODUCTION

As the Greek philosopher Aristotle recognized, “the generality of men are naturally apt to be swayed by fear rather than reverence, and to refrain from evil rather because of the punishment that it brings than because of its own foulness.”¹ This insightful observation into human behavior supports the utilitarian view of punishment – that the primary goal should be deterrence of unlawful activity; that society imposes punishment to dissuade re-offenders and to discourage would-be violators.²

The law, however, prudently tempers the deterrence goal of punishment, and its potential to constrain legal activities if overbearing, with the freedom of corporate officers to make necessary business decisions that allow companies to effectively and efficiently operate.³ The benefits of such temperance are felt by the company, economy,


In designing and analyzing systems of criminal punishment, utilitarian theorists are thus primarily concerned with achieving adequate and effective deterrence – of setting punishment at a level sufficiently high to dissuade potential offenders from committing crimes. Among utilitarians, the temptation to impose increasingly harsher penalties is strong. Criminal punishments generally do not pose a threat of overdeterrence (unlike the civil tort context, where the possibility of overdeterrence is a persistent problem). Because most crimes must be intentional, and because the majority of them deviate so strongly from accepted norms of conduct – robbery and assault do not resemble socially permitted conduct, while negligent driving at least bears a resemblance to safe driving – there is less fear that some socially productive activity will be chilled through stiff penalties on crime.

Id., at 1055-56 (citations omitted).

and society as a whole. As a general rule, corporate officers are insulated from the actions, debts, and liabilities of the corporation. The sound reasoning for these protections stems from employees being paralyzed from taking action if they fear personal liability. Furthermore, the delegation of authority is essential for corporate


Additionally, the business judgment rule has existed in this country as a common law principle protecting corporate directors from suits of the company's shareholders for over 150 years. See e.g., Godbold v. Branch Bank, 11 Ala. 191 (1847); Hodges v. New England Screw Co., 1 R.I. 312 (1850); Smith v. Prattville Mfg. Co., 29 Ala. 503 (1857). Under the rule, the judgment of a company's director is presumed to be made in good faith and designed to promote the best interests of the company. See e.g., Stamp v. Touche Ross & Co., 263 Ill. App. 3d 1010 (1st Dist. 1993). The rule "protects directors who have performed diligently and carefully and have not acted fraudulently, illegally or otherwise in bad faith." Treco, Inc. v. Land of Lincoln S & L, 749 F.2d 374, 377 (7th Cir. 1984). To challenge a director's action, a plaintiff bears the burden of proving the director "breached any one of the triads, of their fiduciary duty -- good faith, loyalty, or due care." Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). See also, 13 Ill. Law & Prac. Corporations § 189 (West 2011); 16B Am. Jur. Corporations §§ 1695-1708 (West 2011).

Another common law principle designed to balance corporate liability with the freedom to operate is the economic loss rule. Most states have adopted some variation of the rule, but in general the economic loss rule requires that a party suing for purely economic losses must have a contract with the defendant. See e.g., Adams v. Copper Beach Townhomes Communities, 816 A.2d 301, 305 (Pa Super. 2003) (no tort cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage); Casa Clara Condo Ass'n v. Charley Toppino & Sons, Inc., 620 So.2d 1244, 1246 (Fla. 1993) (economic loss rule precludes recovery for negligence that results only in economic harm). In effect, the rule limits the liability of companies by barring tort causes of action, and thus limiting the number of potential plaintiffs, where only economic damages are alleged. See e.g., Indemnity Ins. Co. of N. Am. V. American Aviation, Inc., 891 So.2d 532, 536 (Fla. 2004) ("the prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort."). See also, 15 Ill. Law & Prac. Damages § 14 (West 2011); 30A Ill. Law & Prac. Products Liability §12 (West 2011); 22 Am Jur. 2d. Damages § 23 (West 2011).

4 See note 3 supra.

5 The economic impacts of the limited liability company were recognized a century ago by Nicholas Murray Butler, the President of Columbia University, who said

I weigh my words when I say that in my judgment the limited liability corporation is the greatest single discovery of modern times … Even steam and electricity are far less important than the limited liability corporation and they would be reduced to comparative impotence without it. It substitutes cooperation on a large scale for individual, cut-throat, parochial, competition. It makes possible huge economy in production and in trading … It means … the only possible engine for carrying on international trade on a scale commensurate with modern needs and opportunities.

Cohen, Mark et. al., Cause of Action to Establish Liability of Corporate Director or Officer for
operations and it should be encouraged to ensure efficiency through specialization of labor allowing employees with the necessary expertise and time to handle issues for which they have been specifically trained either through education, experience, or company programs.

While maintaining the general deference to traditional corporate protections, the imposition of individual liability of corporate employees for the acts of the company is warranted “in limited circumstances.” As the Supreme Court aptly recognized, such situations include activities that can “profoundly impact human health and the public welfare.” Under such extreme circumstances, courts have established the legal theory of the Responsible Corporate Officer (“RCO”) doctrine, wherein liability may be imposed on corporate officers authorized to make decisions regarding the violating action or inaction by the company, but who failed to implement measures that would have prevented the occurrence of the violations. The RCO doctrine is akin to strict liability; it

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6 Staples v. United States, 511 U.S. 600, 607 (1994) (recognizing that “public welfare offenses have been created by Congress, and recognized by [the Supreme Court] in ‘limited circumstances’”) (quoting United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978)).

The Supreme Court further noted that the “‘existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.’” Staples, 511 U.S. at 605 (quoting United States Gypsum, 438 U.S. at 436 (internal quotation omitted).


8 See notes 11, 47 and 59-62 infra.
does not require any conscious decision or scienter to violate the statute on the part of the officer. Liability is imposed on the basis of the employee’s position, responsibilities, and capacity to have prohibited the violation, as opposed to his actual actions or intent involved in the company’s improper conduct. In the narrow situation where the RCO doctrine can be applied, the impacts to public health and welfare dictate that the corporate officer under whose authority rests the violating action or inaction should be made individually liable for the purpose of maximum deterrence.

Since the Supreme Court’s modern articulation of the RCO doctrine’s applicability to public welfare statutes in *United States v. Park*, the expansion of the RCO doctrine into the federal and state environmental statutes has been steady and consistent. In doing so, several courts have extrapolated a three-pronged analysis from the Supreme Court’s decisions identifying the contours of the RCO doctrine. First, the officer must be in a position to influence the corporate policies or activities. Second, there must be a nexus between the officer’s position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations. Finally, the third element is the officer’s actions or inactions facilitated the violations.

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9 Id.


11 *See In re Dougherty*, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992)(corporate officer was civilly liable for violations of Minnesota’s hazardous waste laws under the RCO doctrine); *Commissioner Ind. Dep’t. of Envtl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556 (Ind. 2001) (corporate officer responsible for environmental compliance of company with authority to prevent and correct violations was individually responsible for civil violations of the Indiana Environmental Management Act); *People v. Roscoe*, 169 Cal. App. 4th 829, 839 (individual defendants liable for $2,493,250 in penalties for violations of the California Health and Safety Code under the RCO doctrine). See also, Mullikan, Nancy, Comment: Holding the “Responsible Corporate Officer” Responsible: Addressing the Need for Expansion of Criminal Liability for Corporate Environmental Violators, 3 Golden Gate U. Envtl. L.J. 395, 420-21(arguing for expanding criminal liability to responsible corporate officers and inferring criminal intent with the RCO doctrine)(noting that the
The RCO doctrine was traditionally limited to criminal liability and spawned from the need to harmonize Congress’ omission of a mens rea for certain statutory criminal violations with the well-established rule that such liability requires scienter. Yet, the doctrine has recently been expanded by courts to civil liability under various federal and state environmental statutes, including the Clean Water Act (“CWA”), an inevitable result of the sweeping language in Park.

A mere cursory review of the CWA, however, logically leads to a conclusion that the expansion of the RCO doctrine into civil liability under the act is precluded by the different language imposing criminal and civil sanctions on violators. Congress enacted the CWA to include a uniquely modified definition of a “person” who may be subject to criminal liability under Section 309(c) of the act. Potential criminal violators under the CWA expressly include any “responsible corporate officer.” By contrast, the act’s civil penalties provision, Section 309(d), does not include such language under its definition of “person,” which is unmodified from the general definition of the term applicable throughout the CWA. Congress thus determined the RCO doctrine should apply only to

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12 See notes 30-32 infra.


14 See note 11 supra and notes 178, 185, 194, and 220 infra.

15 See note 117 infra.

16 Id. § 1319(d). Section 309(d) provides as follows:
the severe violations that warrant criminal liability and not to civil penalties. This
interpretation is supported by the legislative history of the CWA and subsequent
amendments to the Clean Air Act ("CAA"). 17

Nevertheless, with the fervor and ease by which courts applied the RCO doctrine
to civil liability under other environmental statutes, similar attempts to expand the
doctrine to civil liability under the CWA were inevitable. With the decisions in the Ninth
Circuit in Waterkeepers Northern California v. AG Industrial Manufacturing, Inc., 18 and
Humboldt Baykeeper v. Simpson Timber Company, 19 along with the Northern District of
New York’s decision in City of Newburgh v. Sarna, 20 the dominos have already begun to
fall in that direction. Yet, the attempts to expand the RCO doctrine never adequately

(d) Civil penalties: factors considered in determining amount. Any person who violates
section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or
limitation implementing any of such sections in a permit issued under section 402 of this
Act by the Administrator, or by a State, or in a permit issued under section 404 of this
Act by a State[,], or any requirement imposed in a pretreatment program approved under
section 402(a)(3) or 402(b)(8) of this Act, and any person who violates any order issued
by the Administrator under subsection (a) of this section, shall be subject to a civil
penalty not to exceed $25,000 per day for each violation. In determining the amount of a
civil penalty the court shall consider the seriousness of the violation or violations, the
economic benefit (if any) resulting from the violation, any history of such violations, any
good-faith efforts to comply with the applicable requirements, the economic impact of
the penalty on the violator, and such other matters as justice may require. For purposes of
this subsection, a single operational upset which leads to simultaneous violations of more
than one pollutant parameter shall be treated as a single violation.

Id.

17 See notes 241-258 infra.


19 2006 U.S. Dist. LEXIS 91667 (N.D.Ca., Dec. 8, 2006); see also Northern California River Watch v.
Oakland Sustainable Economy, 2011 U.S. Dist. LEXIS 14551 (N.D.Ca., Feb. 14, 2011) (“under the
[CWA], penalties may be imposed against individuals who are in positions of authority at polluting
companies”) (citing Humboldt Baykeeper, 2006 U.S. Dist. LEXIS 91667 at *9-10).

address the unique language in the CWA and confuse the RCO doctrine with individual liability of corporate officers acting in violation of the statute on behalf of the company.\textsuperscript{21}

At stake with the improper expansion of the RCO doctrine into CWA civil liability is the level of involvement on the part of the responsible corporate officer in the company’s wrongful conduct that will impose individual liability on the officer. Under the civil penalties provision of the CWA, responsible corporate officers may be individually liable for their actual personal conduct in violation of the statute taken on behalf of the company.\textsuperscript{22} This would require either action or inaction that directly results in a violation.\textsuperscript{23} For instance, a corporate officer directly ordering the release of a pollutant into a water of the United States, or failing to authorize action to remedy such a discharge after the fact may be liable as an “individual” under the civil liability provision in Section 309(d). By applying the RCO doctrine, however, liability may be imposed on responsible corporate officers based on their corporate positions, their responsibility to prevent such violations, and their mere facilitation of the violation\textsuperscript{24} without any regard for intent to commit, or even knowledge of, the violating conduct.\textsuperscript{25}

A brief hypothetical best illustrates the above-point. A chief executive officer of a large, publically-traded chemical manufacturing company, who is generally responsible for, among other things, the company’s environmental regulatory compliance, delegates

\begin{footnotesize}
\textsuperscript{21} See notes 179-184 and 262-266 infra.

\textsuperscript{22} See 33 U.S.C. §§ 1319(d) and 1362(5); see also notes 229-236 infra.

\textsuperscript{23} Id.

\textsuperscript{24} See notes 11 supra and 47 infra.

\textsuperscript{25} Id. Yet, the Supreme Court clearly held that liability under the RCO doctrine is not imposed based on the officer’s corporate position alone. See notes 60-67 infra. A “responsible relationship” to the violation is also required. See note 61 infra. Therefore, mere delegation of responsibility without any notice of the potential for the wrongful conduct may not be enough to impose liability under the RCO doctrine. Id.
\end{footnotesize}
responsibility over the day-to-day operations, maintenance, and regulatory compliance of a plant in Louisiana via several levels of management to a plant manager. The plant manager, pursuant to his duties, gives an order to operate the facility in a manner that releases effluent into a nearby stream in violation of the plant’s NYDES permit under the CWA. The company’s CEO had no knowledge of the specific wrongful conduct ordered by the plant manager, but over the years the CEO has been aware of past, separate environmental violations at the plant that were addressed through corporate action to avoid future occurrences. Under the liability provisions of the CWA, the plant manager may be personally liable for his order to operate the facility in violation of the company’s permit. His liability arises from his personal actions in violation of the act and he falls under the liability imposed on an “individual” in the general definition of “person.”

The CEO, however, did not engage in any wrongful conduct that could directly impose liability on him or her as an “individual.” Yet, if the RCO doctrine applies, the CEO’s general responsibility for environmental regulatory compliance that comes with the position and the officer’s prior knowledge of separate environmental issues at the plant may impose individual liability, regardless of the CEO’s knowledge or intent. Such liability through the RCO doctrine would be based on the CEO’s failure to prevent the discharge through his continued delegation of responsibility over environmental conditions at the plant.

The purpose of this article is not to argue against the now generally accepted RCO doctrine theory of liability. Those arguments have been made *ad nauseum* and were

26 See 33 U.S.C. §§ 1319(c)-(d), 1362(5).

27 See notes 60-67 infra.
artfully and unequivocally rejected by the Supreme Court over thirty years ago in *Park*.\textsuperscript{28} Nor is the doctrine’s applicability to the CWA’s criminal liability at issue.\textsuperscript{29} Rather, this article will examine the inapplicability of the RCO doctrine to civil liability under the CWA and identify the flawed reasoning and misapplication of case law that courts have so readily employed to support such expansion of the doctrine. Part I of this article examines the historical case law that created and defined the RCO doctrine, and chronicles the expansion of the doctrine into civil liability under federal and state environmental statutes. Part II provides a historical analysis of the CWA. Part III of this article analyzes the application of the RCO doctrine to civil liability under the CWA. Part IV sets forth the arguments against such application and identifies and rebuts the anticipated counterarguments. This article concludes that the RCO doctrine cannot be applied to civil liability under the CWA and that the recent judicial trend to do so confuses the doctrine with individual liability of corporate officers under the definition of a “person” under the CWA.

\textsuperscript{28} See notes 55-59 infra.

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

*Id.* 421 U.S. at 677.

\textsuperscript{29} Indeed, the “responsible corporate officer” language added to the definition of a “person” who may be criminally liable under the CWA must be read to have meaning. See note 234 infra. See also, Mullikan, note 11 supra at 397 (arguing that the added “responsible corporate officer” language was “intended to impose an affirmative duty on corporate officers based on their position and should be interpreted to expand criminal liability in the prosecution of substantive corporate environmental crimes”).
II. HISTORICAL ANALYSIS OF THE RCO DOCTRINE

The early development of the RCO doctrine can be summarized in three Supreme Court decisions: *United States v. Dotterweich*, 30 *Morissette v. United States*, 31 and *United States v. Park*. 32 These decisions establish the elements of the doctrine and identify the rationale for imposing such individual liability.

A. Early Development of the RCO Doctrine

While the core concept of the RCO doctrine has earlier origins, 33 the often cited father of the doctrine is the Supreme Court’s opinion in *United States v. Dotterweich*, which identified the need for the RCO doctrine, ratified its creation by the lower courts, and established its elements. 34

Joseph Dotterweich was the president and general manager of Buffalo Pharmacal Company, Inc. (“Buffalo Pharmacal”), which purchased drugs from manufacturers, shipped them, and repackaged the drugs under its own label. Charges of violating the

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30 320 U.S. 277 (1943).
33 Several courts prior to *Dotterweich* held that in establishing criminal liability for violating certain regulatory measures the government need not prove that a defendant perpetrated, or even knew of, the violation so long as he was in a position to have foreseen and prevented such from occurring. See *United States v. Balint*, 258 U.S. 250 (1922) (finding that Congress did not require a showing of intent for certain criminal regulatory measures); *Heggland v. United States*, 100 F.2d 68 (5th Cir. 1938) (affirming conviction of master of tankership because he was in a position to foresee and prevent discharge of oil from vessel though no proof master committed the violation); *The President Coolidge v. United States*, 101 F.2d 638 (9th Cir. 1939) (affirming misdemeanor conviction of ship owner for strict liability violations of the Rivers and Harbors Act for employees throwing garbage overboard); *State v. Burnam*, 128 P. 218 (Wash. 1912) (corporate officer may be convicted for violations of a regulation enacted to protect public health, regardless of intent).
34 320 U.S. 277 (1943).
Federal Food, Drug and Cosmetic Act ("FDCA") were brought against the company and Mr. Dotterweich, individually, for shipping mislabeled and adulterated drugs.\(^{35}\)

The jury found Mr. Dotterweich guilty on all counts, but failed to find the corporation guilty.\(^{36}\) On appeal, the Circuit Court of Appeals reversed Mr. Dotterweich’s conviction on the ground that that only the corporation was the “person” subject to prosecution. Section 201(e) of the FDCA defined a potentially liable “person” to include a “corporation,” but it did not include the term “individual.”\(^{37}\) The court concluded, however, that Mr. Dotterweich could be individually liable if Buffalo Pharmacal was his alter ego and it remanded the case for trial on that theory.\(^{38}\)

The Supreme Court’s 5-4 majority opinion reversed the court of appeals and held that the far-reaching public health and welfare purposes of the FDCA required that liability be imposed on individuals through whom the corporation acted.\(^{39}\) Specifically, the Court found that the Food and Drugs Act of 1906, which preceded the FDCA, was

\(^{35}\) Id. at 278.

\(^{36}\) Id.

\(^{37}\) Id. at 281.

\(^{38}\) Id. at 279.

\(^{39}\) Id. at 278-81.

The Court recognized the hardships its decision placed on corporate officers. Nevertheless, it believed that a balancing between the hardships to the consuming public, unaware of the hazards, and corporate employees in a position to know of the dangers necessitated the imposition of criminal liability on such employees without scienter. Id. at 284-85.

Hardship there doubtless maybe under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

Id.
enacted by Congress to keep impure and misbranded food and drugs out of the channels of commerce. Recognizing that the legislative purpose behind the FDCA “touches phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection,” the Court believed that “regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely a collection of English words.”

In light of the important purposes of the FDCA, the legislation was found to be of the type “where penalties serve as effective means of regulation … that dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing.” The Court thus held that the government had no obligation to prove scienter on the part of Dotterweich.

In regard to whether the FDCA imposed criminal penalties on the individual employees of a company, the statute’s failure to include “individual” in the definition of a “person” who could be guilty of a misdemeanor posed little obstacle for the Court. The Court reviewed the legislative history of the act and concluded that Congress’ exclusion of the term “individual” was intended to avoid superfluous language. The preceding legislation had included “individual” under the definition and the legislative history revealed that the later legislation was intended to expand the “penal net” and not to narrow and loosen it. The Court noted that “the only way in which a corporation can

40 Id. at 280.
41 Id.
42 Id. at 280-81.
43 Id. at 281-82.
act is through the individuals who act on its behalf\textsuperscript{44} and thus Congress meant the term “corporation” under the FCDA to include the company’s individual officers.\textsuperscript{45}

Although the Supreme Court did not name the doctrine it analyzed,\textsuperscript{46} the elements of the RCO doctrine can be discerned from the \textit{Dotterweich} majority opinion, and can be summarized as follows:

1) when legislation is enacted to protect the public health or welfare; 2) a corporate employee who holds a position of responsibility may be penalized for violating the tenets of that legislation; 3) even though he or she did not participate in the prohibited conduct or have personal knowledge of the violations, 4) if that individual could have, within the scope of his or her responsible position for the corporation, prevented the violation, and failed to do so.\textsuperscript{47}

Almost ten years after the decision in \textit{Dotterweich}, the Supreme Court in \textit{Morissette v. United States}\textsuperscript{48} elaborated on the RCO doctrine and specifically wrestled with when criminal intent is an essential requirement of criminal liability or whether such intent can be presumed from the act itself.\textsuperscript{49} The Court explained that individual criminal

\textsuperscript{44} Id. at 281.

\textsuperscript{45} Id. at 281-83.

\textsuperscript{46} While the doctrine was in use in English common law and its first publication in American case law dates back to 1912, in \textit{Burnam}, note 33 supra, the first case to refer to the “responsible corporate officer doctrine” was not published until 1979. \textit{See} Wise note 7 supra, at 297-302 (analyzing the roots of the RCO doctrine) (\textit{citing United States v. Frezzo Bros., Inc.}, 602 F.2d 1123, 1130 n. 11 (3rd Cir. 1979)).

\textsuperscript{47} \textit{See} Wise, supra note 7 at 302 (\textit{citing Dotterweich}, 320 U.S. at 280-84 (1943). The Supreme Court also distinguished the theory of liability against Mr. Dotterweich from an alter ego theory proposed by the lower. \textit{See} Dotterweich, 320 U.S. at 282-83.

\textsuperscript{48} \textit{See} note 31 supra. In \textit{Morissette}, the defendant was convicted of embezzling, stealing or “knowingly converting” government property. Id. at 248. Specifically, the defendant found three tons of used government bomb casings while hunting on government land. He removed the bomb casings and sold them to scrap. Id., at 247-49. The defendant argued that he did not intend to commit the crime, but rather, believed the casings had been abandoned. \textit{Id.} The trial court instructed the jury that lack of criminal intent was not a defense because the defendant’s intent was “presumed by his own act.” \textit{Id.}

\textsuperscript{49} Id. at 249-63.
liability under a public health and welfare statute could be imposed without intent, or even knowledge, where the liability arose from “neglect where the law requires care, or inaction where it imposes a duty” and when “the accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”

The Court’s well-articulated reasoning for doing away with the mens rea requirement for violations of public welfare statutes would become the lynchpin to future decisions expanding the RCO doctrine to civil liability.

In 1975, over twenty years after Morissette, criminal liability of responsible corporate officers under the FDCA was again challenged in United States v. Park. The Supreme Court’s decision in Park clearly sets forth the contours of the lack of scienter element of the RCO doctrine and laid the foundation for the expansion of the doctrine into the civil context.

In Park, the government charged Acme Markets, Inc. (“Acme”), a national food store chain, and its president, John Park, with several violations of the FDCA for shipping food that had been exposed to rodent contamination in Acme’s Baltimore warehouse.

Acme pleaded guilty and the issue before the Supreme Court was the validity of the district court’s jury instruction that an individual was liable under the FDCA if he

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50 Id. at 255-56. While Morissette elaborates on the analysis in Dotterweich of public welfare statutes and the recognized doctrine that scienter is not required for violations of such legislation, the decision does not decide the liability of a responsible corporate officer. See note 31 supra.

51 See notes 69 and 79 infra.

52 Park, 421 U.S. 658, 660.
“had a responsible relation to the situation, even though he may not have participated personally. In addition, the judge instructed the jury that “[t]he issue is … whether the defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.”

The jury found Mr. Park guilty, but the Fourth Circuit Court of Appeals on appeal reversed the conviction and remanded for a new trial. The circuit court interpreted the Dotterweich opinion narrowly and focused not upon the position and authority of the agent in regard to the violation, but rather upon the alleged action of the employee. Specifically, the circuit court found that while the Supreme Court in Dotterweich and Morissette did not require an “awareness of some wrongdoing” on the part of the corporate officer, to impose individual liability there must still be a showing of a “wrongful action” under the constitutional right to due process.

In a 6-3 majority opinion, the Supreme Court reversed, and held that the district court’s jury charge fairly advised that to find guilt the jury must find that Mr. Park “had a reasonable relation” to the condition of the warehouse and that by virtue of his position he had “authority and responsibility” to address it. The Court elaborated on its early decisions in Dotterweich and Morissette that the FDCA, as a recognized public welfare statute, imposes a primary duty on a responsible corporate officer to implement measures that will insure that violations do not occur. In order to place the burden on food distributors and not the general public, the Supreme Court reasoned that the FDCA

53 Id. at 665-66.
54 Id. at 666-67.
55 Id. at 667, 672-76.
56 Id. at 672.
allows the government to establish a *prima facie* case when it shows that “the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.”\(^57\) The causal link between the individual’s action, or inaction, and the violation arises from the employee’s failure to meet the duty imposed by the public health and welfare considerations behind the statute and his corporate authority.\(^58\) The Court thus concluded that in regard to a violation of a public welfare statute with no *mens rea* requirement, it is the employee’s power to prevent a corporation’s violation that is critical to the imposition of individual liability.\(^59\)

Yet despite the Court’s emphasis that the causal link for the violation arose from the officer’s failure to meet the “‘duty imposed by the interaction of the corporate agent’s authority and the statute,’” the *Park* decision clearly states that liability under the RCO doctrine is not imposed on the basis of the corporate title alone. The Court recognized that the RCO doctrine shaped by courts of appeal after *Dotterweich* had held that corporate officers with the responsibility and power to “devise whatever measures are necessary to ensure compliance with [an act] bear a ‘responsible relationship’ to or a ‘responsible share’ in, violations.”\(^60\) The corporate officer’s blameworthiness, at least in “some measure,” arose from this “‘responsible relationship’” or “‘responsible share.’”\(^61\)

\(^{57}\) *Id.* at 673-74.

\(^{58}\) *Id.* at 674.

\(^{59}\) *Id.* at 673-74.

\(^{60}\) *Id.* at 672 (*citing Lelles v. United States*, 241 F.2d 21 (9th Cir. 1957); *United States v. Kaadt*, 171 F.2d 600 (7th Cir. 1948). *See also*, *Dotterweich*, 320 U.S. at 284 (individual defendant had “a responsible share in the furtherance of the transaction which the statute outlaws”)).

\(^{61}\) *Id.* at 673.
With this idea in mind, the Park Court emphasized that the jury instruction at issue “did not permit the jury to find guilt solely on the basis of [the officer’s] position in the corporation.”

In regard to evidence relevant to Mr. Park’s “responsible share” in the wrongful conduct by the company in violation of the FDCA, the Court did not have to look any farther than his delegation of responsibility over the sanitary storage conditions for publically sold food with the knowledge that “the system for handling sanitation ‘wasn’t working perfectly.’” Mr. Park argued that he “had no choice but to delegate duties to those in whom he reposed confidence,” and he acted through his subordinates to correct the violating conditions once discovered. Indeed, Mr. Park had responsibility over 36,000 employees, 874 retail outlets, and 16 regional warehouses. However, also introduced as evidence was the fact he was advised by the FDA of insanitary conditions at another warehouse prior to the discovery of the violating conditions at issue. The Court found the evidence of the FDA’s prior advisement relevant to show that Mr. Park was on “notice that he could not rely on his system of delegation to subordinates to

\[\text{References}\]

62 Id. at 674 (“the main issue for determination was not respondent’s position in the corporate hierarchy, but rather his accountability, because of the responsibility and authority of his position, for the conditions which gave rise to the charges against him”).

63 Id. at 664-65 (quoting Mr. Park’s testimony).

64 Id. at 677. Mr. Park testified that upon learning from the FDA of the violating conditions at the Baltimore plant, “he conferred with the vice president for legal affairs, who informed that the Baltimore division vice president ‘was investigating the situation immediately and would be taking corrective action and would be preparing a summary of the corrective action to reply to the [FDA’s] letter.’” Id. at 663-64 (quoting Mr. Park’s testimony). Mr. Park further testified that “he did not ‘believe there was anything [he] could have done more constructively than what [he] found was being done.’” Id. at 664 (quoting Mr. Park’s testimony).

65 Id. at 660, 677, n. 19.

66 Id. at 676.
prevent or correct [the violations] and that he must have been aware of the deficiencies of this system before the [ ] violations.”

The legacy of Park as it relates to the expansion of the RCO doctrine to civil liability is the Court’s focus on the blameworthiness of the individual for not meeting “the requirements of foresight and vigilance” arising from the officer’s corporate position and not on any actual criminal intent. This fundamental tenet of the RCO doctrine has allowed subsequent courts to rather easily apply the doctrine to civil liability under statutes with no mens rea requirement and that are “undeniably the same class of public welfare statutes” as those interpreted by the Court in Dotterweich and Park.

B. Modern Era of the RCO Doctrine

While the modern trend of applying the RCO doctrine to civil liability under public welfare regulation spawned from Dotterweich, Morissette and Park, it is the Sixth Circuit Court of Appeals’ important decision in United States v. Hodges X-Ray, Inc., the first federal decision to expand the RCO doctrine to civil liability, which provides the often-cited rationale for such application. Within a few short years of the Hodges X-Ray decision, the RCO doctrine would be applied in the civil context under several federal and state environmental statutes.

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67 Id. at 677. While Mr. Park did not argue that the evidence on record entitled him to a jury instruction as to his lack of power to prevent the violations, the Court stated that “it would be objectively impossible for a senior corporate agent to control fully day-to-day conditions in 874 retail outlets, it does not follow that such a corporate agent could not prevent or remedy promptly violations of elementary sanitary conditions in 16 regional warehouses.” Id. at 677, n. 19.

68 See note 76 infra.

69 759 F.2d. 557 (6th Cir. 1985).

70 Id. at 561.

71 See notes 81-85 infra.

On appeal, Mr. Hodges argued that he could not be held individually liable under the provision of the RCHSA that provided “[i]t shall be unlawful – (1) for any manufacturer to introduce, or to deliver for introduction, into commerce … any electronic product which does not comply with an applicable standard proscribed pursuant to … this title.” Mr. Hodges contended that he was not a “manufacturer” within the meaning of the statute. The Sixth Circuit rejected that argument, noting that the term “manufacturer” was defined in the statute as “any person engaged in the business of manufacturing, assembling, or importing of electronic products.” The court affirmed the district court by stating that “since Hodges was the major shareholder and president of Hodges X-Ray, Inc., the conclusion that he was included in this definition is self-evident.”

Furthermore, the Sixth Circuit concluded that RCSHA was a public welfare statute even though it was not expressly identified as such by Congress. Recognizing that *Dotterweich* and *Park* were premised on the FDCA, which the Supreme Court held was a public welfare statute, the Sixth Circuit found that the RCSHA was “undeniably in the

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72 Id. 579 F.2d. at 560.
73 Id.
74 Id. at 560 (*citing* 42 U.S.C. § 263(j) (Prohibited Acts)).
75 Id. at 560.
same class of public welfare statutes and thus the conclusions of those cases are equally applicable here.”\textsuperscript{76}

\textit{Hodges X-Ray} is a tremendously important case in the expansion of the RCO doctrine for the above conclusions that (1) a responsible corporate officer may be held liable even when the statute at issue speaks in broad generalities that do not specifically include responsible corporate officers or agents, and (2) a statutory scheme may qualify as a public welfare statute, even if Congress did not label it as such, if there is a direct relationship between the regulations and the protection of human health. However, it was more persuasive to subsequent courts for its clear reasoning that the RCO doctrine may be applied in the civil context.

Mr. Hodges attempted to make a formalistic distinction between \textit{Dotterweich} and \textit{Park} and his case by arguing that those decisions specifically applied to criminal and not civil liability.\textsuperscript{77} The Sixth Circuit refused to take such an approach by concluding that if the RCO doctrine can be applied to criminal violations, then it can be applied to civil liability where the punishment is less severe.\textsuperscript{78} Specifically, the court stated the following language, often relied upon by subsequent courts deciding the issue:

\begin{quote}
The rationale for holding a corporate officer criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty. The fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the act of a corporation that
\end{quote}

\textsuperscript{76} \textit{Id.} at 560-61.

\textsuperscript{77} \textit{Id.} at 561.

\textsuperscript{78} Indeed, the \textit{Morissette} Court noted criminal liability for public welfare offenses has been applied, regardless of intent, to misdemeanor crimes. \textit{See} notes 48-51 \textit{supra}. 20
violate health and safety statutes renders civil liability appropriate as well.\textsuperscript{79}

Indeed, the Supreme Court in \textit{Morissette} made the same observation thirty-three years earlier. It noted that the imposition of individual liability for public welfare offenses, regardless of intent, was mitigated by the fact that the statutes contained “relatively small” penalties “and conviction does no grave damage to an offender’s reputation.”\textsuperscript{80}

Applying the above rationale in \textit{Hodges X-Ray}, that if the RCO doctrine can be applied to criminal violations with the potential of harsher penalties, then it can be applied in the civil context where such penalties and personal consequences are lesser, the majority of cases have accepted the use of the RCO doctrine and applied it to civil violations under the Comprehensive Environmental Recovery, Compensation, and Liability Act (“CERCLA”),\textsuperscript{81} the Resource Conservation Recovery Act (“RCRA”),\textsuperscript{82} the Federal Hazardous Substances Act,\textsuperscript{83} and the Clean Air Act (“CAA”).\textsuperscript{84} In addition,

\textsuperscript{79} Id.

\textsuperscript{80} \textit{Morissette}, 342 U.S. at 297. \textit{See also Hanousek v. United States}, 528 U.S. 1102, 1103-04 (2000) (J. Thomas and J. O’Conner dissent) (arguing that the seriousness of the CWA’s criminal penalties “counsels against concluding that the CWA can accurately be classified as a Public welfare statute”).


\textsuperscript{84} 42 U.S.C. § 7401 et. seq. (Westlaw 2011). \textit{See United States v. Mac’s Muffler Shop, Inc.}, 1986 U.S. Dist. LEXIS 18108 (N.D. Ga. Nov. 4, 1986) (“Clean Air Act’s legislative history expressly states that [the RCO doctrine] principal applies to civil penalty proceedings under Section 113 of the Clean Air Act”). However, given the clear legislative history of the 1977 amendments to the CAA, which modeled the act’s penalties provisions after the CWA, the reasoning behind the district court’s decision in \textit{Mac’s Muffler Shop} is critically flawed. \textit{See notes 281-287 infra.}
several state courts have applied the RCO doctrine to various state environmental statutes.\textsuperscript{85}

However, an important distinction exists between the CWA and the public welfare/environmental statutes under which the courts have applied the RCO doctrine to impose civil liability on corporate officers. The RCO doctrine grew out of ambiguities in public welfare statutes. The statute analyzed by the Supreme Court in \textit{Dotterweich} and \textit{Park} did not include “individual” in the definition of a “person” that may be liable for criminal violations. Nor did the statutes examined in \textit{Hodges X-Ray} and its progeny of cases interpret any congressional attempt to address the RCO doctrine.\textsuperscript{86} However, the CWA’s enactment in 1972 established a unique and detailed penalties regime that expressly includes “individual” liability under both criminal and civil liability, and expressly added “responsible corporate officer” only to the criminal context.

\textsuperscript{85} \textit{See People v. Roscoe}, 169 Cal. App. 4\textsuperscript{th} 829 (Cal. Ct. App. 2008) (individual defendants liable for $2,493,250 in penalties for violations of the California Health & Safety Code under the RCO doctrine); \textit{Commissioner, Ind. Dep’t of Envtl. Mgmt. v. RLG, Inc.}, 755 N.E.2d 556 (Ind. 2001) (corporate officer responsible for civil violations of Indiana Environmental Management Act was responsible for environmental compliance and had authority to prevent and correct violations); \textit{BEC Corp. v. Dep’t. of Envtl. Protection}, 775 A.2d 928 (Conn. 2001)(corporate officers personally liable for violations of Connecticut Water pollution Control Act under the RCO doctrine); \textit{In re Dougherty}, 482 N.W.2d 485 (Minn. Ct. App. 1992) (corporate officer civilly liable for violations of Minnesota’s hazardous waste laws under the RCO doctrine).

However, courts applying the RCO doctrine while balancing corporate protections have modified the doctrine in some jurisdictions to meet their needs. See \textit{RLG}, 755 N.E.2d at 561 (\textit{citing Dougherty}, 482 N.W.2d at 490) (holding that “the individual’s actions or inactions facilitated the violations” is a factor to be examined in the RCO doctrine).

\textsuperscript{86} The decision in \textit{Mac’s Muffler Shop} is an exception. The District Court for the Northern District of Georgia, Rome Division, interpreted the penalty provisions of the CAA, which were modeled after the language in the CWA. See notes 281-287 infra. However, this decision is based on an incomplete examination of the CAA’s legislative history and fails to review Congress’ intent behind the version of the act that was enacted. Accordingly, the holding in \textit{Mac’s Muffler Shop} that it was the congressional intent to apply the RCO doctrine to civil liability under the CAA lacks a solid foundation. \textit{Id.}
III. HISTORICAL ANALYSIS OF CWA

A. The CWA is a Public Welfare Statute

Under the first element of the RCO doctrine that can be extracted from the Supreme Court’s decisions in *Dotterweich*, *Morissette*, and *Park*, the doctrine may only be applied to public health and welfare statutes.\(^{87}\) Circuits are split as to whether the CWA falls within that category, with the majority holding that it is a public welfare statute.\(^{88}\) This conclusion is sound given the statute’s enumerated objective and goals and its legislative history.\(^{89}\)

The Supreme Court in *Dotterweich* identified the types of legislation that are public welfare statutes. Specifically, such statutes are created where the legislative purpose “touches phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection” and “where penalties serve as effective means of regulation… that dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing.”\(^{90}\) Given the language of the Court, is it not surprising that the Supreme Court in subsequent decisions has cautioned against the unfettered expansion of criminal strict liability in protecting the public welfare.\(^{91}\)

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\(^{87}\) See note 47 supra.

\(^{88}\) See note 100 infra.

\(^{89}\) Yet, the Supreme Court declined to review the issue. See *Hanousek v. United States*, 528 U.S. 1102 (2000) (denying certiori over *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999).

\(^{90}\) See notes 40 and 42 supra.

\(^{91}\) See *Staples*, 511 U.S. at 607, n. 3 (citing *United States v. Intern’l. Minerals & Chem. Corp.*, 402 U.S. 558, 563-64 (suggesting that is a person shipping acid mistakenly thought that he was shipping distilled water, he could not violate a statute criminalizing undocumented shipping of acids)).

While the court recognized that public welfare statutes do not require “that the defendant know the facts that make his conduct fit the definition of the offense” (*Staples*, 511 U.S. at 607, n. 3), it emphasized that
In an effort to reign in the judicial use of the public welfare doctrine, the Supreme Court in *Staples v. United States* recognized that such legislation involves statutes that “regulate potentially harmful or injurious items.”\(^{92}\) Otherwise, such criminal statutes may “impose a rigorous form of strict liability.”\(^{93}\) The Court then narrowed the scope of potential public welfare statutes by requiring courts to determine “as a threshold matter” whether there exists “some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in ‘responsible relation to a public danger.’”\(^{94}\) Simply put, the alleged violator must know he is dealing with a deleterious device, the character of which should put the defendant on notice of liability for the dangers to the unknowing public.\(^{95}\) In *Staples*, the National Firearms Act\(^{96}\) was silent as to a *mens rea* public welfare offenses are “recognized by this Court, in ‘limited circumstances.’” \(^{92}\) *Id.* at 607 (*quoting United States Gypsum*, 438 U.S. at 437). *See also*, *Hanousek*, 528 U.S. at 1102 (Thomas, J. dissenting).

But we have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities. \(^{92}\) *Staples*, 511 U.S. at 607.

\(^{93}\) *Id.* at 607, n. 3 (“By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability”).

\(^{94}\) *Id.* at 612, n. 6.

\(^{95}\) *Id.* at 607.

In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous devise of a character that places him ‘in responsible relation to a public danger,’ he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to ‘ascertain at his peril whether [his conduct] comes within the inhibition of the statute.’ Thus, we essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements.
requirement for the criminal possession of an unregistered firearm. The Court held that in order to convict an accused, the government had to prove beyond a reasonable doubt that the accused knew that the rifle had the characteristics that brought it within the statutory definition of a machine gun.97

The Staples Court confirmed its decision by noting a limitation recognized in Morissette that penalties for offenses of public welfare statutes “‘commonly are relatively small, and conviction does no grave damage to an offender’s reputation.’”98 While the Staples Court’s opinion did not rest upon this ground, the Court noted that the felony offenses for the possession of an unregistered machinegun under the Federal Firearms Act, punishable by up to ten years federal imprisonment, were not of the type of “small” penalties attached to public welfare statutes.99

Id. at 607 (quoting Dotterweich, 320 U.S. at 281 and Balint, 258 U.S.at 254)).


97 Id.

98 Id. at 617-18 (quoting Morissette, 342 U.S. at 256).

99 Id. at 617. The court elaborated that a “‘felony’ is as we noted in distinguishing certain common-law crimes from public welfare offenses, ‘as bad a word as you can give a man or thing.’” Id. at 618 (quoting Morissette, 342 U.S. at 260). See also United States Gypsum, 438 U.S. at 442, n. 18 (three year imprisonment and fine of $100,000 for a felony violation of the Sherman Antitrust Act “provid[ed] further support” for Court’s conclusion that the act did not create “strict-liability crimes”).

In fact, the criminal violations of the FDCA at issue in Dotterweich and Park were misdemeanors. See Dotterweich, 320 U.S. at 280 (“the statute makes ‘any person’ who violates § 301(a) guilty of a ‘misdemeanor’”); Park, 421 U.S. at 682-83 (Stewart, J. dissenting) (“It is true that the crime was but a misdemeanor and the penalty was light”).

However, as Justice Stewart pointed out in his dissent in Park, joined by Justices Marshall and Powell, “under the statute even a first conviction can result in imprisonment for a year, and a subsequent offense is a felony carrying a punishment of up to three years in prison.” Id. (citation omitted). On this basis, the dissent believed that “[h]owever highly the Court may regard the social objectives of the Food, Drug, and Cosmetic Act, that regard cannot serve to justify a criminal conviction so wholly alien to fundamental principles of our law.” Id.
Federal circuits, interpreting the above rulings, have generally found that the CWA is a public welfare statute. These holdings are consistent with the act’s objectives and legislative history stating that the purpose of the CWA is to protect the public from the life-threatening dangers of pollutants.

The enumerated objective of the CWA is the restoration and maintenance of “the chemical, physical, and biological integrity of the nation’s waters.” To advance this objective, Congress established the ambitious goal “that the discharge of pollutants into the navigable waters by eliminated by 1985.” It further declared the prohibition of the “discharge of toxic pollutants in toxic amounts” a “national policy.” In furtherance of these goals and objectives, Congress requires EPA to “conduct research on the harmful effects of the health and welfare of persons caused by pollutants in water.”

Also, the legislative history of the CWA shows that the criminal provisions are “clearly designed to protect the public at large from the potential dire consequences of water pollution.” In regard to the knowing violations under Section 309(c), Congress

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102 Id. at § 1251(a)(1).

103 Id. at § 1251(a)(3).

104 Id. at § 1254(a).

105 See S. Rep. No. 99-50, 99th Cong., 1st Sess. 29 (1985); H.R. Rep. No. 189, 99th Cong., 1st Sess. 29-30 (1985). See also, e.g., Weitenhoff, 35 F.3d at 1286 (“The criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution and as such fall within the category of public welfare legislation”) (internal citation omitted); Brittain, 931 F.2d at 1419 (quoting 33 U.S.C. § 1251(a)) (“Congress intended, with the Act, ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s water … [and that] the discharge of pollutants into the
expressly stated that a purpose of the criminal penalties was to address knowing violations that “in some cases, [ ] have raised the clear potential for the loss of life and serious personal injury.”

Despite the broad public protection objections and goals of the CWA, the Fifth Circuit has ruled that CWA violations do not fall within the public welfare offenses exception to the mens rea requirement. In United States v. Ahmad, the court of appeals, relying on the decision in Staples, held that dispensing with the mens rea requirement for criminal violations of the CWA “would require the defendant to have knowledge only of a traditionally lawful conduct.” In general, the court reasoned that one should not be guilty of a felony if he or she honestly thought he or she were merely discharging

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107 101 F.3d at 391 (quoting Staples, 511 U.S. at 618). See also Hanousek, 528 U.S. at 1103 (Thomas, J. dissenting) (“it is erroneous to rely, even in small part on the notion that the CWA is a public welfare statute”).

We have said that “to determine as a threshold matter whether a particular statute defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in ‘responsible relation to a public danger.’ Although provisions of the CWA regulate certain dangerous substances, this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities. This fact strongly militates against concluding that the public welfare doctrine applies. As we have said, “[e]ven dangerous items can, in some cases, be so commonplace and generally available” that we would not consider regulation of them to fall within the public welfare doctrine. I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.

Id. (internal citations omitted).
uncontaminated water and the substance turns out to be something else. Thus, the trial
court’s instruction to the jury that inferred that knowledge was only required as to the fact
that something was discharged, and not to any other fact such as a pollutant, from a point
source, and into the navigable waters of the United States, was found to have misled the
jury as to the elements of the offense. The Fifth Circuit held that the instructions
implied that the requisite mens rea was strict liability, rather than knowledge, as to the
other elements of the crime.

The Ahmad court also noted that the criminal violations under the CWA were
felonies punishable with imprisonment in federal prison. The court, relying on the Staples
decision, reasoned that felonies are not a type of “relatively light penalties” that have
“virtually always” constituted public welfare offenses.

108 Id. at 391.
109 Ahmad, 101 F.3d at 391. The jury instruction at issue included the term “knowingly” with the criminal
element of a discharge, with the instruction listing each element of criminal liability on a separate line. Id.
110 Id.
111 Id. (citing Staples, 511 U.S. at 618) (“serious felonies, in contrast, should not fall within the exception
‘absent a clear statement from Congress that mens rea is not required’”). See also Hanousek v. United
States, 528 U.S. 1102, 1103 (2000)(Thomas, J. dissenting)

As Justice Thomas articulated in his dissent in Hanousek, joined by Justice O’Conner:

We have also distinguished those criminal statutes within the doctrine of
“public welfare offenses” from those outside it by considering the severity of the
penalty imposed. We have said, with respect to public welfare offenses, that
“penalties commonly are relatively small, and conviction does no grave damage
to an offender’s reputation.” The CWA provides that any person who
“negligently” violates the Act may be imprisoned for up to one year. A second
negligent violation of the Act may subject a person to imprisonment for up to
two years. The CWA also contains a felony provision that provides that any
person who “knowingly” violates §1321(b)(3) “shall be punished by a fine of
not less than $5,000 nor more than $50,000 per day of violation, or by
imprisonment for not more than three years, 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 $100,000 per day
of violation, or by imprisonment of not more than 6 years, or by both.” The
The decision in *Ahmed*, however, is at odds with the language of the penalty provisions in the CWA. The intent of Congress that the RCO doctrine be applied in the criminal context is evident from the inclusion of “responsible corporate officer” in the definition of “person” who may be liable for criminal penalties.\(^{112}\)

As discussed in further detail in Section V, below, the inclusion of a “responsible corporate officer” as a “person” who may be criminally liable under Section 309(c) of the CWA must be interpreted to have meaning and not be rendered superfluous. With an “individual” expressly potentially liable for either criminal or civil penalties resulting from their actions in violation of the CWA, the addition of the “responsible corporate officer” language in only the criminal penalties provision evidences Congress’ intent that the distinct and separate RCO doctrine be applied only to criminal liability.

**B. Available Penalties Under the CWA**

Section 301(a) of the CWA declares that “the discharge of any pollutant by any person” into the “waters of the United States” without a permit shall be unlawful.\(^{113}\) Section 502(5) defines the term “person” to mean, “*except as otherwise specifically provided*… an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.”\(^{114}\)

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\(^{112}\) CWA, 33 U.S.C § 1319(c)(6).

\(^{113}\) CWA, 33 U.S.C. § 1311(a).

\(^{114}\) *Id.* at § 1362(5) (emphasis added).
Section 309 sets forth the types of penalties that may be sought under the CWA. Specifically, the CWA identifies the following available penalties: criminal; civil; State liability for judgments and expenses; and administrative penalties. Under each category of penalty, the unmodified definition of “person” under § 505(5) applies. The only modification is for criminal penalties, where Congress expressly added

115 Id. at §§ 1319(c) (“Criminal penalties”), 1319(d) (“Civil penalties”), 1319(e) (“State liability for judgments and expenses”), and 1319(g) (“Administrative penalties”).

116 Id. § 1319(c). Section 309(c) provides in pertinent part as follows:

(c) Criminal penalties.

(1) Negligent violations. Any person who—

(A) negligently violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 402 of this Act by the Administrator or a State; 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.

(2) Knowing violations. Any person who—

(A) knowingly violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any
“responsible corporate officer” to the definition of a “person” that may be liable for such.

Section 309(c)(6) provides as follows:

Responsible corporate officer as "person". For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 502(5) of this Act [33 USCS § 1365(5)], any responsible corporate officer.117

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effluent limitation or condition in a permit issued to the treatment works under section 402 of this Act by the Administrator or a State; shall be punished by a fine of not less than $ 5,000 nor more than $ 50,000 per day of violation, or by imprisonment for not more than 3 years, 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 $ 100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment.

(A) General rule. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $ 250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $ 1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

* * *

(4) False statements. Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this Act shall upon conviction, be punished by a fine of not more than $ 10,000, or by imprisonment for not more than 2 years, 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 $ 20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

* * *

117 Id. § 1319(c)(6).
In fact, the intent of Congress to add different language to the criminal penalties provision could hardly be made clearer. The modification to the general definition of “person” is included in the criminal subsection, and in the body of the provision it expressly states that “responsible corporate officer” is added only to “this subsection” and, thus, not to the broader enforcement section or the immediately following, separate civil penalties subsection.

The difference in the scope of liable persons between the criminal and civil penalties provides significant insight into Congress’ intent to include the “responsible corporate officer” language only in the criminal context. For criminal penalties under Section 309(c), both negligent and knowing conduct may be punished. A negligent violation may be punished by a fine of not less than $2,500, but not more than $25,000 per day of violation. In addition, a negligent violator may be sentenced to one year in prison. Repeat offenders can be fined up to $50,000 per day of violation and/or imprisoned up to two years.

For criminal “knowing violations,” the penalties are harsher for the violator’s intentional acts. An intentional violator may be fined up to $50,000 per day of violation and may also be sentenced to three years in prison. Repeat intentional violators may be fined up to $100,000 per day of violation and/or up to six years in prison. Upon conviction of a violator’s knowing endangerment of another, a “person” may be fined up

118 Id. at § 1319(c)(1)-(2).
119 Id. at § 1319(c)(1)(B).
120 Id. at § 1319(c)(2)(B).
to $250,000 and/or imprisoned for fifteen years or less; while an “organization may be fined up to $1,000,000.\textsuperscript{121}

In contrast, civil penalties under Section 309(d) may be imposed on any person, regardless of intent, for proscribed conduct. The penalties are limited to $37,500 per day for each violation and there is no penalty floor. In fact, the provision allows EPA considerable discretion in determining the penalty and sets forth a list of criteria to examine on a case-by-case basis. Also, the provision does not authorize imprisonment.\textsuperscript{122}

\section*{IV. EXPANSION OF THE RCO DOCTRINE INTO THE CWA}

Since 1991, courts in several jurisdictions have interpreted the CWA language in regard to individual liability of corporate officers in the criminal and civil context, culminating in the decision by the District Court of the Southern District of New York in \textit{City of Newburgh v. Sarna} and the expansion of the RCO doctrine into CWA civil liability in the 9\textsuperscript{th} Circuit. The misapplication of case law by the \textit{Sarna} court underscores its misunderstanding of the RCO doctrine. Also, the decisions in \textit{Sarna, Waterkeepers Northern California v. AG Industrial Manufacturing Inc.}, and \textit{Humboldt Baykeeper v. Simpson Timber Co.}, highlight the courts’ unwillingness to address the clear language in the criminal and civil provisions of the CWA. Accordingly, to fully understand these decisions, it is essential to review the prior relevant case law interpreting the CWA.

\subsection*{A. Case Law Interpreting the “Responsible Corporate Officer” Language in the Criminal Penalties Provision of the CWA.}

In 1991, six years after the \textit{Hodges X-Ray} decision and in the middle of the wave of expansion of the RCO doctrine into civil liability under other environmental

\textsuperscript{121} Id. at § 1319(c)(3)(A).

\textsuperscript{122} Id. at § 1319(d) (as adjusted for inflation pursuant to 40 C.F.R. Part 19 § 19.4).
statutes, the Tenth Circuit in United States v. Brittain interpreted the “responsible corporate officer” language in the criminal penalties provision as it applied to individual criminal liability of a corporate officer. While the decision does not address the RCO doctrine’s applicability in the civil context, it correctly recognized that the “responsible corporate officer” language was intended by Congress to add criminal liability to responsible corporate officers without a showing of scienter. In doing so, the Tenth Circuit held that a corporate employee can be individually liable as a “person” who discharges pollutants into the waters of the United States under the criminal penalties imposed by the CWA.

Raymond Brittain was the public utilities director for the city of Enid, Oklahoma, with general supervisory authority over the operations of the Enid wastewater treatment plant and responsibility for filing the plant’s discharge monitoring reports. The evidence on the record showed that Mr. Brittain was aware that the plant was discharging raw sewage and that he directed the plant supervisor to falsify eighteen monthly discharge monitoring reports and the supporting laboratory records submitted to the EPA.

A jury convicted defendant Mr. Brittain of, among other things, eighteen misdemeanor counts of discharging pollutants into the waters of the United States. Mr. Brittain appealed the convictions and argued that he did not fall under the definition of

123 See notes 81-85 supra.
124 931 F.2d 1413 (10th Cir. 1991).
125 See notes 241-260 infra.
126 931 F.2d at 1418-20.
127 Id. at 1415, 1417-18.
“person” under the criminal liability penalties imposed by the CWA. He contended that an “individual” is subject to the criminal sanctions under Section 309(c) for permit violations only if he is a permittee. As support, Mr. Brittain relied upon the addition of the “responsible corporate officers” language in CWA’s general definition of “persons” in section 1362(5). He claimed that if he, as a corporate officer, fell under the general definition of “persons” under section 1362(5), then the additional language in the criminal sanctions provision would be rendered meaningless.

The Brittain court recognized that Congress was silent as to the reason for including the additional “responsible corporate officers” language contained in the criminal sanctions provision. However, the court of appeals drew a comparison with the FDCA at issue in Dotterweich and Park, and “believe[d]” that Congress intended the public welfare objective of the CWA “to outweigh the hardships suffered by ‘responsible corporate officers’ who are held criminally liable in spite of their lack of ‘consciousness of wrong-doing.’” The court interpreted the addition of “responsible corporate officers” as “an expansion of liability under Act rather than, as defendant would have it, an implicit limitation” on the general definition of a “person” potentially criminally liable under the act.

128 Id. at 1414.
129 Id. at 1418-19.
130 Id.
131 Id. at 1419.
132 Id.
133 Id.
The significance of the *Brittain* decision as it pertains to the application of the RCO doctrine under the CWA is the Tenth Circuit’s finding that the “responsible corporate officer” language modifying the persons who may be held criminally liable under act was an expansion of liability in that context. A responsible corporate officer, to be held criminally liable, would not have to ‘willfully or negligently’ cause a permit violation. Instead, the scienter requirement of the actor would be imputed to the responsible corporate officer by virtue of his position of responsibility.\(^\text{134}\)

Thus, the *Brittain* court recognized that corporate officers can be individually liable under Sections 309(c) and 309(d) for their actions as a “person” under the civil and criminal penalties provisions of the CWA. Yet, the inclusion of the “responsible corporate officer” language in the criminal penalties provision creates a separate theory of liability where the RCO doctrine can be applied in the criminal context to impute the scienter requirement and attach liability to corporate officers whose authority and responsibilities included the actions in violation of the CWA.

Almost six years after the *Brittain* decision, the District Court for the Southern District of Mississippi, in *United States v. Gulf Park Water Company, Inc.*, expanded on the holding in *Brittain* and found that a corporate officer could be liable as an “individual” as included in the general definition of “person” applicable in the civil sanctions provision of the CWA.\(^\text{135}\) While the *Gulf Park* court did apply civil liability to corporate officers, it did not do so under the RCO doctrine. Rather, the court recognized

\(^{134}\) *Id.*

that a corporate officer can be liable as an “individual” for his or her actions in violation of the CWA.\(^\text{136}\)

Defendants Gulf Park Water Company, Inc. (“Gulf Park”), Johnson Properties, Inc., Glenn Johnson and Michael Johnson were the owners and operators of a wastewater treatment facility in Jackson County, Mississippi that discharged pollutants into a tributary leading to the Mississippi Sound without a NPDES permit.\(^\text{137}\) Glenn Johnson, the General Manager of the facility, controlled and directly participated in the facility’s operations. He was also identified as the operator of the facility on its permit applications and he continuously acted as Gulf Park’s point of contact with State regulators.\(^\text{138}\) Michael Johnson was the sole shareholder of Johnson Properties, which in turn wholly owned Gulf Park. He exercised day-to-day control over the facility and was its operator.\(^\text{139}\) The court found that the individual defendants had “actual hands-on control of the facility’s activities, were responsible for on-site management, correspondence with regulatory bodies, and were directly involved in the decisions concerning environmental matters.”\(^\text{140}\)

Messrs. Johnson argued that the general definition of “person” applicable to the civil penalties provision of the CWA did not include corporate officers as the criminal

\(^\text{136}\) Id. at 1064 (recognizing defendants’ actual control over violating corporate actions and holding defendants “individually liable for violations of the CWA”).

\(^\text{137}\) Id. at 1058, 1064.

\(^\text{138}\) Id.

\(^\text{139}\) Id.

\(^\text{140}\) Id. at 1064.
sanctions provision expressly included such actors.\textsuperscript{141} However, the District Court, citing the decision in \textit{Brittain}, held that the inclusion of the term “individual” in the definition of “person” applicable to the civil penalties provision indicates congressional intent to hold individuals responsible for violations of the CWA.\textsuperscript{142} The court further recognized that the ability to control the facility, coupled with knowledge of the violation, is sufficient to impose liability.\textsuperscript{143}

Finally, the District Court noted that personal participation can be the basis for individual liability under other environmental statutes and that Messrs. Johnson controlled the activities of the facility and participated in the discharge of pollutants.\textsuperscript{144} Accordingly, the court granted summary judgment to the government and held that corporate officers may be liable as “individuals” for civil penalties under the CWA based on their control and participation of the discharge into the waters of the United States.\textsuperscript{145}

\begin{flushright}
\textsuperscript{141} \textit{Id.}
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\textsuperscript{142} \textit{Id.} at 1063.
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\textsuperscript{143} \textit{Id.} (citing \textit{United States v. Frezzo Brother, Inc.}, 461 F.Supp. 266 (E.D. Pa. 1978), aff’d, 602 F.2d 1123 (3rd Cir. 1979), cert. denied, 444 U.S. 1074 (1980).
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\textsuperscript{144} \textit{Id.} at 1063-64 (citing \textit{Riverside Market Dev. Corp. v. Intern’l Bldg. Products, Inc.}, 931 F.2d 327 (5th Cir. 1990) (individual liability of corporate officer under CERCLA); \textit{United States v. Northeastern Pharm. Chem. Co., Inc.}, 810 F.2d. 726, 745 (8th Cir. 1986) (plant supervisor individually liable under CERCLA); \textit{United States v. Production Plated Plastics, Inc.}, 742 F.Supp. 956, 963 (W.D. Mich. 1990) (individual liability of corporate employees under RCRA)) (“A number of other cases construing federal environmental statutes have stressed personal participation as the bases for individual liability”).
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\textsuperscript{145} \textit{Id.} at 1064.
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Both Michael and Glenn Johnson had actual hands-on control of the facility’s activities, were responsible for on-site management, corresponded with regulatory bodies, and were directly involved in the decisions concerning environmental matters. Given the nature of this family-owned business, it is apparent that both Michael and Glenn Johnson were aware of Gulf Park’s continued discharges without a permit, and that they ordered (or at least acquiesced in) the activity. Therefore, they are individually liable for violations of the CWA.

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\textit{Id.}
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The court did not attach liability through the RCO doctrine, but rather, correctly identified that corporate officers can fall under the general definition of “person” based upon their role in the actions taken in violation of the CWA.\textsuperscript{146} Therefore, under the \textit{Brittain} and \textit{Gulf Park} decisions, the criminal or civil liability of individual corporate officers on the basis of their personal involvement in the company’s violating actions is separate from liability imposed through the RCO doctrine.

In 1999, two years after the \textit{Gulf Park} decision, the District Court for the Northern District of Alabama, Southern Division, decided \textit{Franklin v. Birmingham Hide \& Tallow Company, Inc.}, and followed the holding in \textit{Gulf Park} that a corporate officer can be liable for civil penalties under the CWA as an “individual.”\textsuperscript{147} However, the \textit{Franklin} court also began the confusion between the RCO doctrine and finding responsible corporate officers liable for their individual actions in violation of the CWA. This confusion would later be amplified by the \textit{Sarna} court.

Birmingham Hide \& Tallow Company, Inc. (“BH&T”), operated an animal rendering plant in Bessemer, Alabama. Owen Vickers was the President and Chief Executive Officer of BH&T. As a result of the Bessemer plant’s operations, BH&T discharged various pollutants into Valley Creek, a navigable body of water in Jefferson County, Alabama.\textsuperscript{148} Plaintiff Mike Franklin, an “avid outdoorsman, who fished in, and enjoyed other recreational pursuits along, Valley Creek” brought a civil action against

\textsuperscript{146} \textit{Id.}


\textsuperscript{148} \textit{Id.} at *2-3.
BH&T and Mr. Vickers alleging that BH&T discharged effluent in amounts in violation of its permit and failed to comply with permit monitoring requirements.\textsuperscript{149}

Defendant Vickers moved to dismiss the claims brought against him individually, arguing that he could not be held civilly liable, in his individual capacity, for the violations of BH&T’s permit, because BH&T held the permit at issue. He maintained that he was simply a corporate officer of the company and liability should not attach to him because only the company as a permit holder could be an “individual” under the CWA. The magistrate rejected this argument and recommended that Vickers could be liable in his individual capacity under the CWA.\textsuperscript{150}

The district court was persuaded by the decisions in other jurisdictions imposing individual criminal and civil liability on corporate officers for violations of public health statutes, including the CWA, who undertook wrongful actions on behalf of the corporate entity.\textsuperscript{151} The court recognized that it was “well-established under traditional tort principles that personal participation by a corporate employee, officer, or director, in the wrongful activities of a corporation is sufficient to make the individual liable for a tort, as well as the corporation, substantially liable for a tort.”\textsuperscript{152}

While the above-principal was not radical, Vickers made an interesting alternative argument specific to individual liability under the CWA. He contended that the inclusion

\textsuperscript{149} Id. at *6.

\textsuperscript{150} Id. at *42-43.

\textsuperscript{151} Id. at *43-44 (citing Gulf Park, 972 F. Supp. 1056; Mac’s Muffler Shop, 1986 U.S. Dist. LEXIS 18108) (“a number of courts have found the corporate officers who are responsible for violations of public health statutes, including the CWA, may be civilly and criminally liable in their [ ] individual capacity for such violations, not withstanding that the wrongful actions were undertaken on behalf of a corporate entity”).

\textsuperscript{152} Id. at *44 (citing Gulf Park, 972 F. Supp. at 1063-64; Delong Equipment Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 851 (11th Cir. 1988); Inter-Connect, Inc. v. Gross, 641 So. 2d 867 (Ala. 1994).
of the “responsible corporate officer” language only in the criminal penalties provision evidenced Congressional intent that such corporate officers could fall under the CWA’s definition of “individual” only if his or her violating actions amounted to criminal violations with a showing of the required scienter. Vickers argued that Congress’s omission of the “responsible corporate officer” language from the definition of “individual” that applied to the civil penalties provision was intended to bar the imposition of civil liability against corporate officers. The foregoing argument did not address the RCO doctrine, but rather was limited to whether a responsible corporate officer could be an “individual” under the CWA. Vickers argued that a responsible corporate officer could only be an “individual” in the criminal penalties provision where Congress had expressly so legislated.153

The district court rejected Vickers’ argument. Although the court did not apply the RCO doctrine, it relied on the reasoning articulated in Hodges X-Ray that the rationale for holding corporate officers criminally responsible for acts of a corporation is even more persuasive where only civil liability is involved, which would at most result in a monetary penalty.154

Similar to the courts in Brittain and Gulf Park, the court was persuaded by the evidence on the record that Vickers was responsible for BH&T’s day-to-day operations and had ultimate authority to determine production levels for BH&T and what steps were to be taken to comply with the NPDES permit. The court noted that the complaint also

153 Id. at *45 (“By including such language only in the criminal provision of § 1319(c), Vickers argues, Congress has manifested its intent that corporate officers should only be held criminally responsible under the CWA where the requisite scienter is shown, but not civilly liable in their individual capacity”).

154 Id. at *45-46.
alleged that Vickers’ decisions directly facilitated the violations because he allowed production levels to exceed the capacity of BH&T’s wastewater treatment system. Based on the foregoing, and the fact that there was no existing precedent case law holding that Vickers could not be held civilly liable in his individual capacity, the Franklin court overruled Vickers’ objections to the magistrate’s denial of the motion to dismiss.

The above-analysis by the Franklin court, and its reliance on language in the Hodges X-Ray decision, begins the confusion between the RCO doctrine and allowing individual liability under the CWA for the wrongful acts of a corporate officer on behalf of the company. The court did not attempt to place any meaning into Congress’ “responsible corporate officer” language in the criminal penalties provision. Rather, it summarily dismissed the argument that the omission of that language from the civil liability provision made the imposition of civil liability on a corporate officer inappropriate on the ground that Vickers allegedly committed violating acts under the act, on behalf of the company. While the court did not hold that the RCO doctrine applies to civil liability under the CWA, it did not clarify that the case at issue involved allegations of personal involvement in the CWA violations that may impose civil liability upon the corporate officer as an “individual” and “person” under the civil penalties provisions. Instead, the court buttressed its holding that corporate officers may be civilly liable for the personal actions on behalf of the company with the Hodges X-Ray court’s language justifying application of the RCO doctrine in the civil context. As illustrated by the

155 Id. at *46-47.
156 Id. at *47.
decisions in Brittain and Gulf Park, liability as an “individual” under the CWA for the responsible corporate officer’s violating conduct and liability under the RCO doctrine are two separate liability theories.\textsuperscript{157}

In 2008, the District Court for the Western District of Washington decided the issue of whether a corporate officer could be held individually liable in a citizen suit brought under section 502(a)\textsuperscript{158} for civil penalties under the CWA. In Puget Soundkeeper Alliance v. Tacoma Metals Inc., plaintiff Puget Soundkeeper Alliance (“PSA”), a non-profit organization, initiated a citizen suit alleging that defendant Tacoma Metals Incorporated (“Tacoma”) violated various provisions of the CWA.\textsuperscript{159}

Tacoma operated a metals recycling facility which often stored industrial metal remains. Under the General Permit issued by the Washington Department of Ecology for stormwater discharges associated with industrial activities, Tacoma was required to monitor its stormwater discharges for total suspended solids. PSA claimed that Tacoma repeatedly exceeded the General Permit’s benchmark and action level.\textsuperscript{160}

Defendant Robert Pollack was the president and owner of Tacoma. The complaint alleged that Pollack was primarily responsible for the company’s operations and the facility’s compliance with its NPDES permit. Pollack allegedly knew of, observed, and aided and abetted the violations of the permit.\textsuperscript{161} In addition, defendants’ stormwater pollution prevention plan identified Pollack as a member of the “Stormwater

\textsuperscript{157} See notes 134 and 140 supra.

\textsuperscript{158} 33 U.S.C. § 1365(a).


\textsuperscript{160} Id. at *9-11.

\textsuperscript{161} Id. at *36.
Prevention Pollution Team” responsible for and personally involved in the pollution prevention activities.\textsuperscript{162}

Section 505(a) of the CWA allows private citizens to bring enforcement actions against any person alleged to be in ongoing violation of federal pollution control requirements and any relevant state standards.\textsuperscript{163} The citizen suit provision uses the general definition of the term “person” that is applicable to the civil penalties provision in section 309(d).\textsuperscript{164} Thus, the definition of a “person” potentially liable for civil penalties in a citizen suit under the CWA does not include the “responsible corporate officer” language included in the criminal penalties provision.\textsuperscript{165}

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\textsuperscript{\textit{162}} Id. at *37.
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\textsuperscript{\textit{163}} 33 U.S.C. § 1365(a). Section 1365(a) states as follows:

Authorization; jurisdiction. Except as provided in subsection(b) of this section and section 309(g)(6), any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which did not discretionary with the Administrator.

\textit{Id.} See also, e.g., Middlesex Cty Sewerage Auth. v. Nat’l Sea Clammers, 453 U.S. 1, 16-17 (1981) (“broad category of potential plaintiffs … necessarily includes … plaintiffs seeking to enforce [the CWA] as private attorneys general”); Northwest Envlt. Advocates v. City of Portland, 56 F.3d 979, 986 (9th Cir. 1995) \textit{cert. denied}, 518 U.S. 1018 (1996) (citizens may bring actions to enforce both the federal promulgated standards and any relevant state standards). The Supreme Court has interpreted the citizen suit provision to authorize suits only for violations that are ongoing and not for violations that are “wholly past.” Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64-65 (1987); see also Hudson River Fisherman’s Ass’n v. Westchester Cty, 686 F. Supp. 1044 (S.D.N.Y. 1988).

\textsuperscript{\textit{164}} 33 U.S.C. § 1365(5).

\textsuperscript{\textit{165}} In fact, the criminal penalties provision in section 309(c) expressly states the definition of the term “person” applicable to criminal liability means “in addition to the definition contained in section 502(5) of this Act [33 U.S.C.S § 1365(5)] any responsible corporate officer.” 33 U.S.C. § 1319(c)(6).
Pollack argued that the claims against him should be dismissed on the grounds that there were no genuine issues of material fact and that he was entitled to judgment as a matter of law.\textsuperscript{166} Specifically, Pollack contended that he could not be found liable for the acts of a corporation in a citizen suit under the CWA. As a result of the additional “responsible corporate officer” language in the criminal sanctions provision, Pollack argued that a corporate officer can be subject to penalties and other enforcement actions brought by the government, but a corporate officer is not subject to liability in a citizen suit brought under the civil penalties provision of the CWA.\textsuperscript{167} Thus, responsible corporate officers could only be held liable for criminal violations of the CWA and not for civil penalties under the citizen suit provisions of the CWA.\textsuperscript{168}

The district court rejected Pollack’s argument and denied his motion. The court did so not by applying the RCO doctrine, but rather, by recognizing that a responsible corporate officer could be civilly liable as an “individual” violator. It held that the inclusion of the “responsible corporate officer” language in the criminal penalties provision did not preclude civil liability of such officers under the CWA’s citizen suit provision for their individual violating activities.\textsuperscript{169}

The district court adopted the \textit{Gulf Water} court’s interpretation of the term “individual” in the CWA’s general definition of “person” applicable to both the civil penalties provision in section 309(d) and the citizen suit provision in section 502(a). The

\begin{footnotesize}
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\item[\textsuperscript{166}] Id. at *32.
\item[\textsuperscript{167}] Id. at *35.
\item[\textsuperscript{168}] Id.
\item[\textsuperscript{169}] Id. at 35 (“Therefore, Defendant is not entitled to summary judgment dismissing Plaintiff’s claims against him based solely on the facts that he is a corporate officer of Tacoma Metals and that Plaintiff’s alleged violations were the ‘acts of Tacoma Metals’”).
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Puget court noted the personal involvement/control of the violating acts by the corporate officer defendants in the Brittain and Gulf Water cases, where civil liability was imposed on those responsible corporate officers. Following the reasoning in these decisions that “personal participation [was] the basis for individual liability,” the Puget court held Pollack did not show that a corporate officer cannot be held civilly liable based upon that officer’s involvement in the alleged violations.

B. The Expansion of the RCO Doctrine Into CWA Civil Liability in the Ninth Circuit.

The expansion of the RCO doctrine into civil liability under the CWA by district courts in the Ninth Circuit spawned from the 1998 decision in United States v. Iverson, wherein the Court of Appeals for the Ninth Circuit reviewed a jury’s criminal conviction of a corporate officer for, among other things, violations of the CWA.

In Iverson, the convicted corporate officer oversaw and directed the company’s chemical drum-cleaning operation, wherein contaminated wastewater was discharged on the company’s property, through a sewer drain at an apartment complex that the officer owned, and through a sewer drain at the defendant’s home. Mr. Iverson argued, among other things, that the district court erred in formulating its “responsible corporate officer” jury instruction.

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170 Id. at *33-36. The Puget court further held that Pollack failed to show that the definition of “person” under the civil enforcement provision should be interpreted differently depending upon whether the government or a citizen brought the suit. Id. at *35.

171 Id., at *34-35 (quoting Gulf Park, 972 F.Supp. at 1064).

172 162 F.3d 1015 (9th Cir. 1998).

173 Id. at 1018-19.
In deciding the issue, the court of appeals examined the language in the CWA’s criminal liability provision in Section 309(c)(2) and determined that the inclusion of the term “responsible corporate officer” meant “‘any corporate officer’ who is ‘answerable’ or accountable’ for the unlawful discharge is liable under the CWA.” 174 Following an examination of the RCO doctrine as formulated under the Supreme Court’s Dotterweich and Park decisions, the court of appeals found that Congress acquiesced to this interpretation of the “responsible corporate officer” language in Section 309(c)(2)(6) with its decision not to modify the language in the 1987 amendments to the act making criminal violations a felony rather than a misdemeanor. 175 The court ultimately held the following:

Under the CWA, a person is a “responsible corporate officer” if the person has authority to exercise control over the corporation’s activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity. 176

Thus, the Iverson decision interprets the language contained in the Section 309(c) and sets forth the scope of criminal liability of a “responsible corporate officer” as that term is used in the act. The foundation for the court of appeals holding was the wording of the criminal penalties provision of the CWA, the Supreme Court’s interpretations of the RCO doctrine in the criminal cases Dotterweich and Park, and the scope of the RCO doctrine as interpreted by the court of appeal’s decisions applying penalties under the

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174 Id. at 1022-23.
175 Id. at 1024.
176 Id. at 1022-25.
The court of appeals did not decide the issue of any civil liability arising from the RCO doctrine under the CWA.

In 2005, the holding in *Iverson* was expanded by the United States District Court for the Eastern District of California in *Waterkeepers Northern California v. AG Industrial Manufacturing, Inc.*, to apply the RCO doctrine to civil liability under the CWA. Yet, the decision readily expands the applicability of the doctrine without even a cursory analysis of, or citation to, the text in the civil penalties provision in Section 309(d).

The individual defendant in *Waterkeepers*, along with the corporation, was alleged to have repeatedly discharged industrial pollution into the Mokelumne River and the San Joaquin River Delta. The officer moved for summary judgment on the ground that as a matter of law personal, civil liability cannot be imposed on him under the CWA pursuant to the RCO doctrine. Specifically, the officer argued he should be dismissed from the action because the plaintiff failed to demonstrate that the officer knew that the company was committing any CWA violations.

While it appears from the decision that defendants did not argue that the text of the CWA does not allow the application of the RCO doctrine in the civil context, the

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177 Id. at 1024-25 (citing United States v. Graham, 309 F.2d 210, 212 (9th Cir. 1962) and Purcell v. United States, 1 F.3d 932 (9th Cir. 1993) interpreting the Internal Revenue Code’s imposition of liability for “person required to collect, truthfully account for, and pay over any tax” as required under 26 U.S.C. § 6672(a)).


179 Id. at *1-2.

180 Id. at *37.

181 Indeed, the *Waterkeepers* opinion states only that the company argued that the plaintiff failed to demonstrate that the officer knew that the company was committing any CWA violations (id.) and that the
Waterkeepers court failed to address that threshold question in deciding the issue of whether the officer could fall under such liability. The district court relied almost exclusively on the holdings in Iverson that “the principles of [Dotterweich] applied under the CWA” and that the Park decision’s “refinement of the ‘responsible corporate officer’ doctrine applied under the CWA.”182 The Waterkeepers court cited the criminal penalties provision’s inclusion of “any responsible corporate officer” in Section 309(c)(6), as if the language was the source of liability before the court.183 Yet, the Waterkeepers court failed to address the differing language between the criminal penalties provision of the CWA analyzed in Iverson and the civil liability under Section 309(d) actually at issue before the district court.

In regard to the argument that Iverson involved criminal liability and that the RCO doctrine should not be applied to civil liability, the district court’s one paragraph, lip-service is telling. Citing the holding in Hodges X-Ray that the RCO doctrine could be extended to civil liability, albeit without noting that the case interpreted different legislation, the district court held that it could not find as a matter of law that the officer was not civilly liable under the RCO doctrine.184 Therefore, the Waterkeepers decision extends the application of the RCO doctrine to civil liability under the CWA without examining Section 309(d) or even citing a single case interpreting the civil liability provision therein. Compounding this glaringly inadequate analysis is the district court’s

company “correctly points out that Iverson is a criminal case with facts more egregious than those of the case at bar.” Id. at *39.

182 Id. at *38.
183 Id. at *37
184 Id.
citation to the inapplicable criminal penalties provision, reliance on the *Iverson* opinion’s application of the RCO doctrine in the criminal context under the CWA, and naked adoption of the reasoning in *Hodges X-Ray*.

Shortly after the *Waterkeepers* decision, the issue of the application of the RCO doctrine to CWA civil liability was again addressed in *Humboldt Baykeeper v. Simpson Timber Company*. In 2006, the United States District Court for the Northern District of California found that the RCO doctrine could be used to impose civil liability upon a corporate officer in a position of authority at the polluting company. In *Humboldt Baykeeper*, plaintiffs alleged that a corporate defendant’s President, individually, participated in industrial activity and contaminant clean-up operations that, among other things, left the site in a condition that resulted in “‘the perpetual discharge of pollutants’ into Humboldt Bay.” The corporate officer argued that the plaintiffs failed to make any “specific allegations of wrongdoing against him as an individual, nor any allegations that would support an attempt to pierce the corporate veil of … the company he runs”

In addressing the officer’s arguments, the district court pointed out that the defendant’s arguments relied upon the need for some allegation of independent, individual conduct to sustain a cause of action. In getting around any such pleading requirement, the court reasoned that both RCRA and the CWA “permit the imposition of

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186 *Id.* at *16.

187 *Id.* at *4-5. In addition to alleging violations of the CWA, plaintiffs alleged RCRA violations. *Id.* at *9-10.

188 *Id.* at *9.

189 *Id.* at *9-10.
penalties, even criminal penalties, against individuals because they are in positions of authority at polluting companies.” As support for this position, the court cited the definition of “person” in Section 309(c)(2)(6) of the CWA as “imposing liability on ‘any person who … knowingly violates the CWA, including ‘any responsible corporate officer.’” Similarly to the decision in Waterkeepers, the district court relied on the Iverson decision, which the court interpreted as holding that “individuals whose acts or omissions have to led to such pollution may be held responsible individually, notwithstanding the fact that they may have been acting in their capacity as an employee or officer…” Missing from the opinion is any textual analysis of the actual civil liability provision of the CWA in Section 309(d).

Therefore, the Humboldt Baykeeper court extended the application of the RCO doctrine without referencing or analyzing the controlling provision of the CWA. Rather, it simply applied the definition of “person” in the criminal penalties section in the civil liability context. Moreover, the district court did not even perform the lip-service offered by the Waterkeepers court in addressing the application of the RCO doctrine in a civil context as opposed to criminal liability. Instead, the court cited Iverson for generally holding that a corporate officer may be individually liable under the RCO doctrine, without even acknowledging that the opinion applied only to criminal liability under the act.

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190 Id. at *10.
191 Id.
192 Id. The district court then proceeded to address the officer’s arguments that that he had no actual involvement with the polluting activity and that plaintiffs failed to allege such involvement. Id. at *11-16. For purposes of this article, only the court’s analysis of the application of the RCO doctrine to CWA civil liability is discussed.
C. City of Newburgh v. Sarna.

The examination of the “responsible corporate officer” language in the CWA’s criminal penalties provision that began with the Brittain decision and was advanced in Gulf Park, Franklin, and Puget culminated in the 2010 decision by the United States District Court for the Southern District of New York styled City of Newburgh v. Sarna.\(^{194}\) Whereas the case law outside of the Ninth Circuit that preceded Sarna merely analyzed the individual liability of responsible corporate officers under the CWA for their personal involvement in the wrongful conduct by the company, without specifically addressing the propriety of applying RCO doctrine in the CWA’s civil liability context, the Sarna decision also addressed the argument that the RCO doctrine applied to civil liability under the act. As discussed below, the Sarna court’s analysis of the RCO Doctrine is rife with mischaracterizations of case law. The opinion also highlights the district court’s misunderstanding of the RCO doctrine and the court’s inadequate statutory interpretation. Finally, to support its analysis of the RCO doctrine, the Sarna court was forced to rely on Humboldt Baykeeper, a decision fundamentally flawed in its analysis of the application of the RCO doctrine to civil liability under the CWA.

In Sarna, plaintiff City of Newburgh asserted claims for violations of the CWA against, among others, Sarna Enterprises, Inc. (“SEI”), Mt. Airy Estates, New Windsor

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\(^{193}\) The flawed analysis in Humboldt Baykeeper was repeated by the Northern District of California in Northern California River Watch v. Oakland Maritime Support Services, Inc., wherein the court applied the RCO doctrine to impose individual liability upon a corporate officer for civil violations of the CWA. 2011 U.S. Dist LEXIS 14551 (N.D. Cal. Feb. 14, 2011). In Oakland Maritime, the officer argued that plaintiffs’ allegations were insufficient to pierce the corporate veil. Id. at *9. Citing the decisions in Humboldt Baykeeper and Iverson, the district court held that, “under the CWA, penalties may be imposed against individuals who are in positions of authority at polluting companies.” Id. at *9-10. In a single paragraph, the district court applied the RCO doctrine to CWA civil liability without analyzing the civil liability provision of the act, or even a cursory review of the distinction between civil and criminal liability. Id.

\(^{194}\) 690 F.Supp.2d 136 (S.D.N.Y. 2010).
Development, and Mark Sarna, individually, for the discharge of unfiltered stormwater runoff from the Mt. Airy estates residential development into an adjacent reservoir known as Brown’s Pond. Mr. Sarna moved to dismiss the complaint as against him on the ground that all of the allegations against Mr. Sarna related only to his role as a corporate officer of Mt. Airy Estates and that plaintiff did not make an allegation that could provide a ground for piercing the corporate veil. Plaintiff counter-argued that Mr. Sarna could be found individually liable for civil penalties in the CWA under the RCO doctrine, without piercing the corporate veil.

The district court held that it was premature to dismiss Mr. Sarna from the litigation. The decision is unclear, however, as to whether the basis for the holding is the applicability of the RCO doctrine to civil liability under the CWA or whether there were sufficient allegations as to Mr. Sarna’s personal involvement in the wrongful conduct of the corporate entities.

The court began its analysis by addressing plaintiff’s argument that the RCO doctrine was applicable. It cited the Dotterweich decision as the genesis of the RCO doctrine and quoted the Hodges X-Ray decision’s often-relied upon rationale for the application of the doctrine to civil liability under public welfare statutes—that the rationale for applying the doctrine in the criminal context with potential imprisonment is

195 Id. at 140, 142-43.
196 Id. at 159.
197 Id. at 160.
198 Id. at 159-63.
199 Id. at 160. “The [RCO] doctrine was first articulated by the Supreme Court in United States v. Dotterweich, [ ] which held that a corporate officer is criminally liable under a public welfare statute – in Dotterweich, the [FDCA]- if he had ‘a responsible share in the furtherance of the transaction which that statute outlaws.’” Id.
more persuasive where only civil liability is imposed resulting in monetary penalties.\textsuperscript{200} However, nowhere in its opinion did the \textit{Sarna} court set forth the elements of the RCO doctrine. In particular, the court failed to recognize that liability under the doctrine may be imposed on a responsible corporate officer based upon the employee’s position of authority regardless of any scienter to commit the violation, any actual participation in the wrongful conduct, or even knowledge of the violating action or inaction by the company.\textsuperscript{201}

Moreover, the \textit{Sarna} court’s quotation of the articulated reasoning in \textit{Hodges X-Ray} for the application of the RCO doctrine in civil liability is taken out of context. The \textit{Sarna} court inaccurately relied on \textit{Hodges X-Ray} to support its otherwise baseless assertion that “courts have generally rejected the notion that the [RCO] doctrine should not be applied in civil CWA cases because the phrase ‘responsible corporate officer’ only appears in the \textit{criminal} penalties provision of the CWA.”\textsuperscript{202} While the \textit{Sarna} court acknowledged that the \textit{Hodges X-Ray} decision interpreted the RCHSA and not the CWA, the court failed to address the fact that the \textit{Hodges X-Ray} court did not interpret Congress’ insertion of the “responsible corporate officer” statutory language at all.\textsuperscript{203} In light of this distinguishing fact, the applicability of the \textit{Hodges X-Ray} decision in regard to the statutory interpretation of the uniquely drafted penalties provisions in the CWA is strained beyond reason.

\textsuperscript{200} \textit{Id.} at 160-61.

\textsuperscript{201} \textit{See} notes 11 and 47 \textit{supra}.

\textsuperscript{202} \textit{Sarna}, 690 F.Supp.2d at 160-61 (emphasis in original).

\textsuperscript{203} \textit{Id. See also} note 69 \textit{supra}.
Following the *Sarna* court’s woefully incomplete examination of the contours of the RCO doctrine and its misapplication of the *Hodges X-Ray* decision, the district court proceeded to examine the *Franklin* and *Puget* decisions as “example[s]” of decisions in other jurisdictions holding that the “responsible corporate officer” language in the CWA’s criminal penalties provision should not be interpreted to exclude the application of the RCO doctrine to civil liability under the act.\(^{204}\) These decisions, however, did not decide the applicability of the RCO doctrine to civil liability under the CWA.\(^{205}\) Rather, the *Franklin* and *Puget* decisions involved corporate officers whose actions on behalf of the company exposed to them to “individual” liability under the CWA.\(^{206}\) The issue presented to the *Franklin* and *Puget* courts was whether a responsible corporate officer could be an “individual” under the CWA’s civil liability provision. Both courts answered in the affirmative, but neither applied the RCO doctrine because the responsible corporate officers’ actions taken on behalf of the company imposed individual liability.\(^{207}\) Therefore, the *Sarna* court mischaracterized the holdings of these cases as ‘example[s]’ of other jurisdictions deciding that the omission of the “responsible corporate officer” language did not preclude the application of the RCO doctrine to civil liability under the CWA.

To compound the confusion in the *Sarna* decision, the district court relied to a great extent on the opinion in *United States v. Pollution Abatement Services, Inc.* ("*PAS*"), a decision by the Second Circuit holding that personal civil liability could be

\(^{204}\) *Sarna*, 690 F.Supp.2d at 161.

\(^{205}\) See notes 152, 155, 156 and 169-171 *supra*.

\(^{206}\) *Id.*

\(^{207}\) *Id.*
imposed on individuals under Section 13 of the Rivers and Harbors Act of 1899 ("RHA"). While the RHA was a precursor to the CWA, and courts have interpreted Section 13 to allow for both criminal and civil liability, the statutory text of the RHA does not contain the “responsible corporate officer” language dichotomy between criminal and civil liability that is present under the CWA.

Furthermore, the PAS court expressly distinguished prior cases that held corporate officers could not be held civilly liable for a corporate violation of the RHA by clarifying that the liability imposed on the PAS defendants was “not premised solely on their corporate offices or ownership, but bottoms on their personal involvement in the firm’s [violating] activities.” Implicit in the distinction drawn by the PAS court is that

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208 Sarna, 690 F.Supp.2d. at 161-62 (citing 763 F.2d 133 (2nd Cir. 1985); see also 33 U.S.C. § 407 (the Refuse Act of 1899). The Refuse Act of 1899 states in pertinent part as follows:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed …

Id. The Refuse Act of 1899 has commonly been termed a strict liability statute and there is no scienter requirement. United States v White Fuel Corp., 498 F2d 619 (1st Cir. 1974); United States v American Cyanamid Co., 354 F Supp 1202 (S.D.N.Y. 1973) affd. 480 F2d 1132 (2nd Cir. 1973); United States v Ashland Oil, Inc., 705 F Supp 270 (W.D. Pa. 1989).

209 See PAS, 763 F.2d at 135 (“Courts have long allowed for the imposition of civil liability upon corporations for the [RHA]”) (citing Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967) and United States v. Perma Paving Co., 332 F.2d 754, 757-58 (2d Cir. 1964)


211 PAS, 763 F.2d at 134-35 (distinguishing United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976) and United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976); noting that defendants ran the company’s day-to-day operations and were two of only four shareholders).
individual liability might not be authorized under the RHA if premised solely on the
officers’ position of corporate authority, and not in any part on their wrongful actions.
Under such circumstances, it appears that the PAS court may have held consistent with
other jurisdictions that the corporate officer’s position of authority would not impute civil
liability under the RHA.

The PAS court could not have been any clearer in basing its holding on the actions
of the individual defendants in violation of the RHA as “persons” under the act, separate
and apart from the corporate entity. The PAS court found that the “‘activities’ of [the
defendants fell] within the proscriptive ambit of the Act”212 and therefore the court stated
that “in light of the clear congressional intent to hold ‘‘persons[s]’’ liable for violation,
we see no reason to shield from liability those corporate officers who are personally
involved in or directly responsible for statutorily proscribed activity.”213 Thus, the PAS
court did not review the unique language in the CWA, nor did it interpret or apply the
RCO doctrine to impose civil liability. As a result, the Sarna court’s reliance on the PAS
decision in support of applying the RCO doctrine to civil liability under the CWA cannot
be supported.

Incredibly, given the PAS court’s strong language that the defendants’ personal
involvement with the violating conduct of the company was the basis for imposing
individual civil liability, the Sarna court recognized only that the PAS decision merely
“suggests” that actual personal involvement in the polluting activity is a basis for

212 Id. at 135.
213 Id.
corporate officer liability.\textsuperscript{214} To this extent, the district court acknowledged that such involvement by Mr. Sarna may be relevant at a later stage in the litigation, but the facts need to be “fleshed out in discovery.”\textsuperscript{215} The Sarna court implied that a motion for summary judgment on such grounds might be proper after discovery,\textsuperscript{216} but did so in a manner that does not foreclose the application of the RCO doctrine to civil liability under the CWA. Yet, the court never attempted to explain the meaning of the “responsible corporate officer” language in the criminal penalties provision of the CWA and its exclusion from the civil liability provision.

Without analyzing the elements of the RCO doctrine, the Sarna court attempted to draw support for its proposition that “the few courts … that have expressly considered the question of whether the [RCO] doctrine applies in a civil CWA case have concluded that it does” from the decision in Humboldt Baykeeper.\textsuperscript{217} However, the analysis in the Humboldt Baykeeper decision suffers from the same flaws present in the Sarna court’s examination of the applicability of the RCO doctrine to civil liability under the CWA. Specifically, the Humboldt Baykeeper court failed to examine the provision of the act that creates civil liability, ignored Congress’ exclusion of the “responsible corporate officer” language from Section 309(d), and misapplied case law to fit the court’s conclusion that the CWA permits the imposition of personal, civil liability through the RCO doctrine.\textsuperscript{218}

\textsuperscript{214} Sarna, 690 F.Supp.2d at 162.\textsuperscript{215} Id.\textsuperscript{216} Id. at 163 (“[Mr. Sarna] is, at least for now, a proper defendant in this CWA suit”).\textsuperscript{217} 2006 U.S. Dist LEXIS 91667 (N.D. Cal. Dec. 8, 2006)\textsuperscript{218} See notes 185-193 supra.
Given the Sarna court’s intermingling of the case law and arguments in support of the application of the RCO doctrine with the decisions holding that a corporate officer may be liable for his or her personal involvement in environmental violations as an “individual” under the CWA, it is difficult to determine if the Sarna court ultimately applied the RCO doctrine to civil liability under the CWA or simply denied Mr. Sarna’s motion to dismiss on the ground that individual liability may be imposed upon further discovery.219 The Sarna court’s reliance on the Humboldt Baykeeper opinion suggests the former, and one may reasonably foresee such future arguments to other courts.220

V. ARGUMENTS

A. Congressional Intent is Clear From the Statutory Language.

To determine the congressional intent behind the civil penalties provision contained in Section 309(d) of the CWA, one must look no further than two cardinal canons of statutory interpretation – that a statute should be read as a harmonious whole,221 and where the text of a statute is unambiguous, then its plain meaning shall be followed.222

219 See id. at 163 (holding it was premature to dismiss complaint “in the absence of any authority in this Circuit holding that a responsible corporate officer may not be held personally liable for violations of the CWA”).

220 In fact, the United States District Court for the Northern District of Indiana followed suit. In Stillwater of Crown Point Homeowner’s Ass’n, Inc. v. Kovich, the district court held that individual civil liability under the CWA could be applied through the RCO doctrine in a citizen suit. 2011 WL 4818511 at *28-32 (N.D. Ind. Oct. 11, 2011). Following a recitation of the holdings in Sarna and the other decisions discussed herein, along with the rationale enumerated in Hodges X-Ray, the Stillwater court was “persuaded by the weight of the case law and the rationale articulated in Hodges X-Ray and [found] that the [RCO] doctrine extends to civil violations under the [CWA].” Id. at *30-31. While the court noted the differing language in the criminal and civil penalties provisions in the CWA, the court did not attempt to explain or give meaning to the statutory text, but rather merely fell in line with the quickly growing number of courts that have held that the RCO doctrine may apply in the civil liability context under the act. Id.

221 See e.g., United Savings Ass’n v. Timbers of Inwood Forest Assoc’s, 484 U.S. 365, 371 (1988).

Yet, the courts that have expanded the RCO doctrine into CWA civil liability have failed to ignore the act’s language in Sections 309(c) and (d).

In regard to the rule that a statute should be read as a whole, the various parts of a statute should be read together to fully understand the nuances of the legislation. As Justice Scalia explained,

Statutory construction … is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that it is compatible with the rest of the law. 223

The civil penalties provision of the CWA is silent as to the applicability of the RCO doctrine to civil violations of the act. Yet, this silence is rather easily resolved with an examination of the CWA’s broader enforcement section as a whole, where the language of the criminal penalties provision contained in Section 309(c) could not be any more clear and unambiguous on the topic. In fact, it is difficult to imagine language inserted into the criminal penalties provision that could better articulate Congress’ intent. In the body of the criminal penalties subsection, Congress inserted the following

Responsible corporate officers as “person”. For the purposes of this subsection, the term “person” means, in addition to the definition contained in section 502(5) of this Act [224], any responsible corporate officer.

It is clear from the above-language that Congress intended responsible corporate officers to be added to the definition of “person” that applies to the criminal penalties subsection.

223 Timbers of Inwood Forest Assoc’s, 484 U.S. at 371 (citation omitted).

224 CWA, 33 U.S.C. § 1319(c) (citation omitted) (emphasis added).
In interpreting statutory language, “it is presumable that Congress legislates with knowledge of [the] basic rules of construction.”\textsuperscript{225} Congress’ decision to place the “responsible corporate officer” language directly into the criminal penalties subsection is supported by the recognized rules of statutory construction specific to criminal statutes. Scintor is generally presumed for “each statutory element which criminalize otherwise innocent conduct.”\textsuperscript{226} Also, the “rule of lenity” requires that “before a man can be punished as a criminal… his case must be plainly and unmistakably within the provisions of some statute.”\textsuperscript{227} The rule of lenity “demand[s] resolution of ambiguities in criminal statutes in favor of the defendant.”\textsuperscript{228} Congress could have put this language in the broader enforcement section, but Congress inserted the text into the criminal penalties subsection to emphasize its intent. For Congress to ensure the applicability of the RCO doctrine to criminal violations of the CWA, thereby creating an exception to the scintor rule and avoiding ambiguity subject to the Rule of Lenity, Congress inserted the “responsible corporate officer” language directly into the criminal penalties subsection.

Furthermore, Section 309(c)(6) expressly adds “responsible corporate officer” to the definition of “person” that otherwise applies generally to the CWA. The obvious conclusion must be that the unmodified general definition that applies to civil liability


\textsuperscript{227} United States v. Gradwell, 243 U.S. 476, 485 (1917).

\textsuperscript{228} Hurly v. United States, 495 U.S. 411, 422 (1990). See also Cleveland v. United States, 531 U.S. 12, 25 (2000) (before choosing a “harder alternative” interpretation of the mail fraud statute, “it is appropriate … to require that Congress should have spoken in language that is clear and definite”); United States v. Granderson, 511 U.S. 39, 54 (1994) (“In these circumstances – where text, structure, and [legislative] history fail to establish that the Government’s position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor”); Ratzlaf v. United States, 510 U.S. 135, 148-49 (1994) (quoting Boyle v. United States, 283 U.S. 25, 27 (1931) (“fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed” that that “legislatures and not courts should define criminal activity”).
cannot also include a “responsible corporate officer,” or there would be no need to add the specific reference to a responsible corporate officer in the criminal context. Thus, the intent of Congress to apply the expanded definition of “person” to only criminal liability is clear given the location in the statute of the definition modification, its express application to the criminal penalties subsection, and its addition of responsible corporate officer to the general definition applicable throughout the CWA.

While the meaning of the term “responsible corporate officer” is not defined in the CWA, it can be determined from the statutory text and in particular Congress’ use of the term “individual” in the general definition of a “person” who may fall under the requirements of the act.\footnote{33 U.S.C. § 1362(5).} By the time Congress enacted the enforcement provision of the CWA in Section 309, it was well settled that personal participation could be the basis for individual liability under other federal statutes\footnote{See e.g., \textit{Mead Johnson & Co. v. Baby's Formula Serv., Inc.}, 402 F.2d 19 (5th Cir. 1968) (holding that natural persons, as well as corporations, may be liable for trademark infringement under the Lanham Act); \textit{Tillamock Cheese & Dairy Ass'n v. Tillamook Cty Creamery Ass'n.}, 358 F.2d 115, 118 (9th Cir. 1966) (“the individuals through whom a corporation acts and who shape its intentions can be held liable on a charge of attempted monopolization” under the Sherman Act); \textit{Deaktor v. Fox Grocery Co.}, 332 F.Supp. 536, 542 (W.D.Pa. 1971) (corporate president could be individually liable for antitrust violations under the Sherman and Clayton Acts committed by him on behalf of the corporation); \textit{Hyland v. Aquarian Age 2,000, Inc.}, 148 N.J.Super. 186, 193 (Ch. Div.1977) (corporate employee could be found individually liable under the Consumer Fraud Act through an affirmative misrepresentation or knowing omission).} and that corporate officers could be individually liable in tort for their personal misconduct, whether or not taken on behalf of the company.\footnote{See e.g., \textit{Buckley v. 112 Central Park South, Inc.}, 285 A.D. 351 (N.Y.A.D. 1st Dept. 1954) (in an action for tortuous interference of contract, “when the corporate officer commits independent torts or predatory acts directed at another, he may not seek refuge behind the mantle of immunity”); \textit{Marchant v. Clark}, 357 P.2d 541, 542 (Or. 1960) (in action for injuries caused by a collision between plaintiff’s automobile and defendant county’s truck, even if jury found that county instructed its truck driver to drive in a negligent manner, the driver would still be liable for the tort); \textit{Bayark v. Edson}, 236 Cal. App.2d 309, 315-16 (Cal. App. 1965) (in an action for negligent performance of a building contract against both the company defendant and its employee, court permitted recovery against both defendants on the basis that an agent who assists his principal in commission of a tort is equally liable with his principal); \textit{Smith v. Sherwood}, 229 While the meaning of the term “responsible corporate officer” is not defined in the CWA, it can be determined from the statutory text and in particular Congress’ use of the term “individual” in the general definition of a “person” who may fall under the requirements of the act.\footnote{33 U.S.C. § 1362(5).} By the time Congress enacted the enforcement provision of the CWA in Section 309, it was well settled that personal participation could be the basis for individual liability under other federal statutes\footnote{See e.g., \textit{Mead Johnson & Co. v. 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App. 1965) (in an action for negligent performance of a building contract against both the company defendant and its employee, court permitted recovery against both defendants on the basis that an agent who assists his principal in commission of a tort is equally liable with his principal); \textit{Smith v. Sherwood},
officer who acted in direct violation of the CWA and thus subject to the civil and criminal penalties prescribed in the act.  

Under the above analysis, responsible corporate officers may be individually liable for civil penalties under the CWA’s general definition of “person” for their direct involvement in a prohibited act. Therefore, the “responsible corporate officer” language added to those who may be liable for criminal penalties must mean something beyond individual liability of responsible corporate officers for their own violating misconduct. To conclude otherwise would violate another fundamental canon of statutory interpretation – that a statute should be construed so as to avoid rendering superfluous any statutory language.  

This principle is even more important, and avoidance of mere surplusage “should be heightened[,] when the words describe an element of a criminal offense.” The foundations of the RCO doctrine were firmly laid by the time of the enactment of the criminal penalties provision in Section 309(c). Accordingly, the “responsible corporate officer” language in the criminal liability provision refers to the RCO doctrine articulated in the Dotterweich and Morissette opinions, decided prior to the

308 F.Supp. 895, 899 (D.Md. 1970) (president of a bank could be individually liable for negligently failing to transfer funds to cover a note upon which the plaintiff had been adjudged liable to the bank); Deaktor, 332 F.Supp. at 542 (corporate president could be individually liable for torts committed by him on behalf of the corporation). See also, Restatement (Second) of Agency § 343 (1957) (An agent “who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal”).

See 33 U.S.C. §§ 1319(c)-(d) and 1362(5).

Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”); see also TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”)

enactment of the CWA and which one should presume that Congress knew of when it enacted the legislation using the “responsible corporate officer” language. 235

Whereas a statutory interpretation should not remove meaning from legislation text, it should also not expand the intent behind the statute by adding an “absent word” that Congress did not include. 236 By interpreting civil liability under the CWA to include the RCO doctrine, one must ignore Congress’ decision to exclude such language from the general definition of “person” applicable to the broader enforcement section; the result being an “enlargement” of the statute rather than a “construction of it.” 237

Finally, the decision by Congress to very carefully and deliberately insert the “responsible corporate officer” language into the definition of “person” in the criminal penalties subsection falls within the canon of statutory interpretation that Congress’ inclusion of language in one section of a statute, but its omission in another, evidences

235 An undefined statutory word or phrase may have meaning at common law. In such a case, the accepted meaning governs the interpretation of the statute text. See Astoria Federal Savings & Loan Ass’n v. Solimino, 501 U.S. 104, 108 (1991) (quoting Isbrandsten Co. v. Johnson, 343 U.S. 779, 783 (1952)) (“where a common law principal is well established … the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident’”); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (“we assume that Congress is aware of existing law when it passes legislation”); Morissette, 343 U.S. at 263 (“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”).

236 See Lamie v. United States Trustee, 540 U.S. 526, 537 (2004) (“there is a basic difference between filing a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted”).

237 Iselin v. United States, 270 U.S. 245, 250 (1926) (“What the government asks is not a construction of a statute, but in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.”); see also Lamie v. United States Trustee, 540 U.S. 526, 538 (2004) (“There is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.”) (quoting Mobile Oil Corp v. Higginbotham, 436 U.S. 618, 625 (1978).
congressional intent to deliberately include where added and exclude where omitted\textsuperscript{238}\n
Furthermore, the Supreme Court has held that “negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.”\textsuperscript{239}\n
In the promulgation of the CWA, the relevant portions of the civil and criminal penalties provisions were proposed, debated and enacted simultaneously. At any time during the legislative process, Congress could have either inserted the “responsible corporate officer” language into the civil penalties subsection, or modified the general definition of “person” applicable to the broader enforcement section. However, Congress chose to modify only the criminal penalties subsection, and thereby limited the applicability of the RCO doctrine to the criminal context. A contrary interpretation of the CWA would add text and rewrite the rules Congress carefully, deliberately, and unambiguously enacted.

B. Congressional Intent is Clear From Legislative History.

In addition to the unambiguous language in the enforcement provisions contained in Section 309 of the CWA, congressional intent can be clearly determined from the legislative histories of the CWA and the CAA, which was amended “based on” the

\textsuperscript{238}Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983) (“where Congress includes particular language in one section of a statute but omits it in another …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). See also Bailey v. United States, 516 U.S. 137, 146 (1995) (distinction on one provision between “used” and “intended to be used” creates implication that related provision’s reliance on “use” alone refers to actual and not intended use); Bates v. United States, 522 U.S. 23, 29 (1997) (inclusion of “intent to defraud” language in one provision and exclusion in a parallel provision).

\textsuperscript{239}Lindh v. Murphy, 521 U.S. 320, 330 (1997) (statute was explicit in making one section applicable to habeas cases pending on date of enactment, but was silent as to parallel provision).
“responsible corporate officer” language in the CWA. 240 However, courts imposing civil liability under the CWA through the RCO doctrine have not examined the legislative histories of these two acts and their uniquely drafted liability provisions. 241

Unfortunately, the legislative history of the CWA is silent as to the specific reasoning for the inclusion of the “responsible corporate officer” language in only the criminal penalties provision. In later amendments, however, Congress emphasized generally that the criminal provision was necessary to address the public concern for “aggressive enforcement actions in cases of environmental misconduct” and to “dispel any perception that a knowing violation of the act is not a serious offense.” 242 The amendments were also intended to impose “severe penalties” for “intentional violations of the Act occurring on a regular basis over an extended period of time that result in significant harm to public health or environment.” 243

The CWA’s penalties provisions were amended by Congress in 1977 and 1987, which, among other things, substantially elevated the penalties for both criminal and civil violations. 244 Legislative history reveals that the driving force behind the amendments was to increase the severity of the penalties “necessary to deter would-be polluters.” 245

240 See notes 256-258 infra.

241 See notes 178, 184, 194 and 220 supra.


245 See S. Rep. No. 50, 99th Cong., 1st Sess. 29 (1985). In regard to the CWA’s criminal penalties, along with increasing the penalty amounts, Congress substituted “knowing” for the earlier intent requirement of “willfully.” In contrast, Congress concurrently amended the civil penalties subsection, but it did not add a “responsible corporate officer” to the definition of a “person” that may be subject to civil penalties. Specifically, Congress increased the penalty amounts for civil violations and allowed courts to weigh
However, at the time of these amendments, the judicial expansion of the RCO doctrine into civil liability under the act had yet to begin.\(^{246}\) In fact, the courts that had expressly addressed the issue at the time of the amendments found that the RCO doctrine could not be applied to the CWA’s civil liability.\(^{247}\) With the RCO doctrine traditionally being applied only to criminal liability,\(^{248}\) Congress had no need to clarify its intent that the RCO doctrine was not to be applied in the civil context.

While the legislative history behind the CWA is silent about the specific reason behind the inclusion of the “responsible corporate officer” language, the legislative history of the CAA reveals Congress’ intent. The CAA was amended in 1977 and its penalties provisions were overhauled to include, among other things, civil penalties for stationary sources of air pollution.\(^ {249}\) In describing the intent behind the House of Representative’s proposed civil penalties provisions in Section 113(b), the Committee on Interstate and Foreign Commerce submitted a report accompanying the House’s proposed amendments to the CAA (“House Report”).\(^ {250}\) The House Report advises that the civil

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\(^{246}\) See notes 69, 124, 178, 185 and 194 supra.

\(^{247}\) *Illinois v. Commonwealth Edison Co.*, 490 F.Supp. 1145, 1148 (N.D.Ill.1980) (declining to apply the responsible corporate officer doctrine in a civil suit under Clean Air Act, in the absence of any case authority to the contrary, because the court was “unwilling to disregard what it considers to be the clear intent of Congress to exempt individual corporate officers from liability under citizen's suits of this type”); *Illinois v. Celotex Corp.*, 516 F.Supp. 716 (C.D.Ill.1981) (holding that, given the absence of language specifically defining “person” to include a responsible corporate officer for citizen suits when the term was included for EPA enforcement actions, Congress did not intend that corporate officers be subject to civil citizen suits).

\(^{248}\) See notes 30-32 and 69 supra.

\(^{249}\) See 42 U.S.C. § 7413(b), *see also* H.R. report No. 294, 95\(^{th}\) Cong., 1\(^{st}\) Sess. at 69 (1977) (“Assessment of Civil Penalties”).

penalty provisions as proposed by the House were intended to be strict liability public welfare offenses in which intent or actual knowledge would not be a defense. The House Report elaborated that civil liability under the CAA was “intended to assure that the rationale of the Park case (for food and drug law) will apply to enforcement of the Clean Air Act.”

However, the House’s interpretation of its proposed civil penalties provisions is only part of the legislative history, and, in fact, is a red-herring. The subsequent Senate-House Committee Report on the resolution of the disagreeing houses on the proposed amendments to the CAA (“Joint Committee Report”) reveals that the House Committee’s comments were rejected. The Joint Committee Report states that the Senate proposed the inclusion of the “responsible corporate officer” language to the criminal penalties subsection in Section 113(c) in response to the House’s proposed civil penalties

\[\text{251 Id. at 70-71. Specifically, the House Report states that “the Clean Air Act is intended to deal with activities which “touch phases of the lives and health of people which, in the circumstances of modern industrialism are… beyond self-protection.” Id. at 71 (quoting Dotterweich, 320 U.S. at 280).}

\[\text{252 Id. at 71 (referencing Park, 421 U.S. at 671 and Morissette, 342 U.S. at 255). The House Report adopts the reasoning enumerated in the Park decision and states that the committee intended:}

That in providing sanctions which reach and touch the individual who execute the corporate mission – and this is by no means necessarily confined to a single corporate agent or employee – the act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

\[\text{Id. (quoting Park, 421 U.S. at 671).}

\[\text{253 Senate – House Conference Report, No. 564, 95th Cong., 1st Sess. (1977).} \]
Pursuant to Conference agreement, the Senate’s provisions on criminal penalties were accepted with certain changes proposed during conference. The “responsible corporate officer” language remained in the approved final provisions. In return, the Conference agreed to accept the House’s provision on civil penalties.\textsuperscript{255}

The intent behind the “responsible corporate officer” language added to the CAA’s general definition of “person” in the criminal context is clearly set forth by the Senate, which proposed its inclusion into the act. In an analysis of the civil penalties provision of the CAA contained in the Senate Environmental and Public Works Committee section-by-section analysis report of the amendments to the CAA (“Senate Report”),\textsuperscript{256} the Senate Committee stated that “under another provision, for the purposes of liability for criminal penalties the term “person” is defined to include any responsible corporate officer.”\textsuperscript{257} The Senate Committee reasoned that

\begin{quote}
Criminal penalty[s] should be sought against these corporate officers under whose responsibility a violation has taken place, and not just those employees directly involved in the operation of the violating source.\textsuperscript{258}
\end{quote}

Finally, the Senate Report reveals that this use of language was “based on a similar definition in the enforcement section of the Federal Water Pollution Control Act [CWA].”\textsuperscript{259} Therefore, the legislative history of the CAA shows that while the House

\begin{footnotes}
\item[254] Id. at 107; see also 42 U.S.C. § 7413(c)(6).
\item[255] Id.
\item[256] Senate Environmental and Public Works Committee Print, Section-By-Section Analysis of S. 252 and S. 253, Serial No. 95-2, 95\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1977).
\item[257] Id. at 16.
\item[258] Id. (emphasis added).
\item[259] Id.
\end{footnotes}
proposed expansive civil penalties provisions that included the RCO doctrine, the Senate’s proposal to follow the model of the CWA and limit such to criminal liability was agreed upon in conference and ultimately passed into the CAA.

C. The Judicial Expansion of the RCO Doctrine Into Civil Liability Under the CWA is Based on Flawed Reasoning and a Misunderstanding of the Doctrine.

Attempting to apply the RCO doctrine to civil liability under the CWA requires a court to ignore the clear statutory language and the compelling legislative history revealing Congress’ intent otherwise. In doing so, the courts applying the RCO doctrine to CWA civil liability have been forced to misapply case law to support their holdings. The Sarna decision is a great example of judicial confusion about the RCO doctrine and misapplication of existing case law.

In its relative ease in holding that the RCO doctrine applies to civil penalties, the Southern District of New York made the fundamental mistake of confusing the strict liability doctrine with personal liability of responsible corporate officers for their individual wrongful conduct. Under the RCO doctrine, liability is based not on any

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260 The Sarna court begins its analysis of the application of the RCO doctrine with the incorrect statement that “Courts have generally rejected the notion that the responsible corporate officer doctrine should not apply in civil CWA cases because the phrase ‘responsible corporate officer’ only appears in the criminal penalties.” Sarna, 690 F. Supp. at 160 (emphasis in original). In fact, the majority of the cases referenced in the Sarna decision did not reach that result or even analyzed the RCO doctrine. See id. at 161-62 (citing Franklin, 1999 U.S. Dist. LEXIS 22489, Gulf Park, 972 F. Supp. 1056, Mac’s Muffler Shop, 1986 U.S. Dist. LEXIS 18108 (interpreting the CAA), Puget Soundkeeper Alliance, 2008 U.S. Dist. LEXIS 60741, PAS, 763 F.2d 133 (interpreting the Rivers and Harbors Act).

Only the Humboldt Baykeeper and Waterkeepers decisions cited by the Sarna court apply the RCO doctrine to civil liability under the CWA. Sarna, 690 F.Supp.2d at 160-61.

261 The Sarna court is not alone in making this mistake. Courts troubled with the harshness of the RCO doctrine and its imposition of liability based upon corporate position and responsibility have modified the doctrine to include an element of personal involvement with the violating conduct. See note 11 supra.
intent or knowledge on the part of the employee, but rather on the employee’s position of
authority and ability to avoid or mitigate the violation. On the other hand, individual
liability is based upon the corporate officer’s actual personal involvement in the
violation.

The Sarna court’s confusion of the RCO doctrine is evident in its
misapplication of prior case law. In earlier cases, responsible corporate officers argued
that the inclusion of the “responsible corporate officer” language in the criminal liability
subsection of the CWA barred personal liability under the civil liability provisions.
Courts routinely found that the responsible corporate officers’ wrongful conduct in
violation of the CWA could impose civil liability as an “individual” under the general
definition of “person.” Contrary to the Sarna court, these decisions outside of the
Ninth Circuit did not hold that the RCO doctrine may be applied to civil liability under
the CWA, but rather clarified liability under the term “individual” in the definition of a
“person” that may liable under the act.

In fact, the court in Brittain, often cited as the first case interpreting the
“responsible corporate officer” language in the CWA’s criminal penalties provision,
correctly recognized that the “responsible corporate officer” language in Section
309(c)(6) had to add something to the definition of “person” used in the civil liability
subsection. With both civil and criminal liability expressly applying to an

262 See Brittain, 931 F.2d 1413; Gulf Park, 972 F.Supp. 1056; Franklin, 1999 U.S. Dist. LEXIS 22489;

263 Id.

264 See Brittain, 931 F.2d at 1419 (“The plain language of the statute, after all, states that “responsible
corporate officers” are liable ‘in addition to the definition [of persons] contained, in section 1362(5)…”
citing 33 U.S.C. § 1319(c)(6)) (emphasis in original).
“individual,” the added meaning behind the “responsible corporate officer” language must be the application of the RCO doctrine to the severe violations that impose criminal liability and not the lesser violation justifying civil liability.265

D. Counter-Arguments

There are several counter arguments for applying the RCO doctrine to civil liability under the CWA, all of which attempt to circumvent the statutory language and the intent of Congress.

One anticipated argument arises from the often-cited reasoning for civil application articulated in the Hodges X-Ray decision – if the RCO doctrine can be applied to harsher criminal penalties, then it can be applied to civil liability that generally amounts to financial penalties, does not authorize imprisonment, and does not have the same effects on an individual’s reputation.266

However, this argument fails in light of Congress’ clear intent to apply the RCO doctrine only to the more severe criminal wrongdoing. The legislative history of the penalties provisions reveals that the criminal liability subsection was written to address intentional violations “occurring on a regular basis over an extended period of time” resulting in harm to public health or environment.267 To advance this purpose, Congress deemed it appropriate to apply the RCO doctrine to such criminal violations by corporate employees.268

265 Id. (finding defendant liable as a “person,” but recognizing that willfulness or negligence may also be imputed on a responsible corporate officer in regard to criminal liability on the basis of his position of responsibility”).

266 See note 79 supra.

267 See note 243 supra.

Another argument for applying the RCO doctrine in the civil context is that the definition of “person” under section 502(5) that applies to the civil penalties subsection does not expressly prohibit such application. This argument fails because it requires Congress to spell-out everything it did not intend to cover under the definition of “person” that is generally applicable throughout the entire CWA. Courts should not interpret the CWA to in effect require Congress to identify everything that does not fall under the jurisdictional definition of a person for purposes of determining the scope of civil liability. Instead, they should accept at face value Congress’s carefully crafted tailoring of the definition of a person to include a RCO only in the criminal liability context.269

Nonetheless, Congress deliberately chose to modify the definition of “person” in the criminal subsection. There is no support either textually or in the legislative history for an argument that Congress also intended the RCO doctrine to be applied to the unmodified general definition of “person.” Indeed, such interpretation makes the definition’s modification in the criminal liability subsection superfluous language. While “[n]ot every silence is pregnant,”270 Congress’ exclusion of the “responsible corporate officer” language in the civil penalties provision under Section 309(d) and its inclusion in Section 309(c) evidences that Congress recognized the existence of the RCO doctrine,

269 See e.g., New York v. EPA, 443 F.3d 880, 887 (D.C. Cir. 2006) (“…the approaches of EPA and industry would require Congress to spell out all the applications covered by a definition… ignoring the fact that a definition, like a general rule, need not list everything it covers.”) (citing National Public Radio, Inc. v. FCC, 254 F.3d 226, 229 (D.C. Cir. 2001). “Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use.” New York v. EPA, 443 F.3d at 887, n. 3 (citing TVA v. Hill, 437 U.S. 153, 173 n. 18 quoting Through the Looking Glass in THE COMPLETE WORKS FOR LEWIS CARROLL 196 (1939)).

intended to apply it in the criminal context, and decided to rule out its application in the civil context.

Similarly, any argument that the RCO doctrine should be applied civilly on the basis that environmental statutes are remedial in nature and should be broadly interpreted to effectuate their purposes must also fail in this context. Such an argument may be viable where an ambiguity exists, but must be denied where Congress spoke to the issue.

“A liberal construction does not mean one that flies in the face of the structure of the statute.” Courts may not depart from the plain and obvious meaning of the language used and “where Congress includes particular language in one section of a statute, but it omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion.” Here, Congress expressly added liability under the RCO doctrine only to criminal penalties. Congress intended to limit the application of the RCO doctrine to the criminal liability context in


272 Equal Employment Opportunity Commission v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995) (interpreting the Americans with Disabilities Act) (noting that increasing the number of potentially liable defendants would increase deterrence, but that Congress “struck a balance between deterrence and social cost”). See also, Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1169 (3rd Cir. 1990) (interpreting the Employee Retirement Income Security Act (“ERISA”)) (“It is well settled that implied remedies are disfavored in the context of statutes that set out an expressly detailed remedial scheme.”); Belland v. Pension Ben Guar. Corp., 726 F.2d 839 (D.C. Cir. 1984) (interpreting ERISA) (“Remedial statutes are to be liberally construed to effectuate their purpose, but such principle does not give judiciary license, in interpreting a provision, to disregard entirely plain meaning of words used by Congress”) (quoting Symons v. Chrysler Corp Loan Guar. Bd., 670 F2d. 238, 241 (D.C. Cir. 1981)); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) (interpreting Title VII of the Civil Rights Act of 1964) (“Although the maxim that remedial statutes should be liberally construed is well recognized, that consent has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress”).

273 Where... the language of a statute is unambiguous, only the most extraordinary showing of contrary intentions would justify altering its plain meaning.” Niagara Mohawk, 263 F.Supp.2d at 660, n. 15 (citing Garcia v. United States, 469 U.S. 70, 75 (1984).

274 Id. at 669, n.9 (citing Russello v. United States, 464 U.S. 16, 23 (1983).
light of the well-established principal that responsible corporate officers may be liable for their wrongful acts on behalf of the company as an “individual.”

It may further be argued that Congress put the “responsible corporate officer” language in the criminal penalties subsection to merely warn corporate officers of potential criminal liability under the RCO doctrine, but not exclude the doctrine from civil liability. This argument fails because it assumes Congress would apply such warning in a cumbersome and confusing manner. Congress could have easily made that warning by simply placing the language in the general definition of “person” applicable to both criminal and civil liability. In that case, the warning would serve its purpose while expressly applying the doctrine to civil liability, or to the other penalties that Congress carefully crafted in the CWA’s enforcement section. Statutory interpretation must be guided by common sense. There is nothing in the statute’s text or its legislative history that suggests it was Congress’ intent to merely warn corporate officers of criminal liability under the RCO doctrine, while preserving the use of the doctrine to all the specific types of penalties under the enforcement section of the CWA.

275 See Wise, note 7 supra, at 325 (“Given the purpose and the language of the CWA, Congress likely incorporated [the responsible corporate officer] language to make it obvious that responsible corporate officers were not only civilly liable for the affirmative conduct and omissions, but would also [ ] face serious criminal charges in particularly egregious cases”).

276 CWA §1319 (a) – (g) (enforcement section) (types of liability arise from compliance orders, civil actions, criminal penalties, civil penalties, state liability for judgments and expenses, wrongful introduction of pollutants into treatment works, and administrative penalties).

277 See e.g., Burlington Northern & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 364, n. 46 (finding that “interpretation comports with a fundamental principle of statutory construction – common sense”) (citing California v. F.E.R.C., 383 F.3d 1006, 1016-17 (9th Cir.2004) (explaining that the court must be guided by common sense in determining congressional intent); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir.1997) (describing common sense as a good barometer of statutory meaning); Salt Lake City v. Western Area Power Admin., 926 F.2d 974, 984 (10th Cir.1991)(stating that the most fundamental guide to statutory construction is common sense); First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 869 (4th Cir.1989) (referring to common sense as the most fundamental guide to statutory construction)).
It may be argued that the similar “responsible corporate officer” language in the criminal penalties provision of the CAA, interpreted by the United States for the Northern District of Georgia, Rome Division, in Mac’s Muffler to apply in the civil context, supports a consistent interpretation of the CWA. This argument fails because that decision’s reasoning is flawed given that the court relied upon an incomplete legislative history.

In 1986, the district court in Mac’s Muffler Shop held that civil penalties under the CAA could be assessed against the individual owner of Mac’s Muffler Shop, Inc. (“Mac’s”), for the removal of catalytic converters from motor vehicles in violation of Section 203(a)(3)(B) of the act. The district court found that the CAA’s “legislative history expressly states that [the RCO doctrine] applies to civil penalty proceedings under Section 133 of the [CAA].” In doing so, the court relied upon the House Report that the civil liability provisions of the CAA proposed by the House were to apply the RCO doctrine. The court further reasoned that the same principals apply under the applicable civil penalties provision in Section 205 of the CAA. However, the court failed to examine the Joint Committee Report, revealing that the House Committee’s

278 See note 84 supra.

279 Id. at *19.

280 See note 250 supra.


282 Id. at *19-20.

283 See note 253 supra.
comments regarding the application of the RCO doctrine to civil liability were rejected, and that the Senate’s proposed inclusion of the “responsible corporate officer” language in the criminal penalties provision was adopted into the final legislation in response. The Mac’s Muffler court also did not analyze the Senate Report, setting forth the intent behind the enforcement provisions included in the final adopted legislation and explaining that the RCO doctrine should apply only in the criminal context. The court, therefore, analyzed only a limited portion of the relevant legislative history and failed to recognize that Congress, in fact, added the “responsible corporate officer” language to the criminal provision to apply the RCO doctrine only to violations serious enough to warrant criminal prosecution under the act. The finding in Mac’s Muffler that Congress meant to apply the RCO doctrine to civil liability under the CAA is misguided and incorrect. Accordingly, any attempt to use the Mac’s Muffler decision to support an argument that Congress intended the RCO doctrine to apply to civil liability under the CWA suffers the same result.

VI. CONCLUSION

The expansion of the RCO doctrine into civil liability has been rapid and persistent since the landmark United States v. Hodges X-Ray decision in 1985 bridged the gap between the doctrine’s creation to circumvent the mens rea requirement in criminal violations of public health and welfare statutes and civil liability where scienter is not required. That decision reasons that the rationale for holding a corporate officer

284 See notes 253-255 supra.

285 See notes 256-259 supra.

286 See notes 69, 77-79 supra.
criminally responsible for acts of the company is even stronger where only civil liability is involved with the possibility of lesser penalties on the officer. Armed with the reasoning in *Hodges X-Ray*, it became quite easy for courts to expand the RCO doctrine into civil liability under various federal and state environmental statutes. Consequently, a snowball affect resulted with one decision after another applying the RCO doctrine in the civil context – each citing the previous cases as justification.

Once the RCO doctrine entered the realm of civil liability, attempts to apply the doctrine in that manner under the CWA were soon to follow. The only remaining hurdle appeared to be the act itself, which contained a unique enforcement provision wherein Congress included the term “responsible corporate officer” in the definition of an “individual” who could be criminally liable under the act. Congress did not alter the general definition of an “individual” that applied to the other provisions of the CWA, including the civil penalties provision. Congress’ insertion of “responsible corporate officer” into criminal liability under the act was intentional, deliberate, and precise. The only affected portion of the CWA was the criminal liability provision.

Yet, courts found a rather simple way around the CWA’s unique language and Congress’ purposeful structure of the act’s enforcement provision – they ignored them. The initial cases applying the RCO doctrine to the CWA’s civil liability came out of the Ninth Circuit, where district courts relied on judicial precedent applying the RCO doctrine in the criminal context under the CWA’s criminal liability provision.

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287 See notes 81-85 *supra*.

288 See notes 113-117 *supra*.
Subsequent decisions in the Ninth Circuit blindly relied on the earlier case law without examining the text of the CWA or Congress’ intent.\textsuperscript{289}

The holdings in the Ninth Circuit led to the decision in \textit{City of Newburgh v. Sarna}, where the district court’s readiness to apply the RCO doctrine to civil liability required the court to confuse the RCO doctrine with “individual” liability under the act, misapply prior case law, and rely on the Ninth Circuit decisions without questioning their reasoning.\textsuperscript{290} The decision in \textit{Sarna} is a classic example of a “safety-in-numbers” opinion. The court stepped around the tough issue of legislative intent by simply following, and in some cases misapplying, decisions in other jurisdictions.

With each new case that goes along with the judicial follow-the-leader approach to applying the RCO doctrine to the CWA’s civil liability, the intent of Congress is ignored and traditional corporate protections further erode. A doctrine that was once warranted “in limited circumstances” involving criminal conduct in situations that could “profoundly impact human health and the public welfare,” may now impose civil fines on corporate officers for the slightest of violations.

From nearly its inception, the law has attempted to balance deterrence through punishment with the freedom for individuals to act. An uneven balance in either direction can have undesirable consequences. With the expansion of the RCO doctrine into civil liability under the CWA, corporate officers are exposed to increased personal liability for the acts of the company. With the increased possibility of individual liability, comes greater fear to act or to delegate. Some may applaud this consequence and characterize it as a deterrence of future misconduct. Under the CWA, however, where

\textsuperscript{289} See notes 178-193 \textit{supra}.

\textsuperscript{290} See notes 194-220 \textit{supra}.
Congress has legislated that the RCO doctrine applies only under criminal liability, the consequence arising from applying the doctrine to civil liability is impermissible corporate paralysis.