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FINDING AN ENVIRONMENTAL FELON UNDER THE CORPORATE VEIL: THE RESPONSIBLE CORPORATE OFFICER DOCTRINE AND RCRA

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I. INTRODUCTION

A. Criminalizing Corporate Officer Conduct

Since the late 1980s there has been steady growth in criminal enforcement of federal pollution control law against corporate officials. Prosecuting corporate officials for environmental violations reflects a growing public consciousness that harm to the environment is a serious crime.[1] One extensive national survey conducted by the Department of Justice (DOJ) reported that the public ranked environmental crimes seventh in seriousness among all crimes.[2] In 1989, the Attorney General for the Bush Administration proclaimed the "Environment as a Crime Victim" concept.[3]

Criminalizing the conduct of corporate officers for transgressions of pollution control laws addresses serious shortcomings of civil sanctions, on which the federal government has long relied to pressure the regulated community into compliance. Criminalization, unfortunately, does not perfectly cure the defects characteristic of using civil penalties for enforcement. Civil sanctions are typically aimed at the corporate entity, and thus may eventually harm the interests of shareholders or consumers. Civil sanctions, however, do not directly strike at the corporate officer or manager whose policies and decisions guide or influence corporate environmental compliance. As a result, corporate officials often regard civil penalties simply as a cost of doing business. Corporate officials often engage in calculated

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1. Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It is Hard Time*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,096 (Mar. 1990).

2. Captain James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MILITARY L. REV. 279, 280 n.8 (Summer 1991) (citing Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 380 n.1 (1986)).

3. R. Christopher Locke, *Environmental Crimes: The Absence of "Intent" and the Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311, 313 (1991) (quoting Address by Attorney General Richard Thornburgh, 1989 Conference of National Association of District Attorneys, in Portland, Me. 1-2 (July 19, 1989)).

decision-making, weighing compliance against environmental standards in terms of costs and benefits.[4] Civil penalties are often less expensive than pollution control equipment installation and compliance with environmental standards.[5]

Criminal sanctions against corporate officials inspire self-concern rather than concern for the corporation. As a former Attorney General observed, "nothing so concentrates the mind of responsible management upon the environment as our putting their own pocketbooks and persons in jeopardy. Indeed, the sudden realization that culpable mismanagement might actually result in jail time concentrates minds even more."[6] Criminal sanctions inflict punishment upon the corporate official responsible for the company's deviation from environmental compliance, sending the clear message that noncompliance is a crime rather than a calculated business decision. Additionally, criminal sanctions bring down adverse publicity and public opprobrium upon the offending individual, and impress upon corporate officials in the regulated community the prudence of legal compliance.[7] Many federal pollution control laws have long been viewed as "technology forcing" for businesses.[8] Criminalizing corporate officer conduct for environmental violations can serve as "best management forcing," whereby corporate officers and directors are pressed to redirect company policies and resources toward sounder environmental management practices by their company.[9] In sum, civil sanctions lack the long-recognized coercive qualities embodied in criminal sanctions, which can stimulate the corporate official to

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4. *Developments in the Law--Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1235-36 (1979) [hereinafter *Corporate Crime*].

5. Michael K. Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835, 836 (1973).

6. Roger J. Marzulla & Bret G. Kappel, *Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s*, 16 COLUM. J. ENVTL. L. 201, 201-02 (1991) (quoting Address by Attorney General Richard Thornburgh, 1991 Environmental Law Enforcement Conference, in New Orleans, La. (Jan. 8, 1991)).

7. Calve, *supra* note 2, at 284 n. 2; *see generally*, Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501 (1980) (evaluating major criminological studies that measure corporate crime, and discussing the effectiveness, or lack thereof, of criminal sanctions); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) (discussing the pros and cons of criminal sanctions used with economic regulatory legislation); *Corporate Crime*, *supra* note 4, at 1227 (criticizing the use of criminal sanctions in regulatory law and for corporations).

8. Mary Ellen Kris & Gail L. Vannelli, *Today's Criminal Environmental Enforcement Program: Why You May be Vulnerable and Why You Should Guard Against Prosecution Through an Environmental Audit*, 16 COLUM. J. ENVTL. L. 227, 228 (1991).

9. *Id.*

comply with the law by playing upon the powerful fear of being personally branded and treated as a criminal.[10]

B. Three Branch Contribution to Criminalizing Corporate Officer Conduct

During the last few years, all three branches of the federal government have contributed initiatives to expanding the criminalization of environmental law and encouraging its envelopment of corporate officials.

1. Congress

Congress contributed to the expansion by amending major environmental statutes to include stricter criminal penalties. In 1980, for the first time, Congress authorized felony sanctions for the violation of a federal environmental statute. The Resource Conservation and Recovery Act (RCRA),[11] in the course of reauthorization, was amended to impose felony liability upon any person who knowingly treated, stored, or disposed of hazardous waste without a permit.[12] Four years later, Congress doubled the maximum possible criminal penalty for this violation to five years.[13] The RCRA changes set a pattern in motion. They upgraded violations of federal environmental statutes from misdemeanors to felonies and increased criminal sanctions.[14] Today, criminal provisions in major environmental statutes are ubiquitous.[15] Congress opened the decade of the 1990s with new legislation entitled the Pollution Prosecution Act of 1990.[16] This legislation sought to mandate increased criminal enforcement resources for the Environmental Protection Agency (EPA).[17]

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10. The goals of the criminal justice system include prevention, restraint, deterrence, education, retribution, and rehabilitation. WAYNE L. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5, at 22-27 (2d ed. 1986).

11. Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)).

12. Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 13, 94 Stat. 2334 (codified as amended at 42 U.S.C. § 6928 (1988)).

13. Hazardous Waste and Solid Waste Amendments of 1984, Pub. L. No. 98-616, §§ 232-234, 98 Stat. 3221, 3255-57 (codified as amended at 42 U.S.C. § 6928 (1988)).

14. For instance, CERCLA, 42 U.S.C. §§ 9601-75 (1988), was reauthorized in 1986 and changed from a misdemeanor to a felony the knowing failure to report the release of a hazardous substance. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1760-74 (codified as amended at 42 U.S.C. §§ 9601-75 (1988)).

15. *See infra* note 61 and accompanying text.

16. Pub. L. No. 101-593, § 202, 104 Stat. 2962, 2962-63.

17. *Id.* EPA is required to hire additional criminal investigators every year for the next five years. Its office of Criminal Investigations is to have a staff of at least 200 criminal investigators by 1995. *Id.*

2. Executive Branch: The Department of Justice

The executive branch's contribution to expanding criminalization of corporate environmental conduct was a steady increase in federal prosecution of environmental crimes by the Department of Justice (DOJ).[18] This process began in 1983 and accelerated considerably by the early 1990s.[19] The upswing in federal environmental prosecution began, primarily, as an embarrassed response to the public outcry over blatant emasculation of federal environmental enforcement during the Reagan Administration's early years. For instance, during the first two years of the Reagan Administration there was a sharp decline in EPA case referrals to DOJ for criminal prosecution.[20] There was a corresponding decline in DOJ filing of criminal cases.[21] One of the most notorious and pivotal events during this period was the resignation of EPA Administrator Anne Gorsuch Burford. She resigned in 1983 following Congressional investigations and press exposés on her agency's virtual abandonment of environmental enforcement.[22]

As part of its contribution to the Reagan Administration's supposed new commitment to federal enforcement, the DOJ pronounced it was embarking upon the policy of "identifying, prosecuting, and convicting the highest ranking, truly responsible corporate officials" associated with environmental crimes.[23] The steady increase in federal prosecution began in fiscal year 1983, and from that time to fiscal year 1991, DOJ obtained 774 indictments for violations of the criminal provisions of environmental laws.[24] Corporate officials and employees comprised the bulk of defendants in these cases.[25] Of the 774 indictments, 559 resulted in guilty pleas or convictions.[26] A majority of these convictions occurred during fiscal years 1990 and 1991.[27]

DOJ reported that the highest number of convictions were against company officers operating in their managerial capacity, rather than

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18. Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 SW. L.J. 1199 (1991).

19. *Id.*

20. PETER YEAGER, THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION, 318 (1991).

21. *Id.*

22. *Id.* at 318-20.

23. F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,478 at 10,480 (Dec. 1987).

24. Marzulla & Kappel, *supra* note 6, at 208-09.

25. *Id.*

26. *Id.*

27. Kris & Vannelli, *supra* note 8, at 230.

corporations themselves.[28] By 1990, DOJ claimed it had reached a ninety-five percent conviction rate for environmental prosecutions; nearly eighty percent of those prosecuted were corporations and their managers.[29] Enforcement actions during the Reagan-Bush Administrations peaked near the Administrations' end, fiscal year 1991. One hundred and four defendants, including individuals and corporations, were indicted, and seventy-two of these defendants were convicted and sentenced.[30]

The rise in criminal prosecutions of corporations and corporate officials for environmental crimes during the Reagan-Bush era has been criticized as insufficient.[31] It is nevertheless clear that the gates were open for federal prosecution of environmental crimes, and corporate officials were put on notice that they were vulnerable to prosecution. If past trends persist, criminal prosecution of environmental violations by corporate officials can be expected to continue increasing.

3. Federal Judiciary--Responsible Corporate Officer Doctrine

Beginning in the late 1980s, the federal judiciary made two important contributions to criminalizing violations of environmental law by corporate officials. One way was through adherence to tough amendments to the Federal Sentencing Guidelines adopted in 1987.[32] The Guidelines mandate substantial terms of imprisonment for environmental crimes and the abolition of parole to ensure that the sentence imposed will be the sentence served.[33] The other method was through the subject of this article, the adoption of the responsible corporate officer (RCO) doctrine, which has been sarcastically referred to by the business community as the "designated felon rule."[34] The RCO doctrine chips away at a profound limitation on the use of criminal sanctions for modern-day public welfare regulation like

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28. *Id.*

29. Morgan & Obermann, *supra* note 18, at 1199-1200.

30. *Enforcement Actions at EPA Continue to Climb in Civil, Criminal Cases, Penalty Assessments*, 22 Env't. Rep. Current Dev. (BNA) 1832, 1832 (Nov. 29, 1991).

31. *See Report Alleges Justice Department Failure to Prosecute Environmental Crimes Vigorously*, 23 Env't. Rep. Current Dev. (BNA) 1710-12 (Nov. 6, 1992); *Congressional Report Says Justice Department Failed to Pursue Rocky Flats Case Aggressively*, Env't. Rep. Current. Dev. (BNA) 2253-54 (January 8, 1993).

32. Sentencing Guidelines for the United States Courts, 52 Fed. Reg. 18,046-99 (1987). The Guidelines are reprinted in the United States Sentencing Commission Guidelines Manual (1991) [hereinafter *Guidelines Manual*].

33. Kris & Vannelli, *supra* note 8, at 231; Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines*, NATIONAL ENVTL. ENFORCEMENT J. 3, 3-4 (June 1990).

34. *Better Communication with Government, Public Said to Reduce Chance of Criminal Enforcement*, Env't. Rep. Current Dev. (BNA) 1423-24 (September 18, 1992) [hereinafter *Better Communication*].

environmental legislation. Public welfare legislation is intended to protect society against the harms of industrialization. The limitation addressed by the RCO doctrine is the inability of traditional criminal law categories to deal with the corporate organizational form that pervades our economy.[35]

American legal tradition premises criminal liability on demonstrable *individual* culpability, namely, personal blameworthiness based on knowledge or negligence.[36] Personal blameworthiness premised on an individual's knowledge or negligence concerning criminal conduct is derived from, and better suited to, simpler forms of social organization than the modern corporation.[37] Relying on personal blameworthiness in cases of corporate misconduct is a disadvantage because it thwarts the law's effectiveness to the extent blameworthiness does not penetrate the corporation and attach to real people within it.[38] This limiting situation is manifested in the difficulty of locating and punishing responsible individuals in corporate organizations,[39] or to use the common legal expression, "piercing the corporate veil." As one commentator on the limits of the law observed, "[g]iven their complex divisions of labor, delegation of responsibilities, and often tacit expectations regarding performance and loyalty, large corporations tend to shroud individual culpability from legal detection."[40] As a consequence, the regulatory system must often forsake difficult criminal convictions within the corporation in favor of more lenient measures used to negotiate compliance with business firms.[41] In the alternative, the system may pursue firms for prosecution as fictitious corporate persons, while foregoing prosecution of individual corporate decision-makers.[42] The end result is lessened deterrence because top corporate officials are left unthreatened and untouched by criminal sanctions.[43]

Judicial consideration and development of the RCO doctrine for application to environmental law arose from DOJ's increased reliance on the RCO doctrine to establish liability in the prosecution of upper-echelon managers for environmental violations caused by business operations and the conduct of subordinates. The doctrine is certainly not necessary when the corporate manager is directly liable because

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35. YEAGER, *supra* note 20, at 36.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. YEAGER, *supra* note 20, at 36.
41. *Id.* at 36-37.
42. *Id.*
43. *Id.* at 37.

he is an active and obvious participant in the violation. Instead, it is used in a manner akin to vicarious liability. It is employed to prosecute the corporate official for failure or unwillingness to become informed of environmental considerations, or it may be used to prosecute for failing to adequately oversee subordinates directly responsible for these matters. The RCO doctrine gives real meaning to the phrase, "it's what you don't know that can hurt you," by holding corporate officials criminally responsible for the misconduct of other company employees, that they were unaware of or did not participate in.

At the heart of the RCO doctrine is a transmutation of criminal culpability. It causes a reduction of the state of mind element in criminal law, also known as the mens rea or scienter requirement. To secure a criminal conviction of a corporate officer under most federal pollution control statutes, the government must satisfy an express scienter requirement by proving knowledge of the environmental violation. If strictly and traditionally construed, the scienter requirement in these statutes would probably shield managers from criminal liability who could claim no actual knowledge of or participation in the violation. Several federal courts, however, have relaxed the government's burden of proof by letting the corporate official's knowledge concerning a violation be inferred from circumstantial evidence. The chief vehicle employed to implement the RCO doctrine is a jury instruction allowing the jury to infer knowledge of the violation from the corporate manager's position, responsibility, or authority.

The RCO doctrine is premised on reduction of the scienter requirement in environmental statutes. Federal courts tend to regard environmental statutes like public welfare laws, for which there is a long history of minimizing and eliminating the scienter requirement. The RCO doctrine was originally created for public welfare statutes which had no mens rea requirement, in other words, strict liability statutes. It was next applied to, and transformed for, cases involving non-environmental public welfare statutes which did contain an express scienter requirement. By the late 1980s, some federal circuit courts expanded the RCO doctrine to reach corporate officers who violated environmental statutes. They regarded these statutes in the same light as traditional public welfare statutes out of which the doctrine first germinated and grew.

By treating environmental statutes as similar to, or the same as, previous public welfare statutes, the federal courts followed tradition. As before, they considered violations of public welfare statutes that had scienter requirements general intent crimes rather than tradi-

tional specific intent crimes. This means that "knowingly" as used in the statute is simply awareness of one's conduct. It is not, as would be the case with a specific intent crime, awareness that one is actually committing a crime. The reduced intent standard in the RCO doctrine significantly relieves the government's burden of satisfying the scienter requirement in environmental laws. The result is that, as one former federal judge put it in referring to federal prosecutors, it "turns sharpshooters into grenade throwers."[44]

Virtually all of the significant litigation concerning the application of the RCO doctrine has been connected with the Resource Conservation and Recovery Act (RCRA)[45] and its general criminal offense provision contained in section 6928.[46] In fact, most federal environmental prosecution is brought under either RCRA or the Clean Water Act, and frequently under both statutes.[47] Several federal circuit courts have applied the RCO doctrine to section 6828 of RCRA, but the degree of stringency used for the doctrine ranges from very permissive to very restrictive.

This article charts the development of the RCO doctrine and its very recent application to environmental law and RCRA. Part II lays out how traditional conceptions of mens rea must be altered and relaxed in order to make the RCO doctrine possible. Part III examines the series of Supreme Court decisions which provide the doctrinal underpinnings for the RCO doctrine. Part IV surveys the series of federal lower court decisions that, beginning in the mid-1980s, ex-

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44. *Better Communication, supra* note 34, at 1424.

45. Pub. L. No. 94-589, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)).

46. *See infra* part V.A. While application of the responsible corporate officer doctrine has been most often applied in RCRA prosecutions, RCRA does not include criminal penalties applicable to corporate officers who violate the Act. 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1992); *cf.* Clean Water Act (CWA), 33 U.S.C. § 1319(c)(6) (1988) (defining "person" for purposes of the subsection, which prescribes criminal penalties for persons who violate the Act, as including "any responsible corporate officer"); Clean Air Act (CAA), 42 U.S.C. § 7413(c)(3) (1988 & Supp. 1992) (providing that criminal penalties apply to "any corporate officer"); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2677 (codified at 42 U.S.C. § 7413(c)(6) (1988 & Supp. 1992)). "[T]he term 'person' includes . . . any responsible corporate officer." *Id.*; *see also* Federal Insecticide, Fungicide, & Rodenticide Act (FIFRA), which expressly provides for vicarious liability of any person or entity for the acts, omissions, or failure of "any officer, agent, or other person acting for or employed by" that person or entity in violation of FIFRA, 7 U.S.C. § 136l(b)(4) (1988), and defines "person" as including "individual[s], association[s], partnership[s], corporation[s], and any organized group of persons whether incorporated or not." 7 U.S.C. § 136(s) (1988).

47. For instance, in 1989, seventy-one percent of federal criminal enforcement cases involved a violation of RCRA or the Clean Water Act. Robert W. Adler and Charles Lord, *Environmental Crimes: Raising the Stakes*, 23 LAND USE & ENV'T L. REV. 383, 399-400 (Stuart L. Deutsch & A. Dan Tarlock eds., Clark Boardman Callaghan 1992), *reprint from* 59 GEO. WASH. L. REV. 797-98 (1991).

tended the RCO doctrine to environmental prosecutions, chiefly in RCRA. This part of the article reveals the development of two diverging lines of thinking in the federal circuits concerning the RCO doctrine. One is a permissive line of cases which reflects a warm reception for the doctrine and a tendency to expand it. The other is a restrictive approach which reflects a hesitant attitude toward the doctrine and which attempts to constrain or constrict its application. Part V is the conclusion.

II. ALTERATION OF MENS REA FOR CORPORATE OFFICIAL CULPABILITY

A. Traditional Theories of Corporate and Corporate Employee Criminal Liability

Criminal liability pertaining to conduct within corporations can be divided into two categories. The first is the liability of the corporation itself for acts considered criminal, and the second is the personal liability of the corporation's employees for criminal violations occurring within the corporation. Today, it is well established that a corporation can commit a crime.[48] This has not always been so, as corporations were traditionally immune at common law from prosecution for criminal conduct under the theory of *societes delinquere non potest* (a corporation can do no wrong). Blackstone stated the common law view that "a corporation may not commit treason, or felony or any other crime in its corporate capacity."[49] Contemporary law regards the corporation as a legal "person." Numerous federal environmental statutes expressly define corporations as persons for the purpose of imposing criminal liability.[50] Because of the doctrine of respondeat superior, a corporation is liable for the crimes of its employees and officials who are acting within the course and scope of their employment.[51] The converse is not generally true, however.

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48. The Supreme Court in 1909 overruled former doctrine and held that a corporation can be held criminally liable. New York Central and Hudson River Railroad Company v. United States, 212 U.S. 481, 493-95 (1909) (convicting railroad company and its manager for paying rebates to shippers in violation of the Elkins Act); *see also* Keith Welks, *Corporate Criminal Culpability: An Idea Whose Time Keeps Coming*, 16 COLUM. J. ENVTL. L. 293 (1991).

49. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 476 (W. Lewis ed. 1922).

50. For an enumeration and description of provisions of federal environmental laws that impose criminal liability upon corporations and the applicable places in the U.S. Code, see Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 824 (1991); Robert I. McMurray and Stephen D. Ramsey, *Environmental Crimes, The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1145-51 (1986).

51. As to the application of this principal to federal environmental statutes, see, e.g., Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976) (imputing employee's knowledge of oil spill to corporation to hold it criminally liable under the Clean Water Act), *cert. denied*, 429 U.S. 827 (1976); United States v. Hayes International, 786 F.2d 1499, 1501 (11th Cir. 1986) (finding

Employees and officials are not criminally liable for the crimes of the corporation.

Under traditional theories, in order to affix personal criminal liability to a manager or employee for acts occurring within the corporation, the individual must typically perform or direct the criminal activity.[52] There are three such theories of individual criminal liability.[53] The first is conspiracy, where a corporate officer may be held criminally liable for a conspiracy to engage in a crime in furtherance of corporate activities.[54] The second theory is liability when a corporate official or employee engages in an act that is a crime, even if the act was an official act performed during the course of employment.[55] The third theory is accomplice liability, under which a corporate official or employee may be held criminally liable as an accomplice for crimes committed by cohorts or subordinates.[56] Finally, criminal responsibility may result from a failure to control corporate wrongdoing.

For the three traditional theories previously described, the corporate official must perform, direct, or participate in the criminal activity to incur liability. Ordinarily, a corporate official who did not actively participate in or authorize a violation of law is not considered responsible for misconduct occurring within the corporation. However, under the RCO doctrine, a corporate official would be considered liable for actions within the corporation that might fall within the purview of his knowledge and control.[57] As noted earlier, the RCO doctrine can provide a very loose conception of the knowledge and control attributed to the manager. The corporate official may incur liability for the wrongdoing of a subordinate by failing to prevent or discourage such misconduct. The consequence is that

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corporation liable under RCRA, which provides for criminal sanctions due to the act of employee); United States v. MacDonald & Watson Co., 933 F.2d 35, 42 (1st Cir. 1991) (noting "[a] corporation may be convicted for the criminal acts of its agents under a theory of respondeat superior . . . where the agent is acting within the scope of employment.") (emphasis added) (citations omitted).

52. Nye & Nissen v. United States, 336 U.S. 613, 619-20 (1949); United States v. Amrep Corp., 560 F.2d 539, 545 (2d Cir.), *cert. denied*, 434 U.S. 1015 (1977).

53. Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses--Another View*, 35 VAND. L. REV. 1337, 1338-42 (1982) (describing theories under which the federal courts hold corporate officers criminally liable); *see also* HARRY G. HENN, LAWS OF CORPORATIONS 480-84 (3d ed. 1983) (discussing theories of criminal corporate liability).

54. *See, e.g.*, Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925, 947 (1977).

55. *See generally* 3A WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 1348-1349 (perm. ed. rev. vd. 1992).

56. *See* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and Observation*, 60 WASH. U. L.Q. 393, 415-21 (1982).

57. *See, e.g.*, Anderson v. Abbott, 321 U.S. 349 (1944).

criminal liability may reach corporate officials who have not taken, and may not even be aware of, the wrongful activities of the firm's employees.[58]

B. Erosion of Traditional Mens Rea as a Basis for the RCO Doctrine

The RCO doctrine assigns criminal liability to corporate officers for their failure or unwillingness to properly supervise corporate operations. The doctrine alters the customary conceptions of actus reus (guilty act) and mens rea (guilty mind),[59] whose concurrence has traditionally been required for criminal liability to attach. The alteration in *actus reus* is obvious. The action constituting the offense is engaged in by the subordinate, not his superior. The subordinate does the wrongdoing, but the supervisor pays.

The alteration of the mens rea, or scienter requirement in the RCO doctrine is more complicated and controversial. The mens rea requirement is the criminal intent or criminal mind element of criminal liability. At common law such criminal intent was expressed by terms like "willful and corrupt," "with intent to," "malicious," "fraudulent," or "felonious."[60]

Modern day regulatory statutes, including environmental laws, usually use the term "knowing" or "knowingly" as the scienter requirement for a criminal violation.[61] At first glance, a state of mind

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58. Calve, *supra* note 2, at 297.

59. Conventional mens rea generally "requires that the actor must be aware of the factors making his conduct criminal." Truxton Hare, Comment, *Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. PA. L. REV. 935, 969 (1990).

60. LAFAVE & SCOTT, *supra* note 10, at § 3.4(a).

61. According to the Department of Justice, whose Environmental Crimes Section of the Environment and Natural Resources Division has responsibility to prosecute federal environmental crimes, there are five federal statutes at which federal criminal enforcement is principally directed. They are the Clean Water Act, Clean Air Act, Toxic Substances Control Act, Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Federal Insecticide, Fungicide and Rodenticide Act. U.S. DEPARTMENT OF JUSTICE MANUAL § 5-11.102 (1991 Supp.).

There are numerous provisions in each of these statutes for "knowing" criminal violations: the Clean Water Act, 33 U.S.C. § 1319(c)(2) (1988) ("knowingly" engages in violations of particular source standards and NPDES permit requirements), 33 U.S.C. § 1319(c)(4) (1988) ("knowingly" making false statements or reporting or tampering with a monitoring device), 33 U.S.C. § 1319(c)(3) (1988) (knowing endangerment which occurs when a violator "knowingly" places another person in "imminent danger" of death or serious bodily injury" through the violation); The Clean Air Act, 42 U.S.C. § 7413(c)(1) (Supp. 1992) ("knowingly" engages in violations of regulatory standards such as an applicable implementation plan, emission standard or compliance order, or release of any hazardous air pollutant), 42 U.S.C. § 7413(c)(2) (Supp. 1992) (knowing failure to pay fees), 42 U.S.C. § 7413(c)(3) (Supp. 1992) ("knowingly" making false statements or reporting or tampering with a monitoring device), 42 U.S.C. § 7413(c)(5) (Supp. 1992) (knowing endangerment which occurs when a violator "knowingly" places another person in "imminent danger" of death or serious bodily injury" through the

element expressed with the term "knowingly" seems to suggest a crime that requires specific intent or subjective fault corresponding with traditional mens rea. "Knowingly," in specific intent or subjective fault terms, is frequently associated with definitions like "[a] person acts knowingly . . . [when] he is aware that it is practically certain that his conduct will cause such a result."[62] Put another way, when an express knowledge requirement is treated as dictating scienter in terms of specific intent or subjective fault, it will require awareness of both one's actions and their consequences.[63] Thus, a regulatory statute which specifies a knowledge requirement that indicates specific intent invokes a state of mind approximating the guilt of a person who acted "feloniously," "maliciously," or "with intent to" at common law.

The courts applying the RCO doctrine in regulatory statutes have largely handled express knowledge requirements for criminal violations as general intent or objective fault crimes. For these regulatory statutes, an express "knowledge" requirement is awareness of one's actions but not of their consequences.[64] This is different than specific intent crimes, which require knowledge of actions and consequences. Changing from specific intent to general intent is a significant reduction of the intent requirement.

Moreover, application of the RCO doctrine to regulatory statutes frequently goes hand-in-hand with "element analysis."[65] This increases the likelihood of reduction or elimination of mens rea still further. In element analysis, the court ponders what type of mens rea to employ, and it analyzes to what extent the "knowledge" requirement modifies each element of the offense.[66] Some courts have gone so far

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release of a hazardous air pollutant); The Toxic Substances Control Act, 15 U.S.C. § 2615(b) (1988) ("knowingly" or "willfully" violating specified provisions of the Act); The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136l(b) (1988 & Supp. 1992) ("knowingly" engaging in certain acts that violate the Act's regulatory requirements); CERCLA, 42 U.S.C. § 9603(b) (1988) ("knowingly" fails to report a hazardous substance release), 42 U.S.C. § 9603(d)(2) (1988) ("knowingly" falsifies, destroys or makes unavailable records required to be maintained), 42 U.S.C. § 9603(c) (1988) ("knowingly" fails to provide notice to EPA of unpermitted facilities, types and amounts of hazardous waste found there, and any known or suspected releases of hazardous substances), 42 U.S.C. § 9612(b)(1) (1988) ("knowingly" submits false claims for CERCLA response costs). *See infra* notes 175-176 (concerning the scienter requirements of the Resource Conservation and Recovery Act.)

62 *E.g.*, MODEL PENAL CODE § 2.02(2)(i) (Proposed Official Draft 1962).

63. Habicht, *supra* note 23, at 10,483.

64. *Id.*

65. *See* Paul H. Robinson & Jane A. Grail, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

66. "Mens rea is not a unitary concept, but may vary as to each element of a crime . . . . To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what level of intent Congress intended the

as to impose strict liability for some elements of the offense and relax the "knowledge," or mens rea requirement, as to others.

The "substantive" erosion of the scienter requirement makes possible the RCO doctrine. Additionally, it has eased the prosecution's "procedural" duty of proving the knowledge requirement. Under the RCO doctrine, the prosecution is not required to present direct evidence of the corporate manager's state of mind. The primary characteristic of the RCO doctrine is that circumstantial evidence can be used to infer knowledge, specifically, that wrongful conduct can be inferred as a result of the position, responsibility and authority of the company official.

III. SUPREME COURT DEVELOPMENT OF THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

The RCO doctrine has its genesis in a series of Supreme Court cases stretching from the turn of the century to 1975. These decisions reviewed criminal convictions arising under regulatory statutes designed to protect the public health and welfare.[67] Those statutes have become known as "public welfare" statutes.[68] None of the Supreme Court decisions reviewed environmental protection statutes.

There was a considerable leap, in both years and legal theory, to the application of the RCO doctrine to environmental crimes. It was not until the late 1980s and early 1990s that the doctrine was applied to environmental offenses. Its use for such offenses seemed to materialize suddenly, almost as if out of nowhere. The major environmental decisions concerning the RCO doctrine came from the federal circuit courts. To date, none has been reviewed by the Supreme Court.

In Supreme Court cases, the RCO doctrine started in the context of misdemeanor violations prosecuted under public welfare statutes. The statute imposed strict liability, thereby dispensing with the traditional mens rea or scienter requirement. In contrast, a recent line of environmental cases reviewed by federal circuit courts expanded the RCO doctrine to fit felony statutes that expressly specify the scienter element by requiring a "knowing" violation.[69] However, some of the

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Government to prove . . . ." United States v. Freed, 401 U.S. 601, 612-14 (1971) (Brennan, J., concurring).

67. Public welfare legislation is meant to "touch phases of the lives and health of people, which in the circumstances of modern industrialism, are largely beyond self-protection." United States v. Dotterweich, 320 U.S. 277, 280 (1943) (referring to the Federal Food, Drug and Cosmetic Act (FDCA) of 1938, which was meant to prohibit the introduction of adulterated or misbranded drugs into interstate commerce).

68. *Id.*

69. *See supra* note 51.

decisions in the environmental cases have diluted the notion of a "knowing" violation so far that the offense comes perilously close to strict liability.

A. *Legitimating the Removal of Intent in Public Welfare Legislation:* Shevlin-Carpenter Co. v. Minnesota *and* United States v. Balint

The seeds of the RCO doctrine are found in two Supreme Court cases. Those cases determined whether due process prevented the application of strict criminal liability to violations of public welfare statutes. To prevent the criminal punishment of innocent conduct, the common law required proof that mens rea underlay the defendant's conduct. Violators of public welfare statutes therefore relied on a due process guarantee that scienter was required for a criminal prosecution.

In the 1910 decision *Shevlin-Carpenter Co. v. Minnesota*[70], the Court held that due process was not violated by public welfare statutes from which the mens rea requirement had been removed.[71] The defendant, a corporation, was convicted of a misdemeanor violation of a state statute prohibiting the removal of timber from state lands without a permit.[72]

The fundamental policy question before the Court was whether to allow the elimination or diminution of traditional scienter requirements for criminal conduct when such requirements would undercut the protection sought for society through emerging regulatory laws enacted in the name of public welfare. These laws were products of the turn of the century progressive movement in American legislation, and later characterized by the Supreme Court as a legislative response to the threats created by a modern industrial society.[73] They were initially meant to extend government regulation to activities that threatened the public welfare in areas like food, narcotics, industrial safety, traffic, and natural resource protection.

Public welfare statutes eliminated the scienter requirement from criminal proof through strict liability. This was no small matter, for it clashed head-on with the fundamental principle that criminal liability must be based on a guilt-laden or criminal state of mind.[74] *Shevlin-*

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70. 218 U.S. 57 (1910).
71. *Id.* at 67-70.
72. *Id.* at 62-63.
73. Morrisette v. United States, 342 U.S. 246, 252-56 (1951).
74. *See id.* at 250-51.

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Carpenter enunciated that due process in criminal prosecution was not undercut by the lack of a scienter requirement in public welfare legislation.[75] The Court adopted the outlook that in order to prevent or prohibit certain acts which jeopardize the public welfare, people who performed these acts would do so at their own peril and could not resort to the defense of good faith or ignorance.[76]

Public welfare statutes removed the scienter requirement and looked to strict liability to induce the targets of public welfare regulation to learn about and comply with the law. The public welfare statute places risk of the harm sought to be addressed on the targets of regulation because they can easily inform themselves of the dangers they create and not on members of the public, as they are unlikely to be able to protect themselves. This philosophy was behind the 1922 decision in *United States v. Balint*.[77]

In *Balint*, the Court upheld the constitutionality of a strict liability public welfare statute for a felony conviction. The defendant was indicted for a violation of the Narcotics Act of 1914.[78] He claimed that due process dictated that the government, in a felony offense, had the burden of proving that he knew the substances he sold were illegal drugs.

The Court rejected the defendant's due process claim based on the absence of a mens rea requirement[79] and stated the government "may in the maintenance of a public policy provide 'that he who shall do [specified wrongful acts] shall do them at his peril and will not be heard to plead in defense good faith or ignorance.'"[80] In the instance of the Narcotics Act, the Court accepted the principle that a strict liability public welfare statute could impose felony sanctions because

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Id.; Smith v. California, 361 U.S. 147, 150 (1959)("'[T]he existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'") (quoting Dennis v. United States, 341 U.S. 494, 500 (1951)); United States v. Int'l Mineral & Chem. Corp., 420 U.S. 558, 565 (1971) (referring to the well-rooted importance in the legal system of requiring proof of the guilty and criminal mind for criminal liability: "This case stirs large questions—questions that go to the moral foundations of the criminal law. Whether postulated as mens rea, or willfulness, or criminal responsibility, or scienter, the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice." (Harlan, Brennan, & Stewart, J.J., dissenting).

75. 218 U.S. at 67-70.

76. *Id.* at 70.

77. 258 U.S. 250 (1922).

78. Pub. L. No. 63-223, 38 Stat. 785.

79. *Balint*, 258 U.S. at 251-52 ("While the general rule at common law was that the *sciente* was a necessary element in the . . . proof of every crime . . . . [T]here has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.").

80. *Id.* at 252 (quoting *Shevlin-Carpenter Co.*, 218 U.S. at 69-70).

the importance of protecting public health and welfare exceeded the possibility of subjecting an innocent person to felony exposure.[81]

B. *From Absence of Intent to Responsible Share Doctrine:* United States v. Dotterweich

Shevlin-Carpenter and *Balint* allowed the elimination of the scienter element in public welfare statutes. This is an exception to the due process requirement that *scienter* be proved in criminal prosecutions. The first Supreme Court case to approve the extension of this exception to corporate officers was the 1943 decision in *United States v. Dotterweich*.[82] *Dotterweich* created the "responsible share" doctrine, predecessor to the RCO doctrine.

The Supreme Court's decision in this case substantially turned on recognition that the statute being reviewed, the Food, Drug, and Cosmetic Act (FDCA),[83] was a public welfare statute. The Court reasserted and reinforced the stance implied in the previous two decisions, that public welfare legislation places the risk of the danger sought to be regulated on the presumptively informed, regulated community, rather than the presumptively innocent, unprotected public.[84] Upholding the conviction of a pharmaceutical company president for a criminal violation of the FDCA, the Court stated, "[in] the interest of the larger good [Congress] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[85]

The Supreme Court upheld a jury's guilty verdict against Joseph H. Dotterweich, the president and general manager of the Buffalo Pharmaceutical Company.[86] He was convicted for misdemeanor violations of the FDCA because the company shipped misbranded and

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81. *Id.* at 254 (The Court described the purpose of the Narcotics Act: "to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.").

82. 320 U.S. 277 (1943).

83. 21 U.S.C. §§ 301-393 (1988 & Supp. 1992).

84. United States v. Dotterweich, 320 U.S. 277, 285 (1943) ("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.").

85. *Id.* at 281.

86. *Id.* at 278.

adulterated drugs in interstate commerce.[87] At that time, it was a misdemeanor for "any person" to violate the Act.[88] Dotterweich's company did not manufacture the drugs, but repackaged them with its own label and shipped the drugs without knowing they had been adulterated. The Second Circuit overturned Dotterweich's conviction using a corporate veil rationale.[89] It said the corporation was the only "person" subject to conviction under the FDCA unless the corporation functioned "as a screen for Dotterweich."[90]

The Supreme Court rejected the argument that only the corporation could be held criminally liable, noting that "the only way in which a corporation can act is through the individuals who act on its behalf."[91] The Supreme Court reinstated the misdemeanor conviction even though the shipment had been accidental. The prosecution did not claim that Dotterweich knew the violations occurred or that he participated in the shipping and distribution of the company's goods. "Ignorance of the law" traditionally does not excuse criminal behavior,[92] and the court rejected the defense that Dotterweich's ignorance of unlawful conduct relieved him of criminal liability.[93]

The Supreme Court had become fully comfortable with the notion that public welfare legislation could discard the conventional mens rea requirement and employ strict liability. It found the FDCA was "a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing."[94]

Based on the premise that the corporation acts through individuals who act on its behalf, the Supreme Court determined the

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87. *Id.* The FDCA forbids "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." 21 U.S.C. § 331(a) (1988).

88. 21 U.S.C. § 333(a)(1940).

89. United States v. Dotterweich, 320 U.S. 277, 279 (1943).

90. *Id.*

91. *Id.* at 281. The Court's view was reminiscent of the view of the eighteenth century Lord Chancellor of England, Barron Thurlow, who stated: "Did you ever expect a corporation to have conscience, when it has not soul to be damned, and no body to be kicked." Janet Wodka, Comment, *Sentencing the CEO: Personal Liability of Corporate Executives for Environmental Crimes*, 5 TULANE ENVTL. L. J. 635, 648 (1992) (citing *e.g.*, John C. Coffee, Jr., *No Soul to Damn, No Body to Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 390 (1981)).

92. *See* United States v. Freed, 401 U.S. 601, 612 (1971) (Brennan, J., concurring) ("If the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the ordinary intent requirement – mens rea – of the criminal law does not require knowledge that an act is illegal, wrong or blameworthy.").

93. United States v. Dotterweich, 320 U.S. at 280.

94. *Id.* at 280-81.

offense can be imputed to "all who do have a responsible share in the furtherance of the transaction which the statute outlaws . . . ."[95] The Court thus gave approval to exposing Joseph Dotterweich to criminal prosecution on a strictly liable basis because of his position in the company.[96]

The Supreme Court in *Dotterweich* did not create the RCO doctrine, but rather created its precursor, the "responsible share" doctrine. The responsible share doctrine was not an effort to expand liability for the sake of advancing public welfare legislation. It appears to have been an effort to place a reasonable boundary. It prevented over-stretching employee liability in the face of the balancing act Congress confronted in enacting public welfare protection based on strict liability.

The Court acknowledged the hardship of imposing criminal liability on persons who had no actual knowledge of criminal wrongdoing, in this case a corporate official, but gave deference to Congressional weighing of the hardships. It also found that the legislature chose to situate the hardship "upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers . . . rather than throw the hazard on the innocent public who are wholly helpless."[97] Due process considerations prompted the Supreme Court decision to place a limit on the imposition of hardship on employees actually lacking "awareness of wrongdoing." *Dotterweich* confined liability to those employees who might have a "*responsible share* in furtherance of the transaction which the statute outlaws."[98] The Court did not specify the kinds or categories of employees who have a "responsible share" in corporate business.[99] It merely stated that a duty of care applied to the corporate employee "otherwise innocent but standing in a *responsible relation* to a public danger."[100] At the very least, the conviction of Dotterweich illustrated that "responsible relation" covered corporate employees who had the authority to prevent violations.

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95. *Id.* at 284.
96. *Id.* at 279-81.
97. *Id.* at 285.
98. United States v. Dotterweich, 320 U.S. 277, 284 (1943) (emphasis added).
99. The Court stated:

> It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress . . . would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.

Id. at 285.
100. *Id.* at 281 (emphasis added).

C. *From Responsible Share to Responsible Corporate Officer Doctrine:* United States v. Park

Over thirty years after *Dotterweich*, the Supreme Court transformed the responsible share doctrine into the RCO doctrine in *United States v. Park*.[101] *Park* also involved the conviction of a corporate officer for violating the FDCA. The Court directly addressed the issue of whether a top officer in a large corporation could be held criminally liable for the actions of subordinates.

Park established the principle that, under public welfare statutes, corporate officials are ultimately responsible for the violations of subordinates over whom they exert authority. The Court imposed upon corporate officials a duty of vigilance to ensure public welfare offenses do not happen. *Park* refined the responsible share doctrine to impose a standard of care on corporate officials in a position to prevent or correct violations. As the Supreme Court in *Park* made clear, strict liability for violation of a public welfare statute such as FDCA does not arise from a corporate position per se, but from the responsibility and authority to stop or remedy a violation. The *Park* decision also very clearly illustrated that public welfare statutes could validly impose criminal liability upon corporate officials who were far-removed from the daily operations of their large-scale organizations.

In *Park*, the government secured convictions, under the FDCA, of Acme Markets and John R. Park, its president, for allowing rodents to infest the company's Baltimore warehouse.[102] Acme was a large national food chain that employed approximately 36,000 employees and operated 874 retail outlets and sixteen warehouses.[103] Park, whose office was located in Philadelphia, pleaded not guilty to the violations at the Baltimore warehouse.

Park essentially offered a defense of objective impossibility,[104] arguing that as head of a large corporation he was "powerless" to prevent or remedy violations arising from day to day operations.[105] Additionally, he argued it was reasonable for him to delegate authority for such matters to dependable subordinates upon whom he relied to comply with the statute.[106] The Food and Drug

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101. 421 U.S. 658 (1975).

102. *Id.* at 660. An FDA inspector found mouse pellets and a hole chewed in one of the boxes. *Id.* at 662 n.4.

103. *Id.* at 660.

104. *Id.* at 677 (the Court observed that Park did not request an instruction on the impossibility defense and consequently was not deciding whether he was entitled to this defense).

105. *Id.*

106. United States v. Park, 421 U.S. 658, 677 (1975).

Administration (FDA) had informed Park of violations at the Baltimore warehouse.[107] He contended he was informed by his corporate legal department that the head of the Baltimore division was undertaking remedial action and had informed the FDA he was doing so.[108] As part of his objective impossibility defense, Park asserted "he did not 'believe there was anything [he] could have done more constructively than what [he] found was being done.'"[109]

The Supreme Court had little trouble disposing of Park's objective impossibility defense. *Park* did allow use of the defense, and in doing so, softened the strict liability standard imposed in *Dotterweich*. The Court concluded that Park did not meet his burden of proving the defense. The government demonstrated that two years earlier Park had been informed by the FDA of violations at the company's Philadelphia warehouse. From this earlier notification of the employees' failure to prevent violations at the Philadelphia warehouse, the Supreme Court concluded he should have known he could not absolutely depend upon subordinates to prevent contamination at the company's other warehouses.[110] The government also showed that, as a matter of his actual role and behavior in the company, Park could not credibly claim he relinquished all of his responsibilities and duties to subordinates for the company's day-to-day operations.[111] The general counsel for the company testified that according to its bylaws, Park's responsibilities included "general and active supervision of the affairs, business, offices and employees of the company."[112] During cross examination, Park conceded that his overall responsibilities included concern for the sanitary conditions at the company's warehouses.[113] Park did not factually establish the defense of objective impossibility. The Court could only conclude that Park was not personally powerless to prevent violations at the Baltimore warehouse and that he failed to adequately oversee subordinates to prevent infractions from happening.[114]

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107. *Id.* at 659-60.

108. *Id.* at 664.

109. *Id.* (quoting the record on appeal at pp. 43-47).

110. "Assuming, *arguendo*, 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.

111. *Park*, 421 U.S. at 677.

112. *Id.* at 663 n.7. The Court did note that juries may demand more evidence than corporate bylaws before they find a corporate officer has sufficient authority and responsibility to be criminally liable. *Id.* at 676.

113. *Id.* at 664-65.

114. *Id.* at 677.

The Supreme Court also made clear that the objective impossibility defense was a weak defense against prosecution for a violation under a public welfare statute. This was due to the Court's conclusion that the FDCA established a duty of care for corporate officials who had responsibility for ensuring compliance with the Act.[115] If a corporate official like Park raised the objective impossibility defense of powerlessness to prevent or remedy a violation, that person carried the burden of proving such powerlessness.[116] Essentially, the Court operated on a presumption of responsibility, in which the corporate official was regarded as being responsible for ensuring compliance with public welfare legislation like the FDCA. The Court stated:

> Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts 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.[117]

The Court implied that serious judicial scrutiny would be applied to a defendant's claim of powerlessness where public welfare statutes like the FDCA were concerned.[118]

Park recognized that public welfare statutes like the FDCA impose a burden of vigilance upon corporate officials, equivalent to a "should have known" standard of responsibility, for activities or violations they have the authority to oversee. The Court noted that Congress made the FDCA a strict liability statute to require the "highest standard of foresight and vigilance."[119] In the case of Mr. Park, this duty of care was breached because he was aware of previous violations and was in a supervisory position with authority to correct and prevent violations. The Court stressed that Park's liability arose, not from his corporate position alone, but from the responsibility and authority his position gave him to prevent violations of the FDCA.[120] The duty of care owed by a corporate official under the FDCA was, "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 ensure violations will not occur."[121] In sum, to achieve a conviction for violation of a strict liability public welfare statute like

115. *Id.* at 671-72.
116. United States v. Park, 421 U.S. 658, 673 (1975).
117. *Id.* at 673-74.
118. *Id.* at 673.
119. *Id.*
120. *Id.* at 672, 674.
121. *Park*, 421 U.S. at 672.

the FDCA, the government need only prove the corporate official had responsibility and authority to prevent or correct a violation and failed to do so.[122]

The RCO doctrine essentially boils down to making corporate officials vicariously liable for the offenses committed by their subordinates. If the corporate official is vicariously liable, then both the actus reus, or overt guilty act requirement, and the mens rea, or guilty mind requirement, are altered from traditional common law. The Supreme Court, in fact, likened a corporate officer's responsibility for the acts of subordinates who violate the FDCA to vicarious liability. The Court observed that under vicarious liability, the criminal act of an employee could result in liability for superiors "who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for [the act's] commission .... [W]here the statute . . . dispense[s] with 'consciousness of wrongdoing' an omission or failure to act [is] a sufficient basis for a responsible corporate agent's liability."[123] It is the duty of foresight and vigilance imposed upon the corporate official by public welfare legislation that logically leads to the RCO doctrine corresponding to vicarious liability.

D. Lessons from Dotterweich *and* Park *Together*

As in *Dotterweich*,[124] the Court in *Park* was conscious that sacrificing individual liberties by imposing criminal liability on corporate officers lacking actual knowledge of criminal wrongdoing was harsh. In both decisions, furthering the public welfare purposes of the FDCA took precedence. In *Dotterweich*, the Court found that in enacting the FDCA, Congress made a choice in balancing hardships, preferring to place the hardship on the regulated parties who at least could inform themselves of conditions dangerous to consumers.[125] This was a better alternative than inflicting the hazard on an innocent and helpless public.[126] In *Park*, the Court accepted the sacrifice of the corporate official's individual liberties because Congress saw that imposing "the highest standard of foresight and vigilance"[127] was a justified public expectation 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."[128]

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122. *Id.* at 671.
123. *Id.* at 670-71.
124. United States v. Dotterweich, 320 U.S. 277, 285 (1943).
125. *Id.*
126. *Id.*
127. *Park*, 421 U.S. at 673.
128. *Id.* at 672.

For strict liability public welfare violations, *Park* did to the traditional actus reus requirement what *Dotterweich* did to the traditional mens rea requirement. Both greatly diminished the requirement's importance. The lower court opinion in *Park* held that, while *Dotterweich* had "dispense[d] with the element of 'awareness of some wrongdoing,'" the Supreme Court had not interpreted the FDCA as eliminating the element of wrongful action.[129] The Court of Appeals held that Park could only be found guilty if the government proved he personally engaged in the wrongful action. The Supreme Court disagreed.

The Supreme Court's construction of the FDCA imposed a duty of vigilance and foresight in the interest of public safety. This amounted to eliminating the element of wrongful action by the corporate executive. The Court, as noted before, concluded this duty meant the corporate official must not only pursue and correct violations when they arise, but also must use foresight to prevent them from occurring.[130] By virtue of *Park* and *Dotterweich*, under strict liability public welfare statutes, corporate officers may be held liable for offenses even if they committed no overt act and had no blameworthy intent or knowledge.

E. Moving Forward in the RCO Doctrine: From Statutory Strict Liability to Statutory Scienter

The RCO doctrine as it developed and emerged from *Dotterweich* and *Park* was not specifically devised to fit the criminal liability determination found in most federal environmental statutes. *Park* and *Dotterweich* focused on the FDCA, which was explicitly a strict liability statute, meaning it did not contain any scienter requirement. The environmental laws are different because they do contain a scienter requirement. To avoid the due process problem of punishing innocent conduct, environmental statutes that impose felony sanctions require "knowing" violations.[131]

A number of federal circuit courts have extended the RCO doctrine beyond traditional strict liability public welfare statutes to environmental statutes containing a knowledge requirement and felony liability. These circuits have allowed knowledge to be imputed from employees of the corporation to responsible corporate officials. Federal circuits have been able to take these steps by regarding these laws as strict liability public welfare statutes like the Narcotics Act

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129. *Id.* at 666 (citing *Dotterweich*, 320 U.S. at 281).
130. *Id.* at 672.
131. *See supra* note 61.

and the FDCA. One commentator has suggested that those environmental laws with a scienter requirement are not true public welfare laws because they are not strict liability.[132] He has instead labeled them "public welfare hybrids" because of the addition of a knowledge requirement.[133] Whatever they are called, the environmental statutes with a knowledge requirement like RCRA and the Clean Water Act, to which the RCO doctrine has been applied, are being treated like public welfare statutes. The result is that the scienter requirement is significantly diluted, and the government is accorded a very easy burden of proof.

The reduction of the scienter requirement by the federal circuit courts has been accomplished through allowing the mere showing of general intent to satisfy the knowledge requirement. In traditional felony crimes, "knowledge" required specific intent or knowledge of one's actions and their consequences. When applying the RCO doctrine to environmental statutes, the Circuit Courts have allowed "knowledge" to correspond to general intent, or awareness of one's actions, but not to their consequences.[134]

It is unlikely that the federal circuits would have so readily progressed with an RCO doctrine based on a diluted scienter requirement without a firm foundation in Supreme Court decisions. Primarily four other Supreme Court decisions make it possible for the circuit courts to move from application of the RCO doctrine in *Dotterweich* and *Park* for strict liability public welfare offenses, to environmental laws which include a knowledge requirement and impose felony sanctions. These Supreme Court cases, in one fashion or another, all justify dilution of the scienter requirement in regulatory legislation by recognizing both the public welfare status and purpose of the statute. Although these Supreme Court decisions reviewed non-environmental statutes, it was a relatively simple matter for the federal circuit courts to take them as examples for diluting the knowledge requirement in environmental legislation, thereby allowing application of the RCO doctrine to it.

In *Morrisette v. United States*,[135] the Court discussed the importance of criminal intent in determining criminal liability[136] and

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132. Clave, *supra* note 2, at 293.

133. *Id.*

134. *Id.* at 293-94.

135. Morrisette v. United States, 342 U.S. 246 (1952). Morrisette was convicted of a misdemeanor theft of federal property in violation of 18 U.S.C. § 641 (presently 18 U.S.C. § 641 (1988)). The Court overturned Morrisette's conviction because it indicated that Congress had codified a common law crime in the statute he allegedly violated and that it could not do away with the traditional mens rea requirement for a codified common law crime unless Congress clearly intended it. However, the Court noted that when "an offense [is] new to general law," as

the justification for eliminating intent through strict liability in public welfare offenses. As to the elemental nature of requiring knowledge of wrongful conduct for criminal liability, the Court made reference to a characteristically pithy remark by Oliver Wendell Holmes, who stated "[e]ven a dog distinguishes between being stumbled over and being kicked."[137] The Court noted that the "[m]ost extensive inroads upon the requirement of intention . . . are . . . the whole range of crimes arising from omission of duty."[138] Recognizing that a failure to act can incur liability just like performing a prohibited act, *Morrisette* noted that many public welfare crimes "are in the nature of neglect where the law requires care, or inaction where it imposes duty."[139] The Court explained that dispensing with the traditional mens rea requirement is congruent with the duty of care created by public welfare legislation.[140] It noted that "[t]he 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."[141]

The next big step for the application of a knowledge requirement to a public welfare offense occurred in *United States v. Freed*.[142] *Freed* rested upon the proposition that parties subject to the demands of public welfare regulation are obligated to be aware of the rules affecting their activities and to see that these activities meet those rules. In *Freed*, the Court rejected the argument that conviction for the unregistered possession of hand grenades required knowledge of the law's registration requirement.[143] Justice Douglas' opinion declared that because the firearms law was a "regulatory measure in the interest of the public safety," requiring proof of knowledge of the law's registration requirement was not necessary because "one would hardly be surprised to learn that possession of hand grenades is not an innocent

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opposed to a codified common law crime, an apparent failure to include criminal intent as a requirement for conviction can be construed to intend strict criminal liability. *Id.* at 262-63.

136. *Id.* at 250-51 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of human will and a consequent ability and duty of the normal individual to choose between good and evil.").

137. *Id.* at 252 n.9 (quoting *The Common Law* (1881)).

138. *Id.* at 251 n. 8.

139. *Id.* at 255.

140. *Morrisette*, 342 U.S. at 256.

141. *Id.*

142. 401 U.S. 601 (1971).

143. *Id.* The case concerned a federal statute making it illegal to receive or possess an unregistered firearm (current version at 26 U.S.C. § 5812(a)(1988)).

act."[144] The concurrence by Justice Brennan, who noted that Congress did not intend to require knowledge that the registration of hand grenades was required, nonetheless observed that such weapons were so dangerous the defendant should be presumed to know they were regulated.[145]

During the same term as *Freed*, the Court decided *United States v. International Minerals and Chemical Corp.*,[146] where it construed the word "knowingly" in a statute that imposed criminal sanctions for violating federal regulations governing the shipment of dangerous bulk liquids.[147] The Court in *International Minerals* rejected the argument that the government must prove the defendant possessed actual knowledge of the statute or regulation allegedly violated. The Court held that the word "knowingly" in the statute referred to knowledge of the facts and not actual knowledge of the regulation or of a violation of the regulation.[148]

The Court rejected construing the statute as imposing strict liability, but it did not find that a knowledge requirement allowed the defendant to raise ignorance of the law as a valid defense.[149] While the government did not have to show the defendant had actual knowledge of the regulation, the knowledge requirement was applicable to each element of the offense.[150] The only defense available regarding the knowledge requirement was ignorance of a material fact or circumstance.[151] Therefore, the corporate official need only know the shipment occurred, not that the shipment was subject to regulation or

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144. *Id.* at 609 (citing United States v. Mack, 112 F.2d 290 (1940)).

145. *Id.* at 616 (Brennan, J., concurring) ("Without exception, the likelihood of government regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it.").

It should be noted the statute in question lacked an express mens rea requirement and appeared to impose strict liability. Justice Brennan's concurring opinion noted the crime was divided into three elements: (1) possession of the items that (2) are hand grenades and (3) are unregistered. *Id.* at 612, 614. Explaining that "mens rea is not a unitary concept, but may vary as to each element of a crime," he concluded that Congress intended a knowledge requirement for the first two elements but not for the last. *Id.* at 614; *see also id.* at 609 (explaining the conclusion that Congress meant to impose strict liability for the third element of the crime) (citing *Balint*, 258 U.S. at 254).

146. 402 U.S. 558 (1971).

147. *Id.* The defendant was charged with shipping dangerous acids in interstate commerce without indicating in shipping documents that they were "corrosive liquids," that violated regulations adopted pursuant to 18 U.S.C. § 834(a), which provided that whosoever "knowingly" violated such regulations was subject to criminal penalties.

148. *Id.* at 563.

149. *Id.* (noting "it is too much to conclude that in rejecting strict liability the House was also carving out an exception to the general rule that ignorance of the law is no excuse.").

150. *Id.* at 563.

151. *International Minerals*, 402 U.S. at 563-64 (stating "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered").

that the regulation had been violated. The net result is that all the government had to do to satisfy the knowledge requirement was show the defendant was aware of the actions which allegedly violated the statute. This is pure general intent.

Minimizing the scienter requirement so that all the government had to prove was a defendant's awareness of the *actions* that allegedly violated the statute, but not awareness of the statute itself, was justified in the manner typical for public welfare statutes. It was the danger posed by the activity regulated that was important to the Court in *International Minerals.* The Court established the presumption that anyone dealing in dangerous materials has knowledge of the regulations governing them. It was this danger that allowed both due process objections to be overcome and a presumption of awareness of the regulation to be imposed upon the defendant. As the Court noted, "pencils, dental floss, paper clips may also be regulated. But they may be the types of products which might raise substantial due process questions if Congress did not require . . . *'mens rea'* as to each ingredient of the offense."[152] Likening the dangers of hazardous materials shipments to the earlier cases of *Balint* (narcotics) and *Freed* (hand grenades), the Court concluded that when "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be *presumed to be aware of the regulation.*"[153]

Liparota v. United States[154] is the latest Supreme Court decision that has bearing upon the less stringent scienter requirement that underlies the RCO doctrine as it has been developed for environmental prosecutions. *Liparota* illuminates the proposition that the trip point for diminishing the scienter requirement goes no further than determining whether the legislation is a public welfare statute. In the case, the Court held that a statute punishing illegal possession of food stamps required knowledge of the illegality.[155] The Court determined the defendant's claim of ignorance of the regulations was an

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152. *Id.* at 564-65.

153. *Id.* (emphasis added). Justice Stewart's dissent had grave problems with the presumption of defendant's knowledge of the regulation, noting that the majority opinion made it possible that a person who had never heard of the regulation might make a single shipment in his lifetime and be criminally liable for an offense punishable by a year in prison. *Id.* at 569 (Stewart, J., dissenting).

154. 471 U.S. 419 (1985).

155. The defendant was alleged to have committed food stamp fraud by violating a statute that punished "whoever knowingly uses, transfers, acquires, alters or possesses coupons . . . in any manner not authorized by [the statute] or the regulations." *Id.* at 420 (quoting 78 Stat. 708 (codified as amended at 7 U.S.C. § 2024(b)(1)(1988))).

acceptable ignorance of fact defense, reasoning that the unauthorized nature of his conduct was a material fact and legal element of the crime. To explain its holding, the Court indicated the importance of the distinction between whether or not an offense fitted into the public welfare mode. The Court allowed that even if knowledge of the regulation was an intended element of a crime, "[i]n most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[156] As the Court saw it, food stamp fraud was not regarded as such an offense by Congress.[157]

The Court noted Congress could have intended to impose strict liability concerning knowledge of the regulatory requirements.[158] The lack of clear legislative intent or public welfare benefit precluded this interpretation because the statute would have otherwise "criminalized a broad range of apparently innocent conduct" and thus violated due process.[159] The Court made clear that the dangerous activities regulated by public welfare statutes have just the opposite effect. They deal with conduct which cannot reasonably be considered innocent. Looking back to the hand grenade case in *Freed*, the Court repeated the statement that the government need not prove the owner of dangerous hand grenades knows they have to be registered.[160] The Court placed a reminder in its *Liparota* decision, that in *Freed* it had observed "one would hardly be surprised to learn that the possession of hand grenades is not an innocent act."[161]

IV. RCRA AND THE RCO DOCTRINE

A. The Knowledge Requirement in RCRA

The Resource Conservation and Recovery Act (RCRA)[162] has been the principal statutory battleground for the debate over the application of reduced mens rea, and the concomitant use of the RCO doctrine in federal environmental law. The legislation's stated findings and objectives declare a Congressional intent to protect human

156. *Id.* at 433.
157. *Id.*
158. *Id.* at 432-33.
159. *Liparota*, 471 U.S. at 432-33.
160. *Id.* at 433.
161. *Id.* (quoting *Freed*, 401 U.S. at 609.)
162. Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1992)).

health and the environment, while characterizing the statute in the mold of public welfare legislation.[163]

RCRA provides for "cradle to grave" regulation of solid waste[164] and hazardous waste[165] disposal. RCRA requires EPA to identify and list hazardous wastes.[166] Generators of hazardous waste must comply with EPA's regulations concerning record keeping, labeling, and reporting requirements[167] and can only treat, store, or dispose of hazardous waste at a facility with a permit.[168] The legislation imposes a manifest system to allow for the process of tracking hazardous waste from generators to treatment, storage, and disposal.[169] The transporters of hazardous waste must comply with labeling and manifest requirements.[170] Treatment, storage, and disposal facilities must obtain a permit,[171] and their operations are subject to record keeping, inspection, and monitoring requirements.[172]

There are two kinds of criminal enforcement provisions in RCRA, and both have express knowledge requirements.[173] One is the

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163. 42 U.S.C. § 6901(b) states: The Congress finds with respect to the *environment and health*, that: . . . (2) disposal of solid and hazardous waste in or on the land without careful planning and management can present a danger to *human health and the environment*" (emphasis added).

42 U.S.C. § 6902(a) states: "The objectives of this chapter are to promote the protection of *health and the environment* . . . " (emphasis added).

42 U.S.C. § 6902(b) states: "Congress hereby declares it to be the national policy of the United States that . . . [w]aste . . . should be treated, stored or disposed of so as to minimize the present and future threat to *human health and the environment*" (emphasis added).

164. The term "solid waste" is defined as:

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . .

42 U.S.C. § 6903(27) (1988).

165. The term "hazardous waste" is defined as:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may - (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5) (1988).

166. 42 U.S.C. § 6921 (1988 & Supp. 1992).

167. 42 U.S.C. §§ 6922, 6927, 6930, 6934 (1988 & Supp. 1992).

168. 42 U.S.C. § 6928(d)(2)(A) (1988 & Supp. 1992).

169. 42 U.S.C. § 6922(5) (1988).

170. 42 U.S.C. § 6923(a) (1988).

171. 42 U.S.C. § 6925(a) (1988 & Supp. 1992).

172. 42 U.S.C. § 6924 (1988 & Supp. 1992).

173. RCRA also provides for civil penalties. EPA is empowered to issue compliance orders assessing civil penalties of up to $25,000 per day for any violation of RCRA, including suspension or revocation of permits. 42 U.S.C. § 6928(a), (g) (1988). If a violator fails to correct the violation pursuant to a compliance order, EPA may issue additional civil penalties of up to $25,000

general criminal penalty section of RCRA 3008(d),[174] which imposes felony sanctions for "knowingly" conducting an activity in violation of RCRA.[175] The other criminal provision is the "knowing

per day for continued noncompliance and suspend or revoke the violator's RCRA permit. 42 U.S.C. § 6928(c) (1988). Federal courts can assess civil penalties of up to $25,000 per day for violations of RCRA. 42 U.S.C. § 6928(g) (1988 & Supp. 1992).

174. 42 U.S.C. § 6928(d) (1988 & Supp. 1992).

175. The text of RCRA § 3008(d), codified in 42 U.S.C. § 6928(d), provides as follows:

(d) Criminal penalties

Any person who –

(1) *knowingly* transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et. seq.];

(2) *knowingly* treats, stores, or disposes of any hazardous waste identified or listed under this subchapter –

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et. seq.]; or

(B) *in knowing* violation of any material condition or requirement of such permit;

(C) *in knowing* violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) *knowingly* omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) *knowingly* generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who *knowingly* destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) *knowingly* transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) or to be accompanied by a manifest;

(6) *knowingly* exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) *knowingly* stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter –

(A) *in knowing* violation of any material condition or requirement of a permit under this subchapter; or

(B) *in knowing* violation of any material condition or requirement of any application regulations or standards under this chapter;

42 U.S.C. § 6928(d) (1988 & Supp. 1992) (emphasis added).

endangerment" section in RCRA 3008(e).[176] This provision imposes severe felony sanctions[177] for persons who knowingly conduct an activity in violation of RCRA 3008(d), and who also "know" at the time that another person is being placed "in imminent danger of death or serious bodily injury."[178]

When undertaken knowingly, the key actions which are punished by the general criminal penalty section 3008(d) include: transporting hazardous waste to a site which does not have a RCRA permit;[179] treating, storing, or disposing of hazardous waste without a permit or in violation of one;[180] omitting material information or making a false statement in a document filed for purposes of compliance with EPA regulations;[181] generating, storing, treating, transporting, disposing, exporting or otherwise handling hazardous waste and; failing to file or maintain required documentation;[182] transportation of hazardous waste without a manifest,[183] and improper exportation of hazardous waste.[184]

RCRA does not provide a definition for "knowingly" as used in the general criminal penalty section. Congress allowed that the courts could apply the provision according to "general principles."[185] Unfortunately, "general principles" are different for general intent crimes and specific intent crimes. If applied according to the general principals of traditional criminal law and corresponding specific intent, then "knowingly" would be defined as requiring awareness of

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176. 42 U.S.C. 6928(e) (1988 & Supp. 1992). The text of this section provides as follows:

> (e) Knowing endangerment
>
> Any person who *knowingly* transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1),(2),(3),(4),(5),(6),(7) of subsection (d) of this section who *knows* at that time that he thereby places another person in imminent danger of death or serious bodily injury.

Id. (emphasis added).

177. Violators of this section are subject to a maximum fine of $250,000 (or $1,000,000 if the defendant is an organization) for each violation, imprisonment for up to fifteen years or both. 42 U.S.C. § 6928(e) (1988 & Supp. 1992).

178. *Id.* The knowing endangerment offense requires a two-step process of proof. First, it must be shown the defendant knowingly violated one of section 3008(d)'s criminal provisions. Second, the prosecution must show the defendant acted knowing that the violation put another person in imminent danger of death or serious bodily injury.

179. 42 U.S.C. § 6928(d)(1) (1988 & Supp. 1992).

180. 42 U.S.C. § 6928(d)(2)(A)-(C) (1988 & Supp. 1992).

181. 42 U.S.C. § 6928(d)(3) (1988 & Supp. 1992).

182. 42 U.S.C. § 6928(d)(4) (1988 & Supp. 1992).

183. 42 U.S.C. § 6928(d)(5) (1988 & Supp. 1992).

184. 42 U.S.C. § 6928(d)(6) (1988 & Supp. 1992).

185. S. Rep. No. 172, 96th Cong., 2d Sess. 39 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038.

both one's actions and their consequences. If, as discussed later, RCRA is regarded by a court as similar to a public welfare statute, then general principles would regard "knowingly" as requiring no more than awareness of one's actions,[186] thus making it a general intent crime. The latter approach opens the door to application of the RCO doctrine to offenses under RCRA's criminal penalty section, in which the criminal activities of corporate subordinates or colleagues can be imputed to the corporate officer.

Congress' failure to expressly define "knowingly" for the criminal offenses under RCRA § 3008(d) leaves room for a court that views RCRA as a public welfare statute to apply the RCO doctrine. Little room for this application, however, is allowed for the "knowing endangerment" offense in RCRA § 3008(e). Both by its express terms and legislative history, the "knowing endangerment" offense of RCRA almost completely precludes application of the RCO doctrine. Since the RCO doctrine may not be used for the knowing endangerment offense, it follows that the absence of similar barriers in the criminal penalty section of RCRA allows application of the RCO doctrine in that instance.

The knowing endangerment offense has expressly defined the "knowledge" required for "knowing endangerment" in terms of specific intent, namely that the defendants have *actual knowledge* of both their actions and the consequences. RCRA 3008(f) states that for purposes of the "knowing endangerment" offense, "knowing" is defined to mean defendants possess actual knowledge that their actions put another in imminent danger.[187] Moreover, RCRA 3008(f) dictates that another's knowledge cannot be imputed to the defendant.[188] The Act disallows vicarious or constructive knowledge, which allows the

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186. *See infra* notes 197-250 and accompanying text, discussing opposing views of the Third Circuit in United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) and the Eleventh Circuit in United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1980).

187.

> (1) A person's state of mind is knowing with respect to--(A) his conduct, if he is aware of the nature of his conduct; (B) an existing circumstance, if he is aware or believes that a circumstance exists; or (C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or seriously bodily injury.

42 U.S.C. § 6928(f)(1)(A)-(C) (1988 & Supp. 1992).

188. The section provides:

> (2) In determining whether a defendant who is a natural person knew his conduct placed another person in imminent danger of death or serious bodily injury--(A) the person is responsible only for actual awareness or actual belief that he possessed; and (B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.

42 U.S.C. § 6928(f)(2)(A)-(B) (1988 & Supp. 1992).

awareness of a subordinate to be imputed to the corporate officer, as is possible under the RCO doctrine.

Legislative history reiterates that only actual knowledge can be used to convict for knowing endangerment, not vicarious or constructive knowledge.[189] The committee report declares that a "supervisor . . . who personally lacks the necessary knowledge, should not be criminally prosecuted for knowledge that only his subordinates possessed."[190] Accordingly, if a subordinate knowingly puts another in imminent danger of death or serious bodily injury, the corporate officer cannot be held criminally accountable unless he was actually aware of the conduct.[191]

RCRA allows the introduction of evidence that the defendant took affirmative steps to shield himself from actual knowledge, in a knowing endangerment prosecution.[192] This codifies the "willful blindness" doctrine,[193] under which corporate officials can be held criminally liable if they deliberately shield themselves from knowledge. As a result, corporate officers who lack actual knowledge that employees knowingly placed others in danger nevertheless can be held criminally liable if they purposely avoided awareness of the illegal activity through willful blindness.[194]

B. Opening the Door for the RCO Doctrine for RCRA Offenses

The first few federal circuit courts that applied the RCO doctrine to RCRA were highly receptive to the doctrine, and the early line of cases displayed a steadily more permissive interpretation and application of the doctrine. Once the door to the RCO doctrine had been cracked, the early decisions of courts continued to open it wider.

The permissive approach was based on RCRA as a public welfare statute for which mere general intent sufficed to satisfy the

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189. H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5028, 5038-5039.

190. *Id.* at 5039.

191. However, there is a provision that allows the prosecution to introduce evidence which can expose the corporate officer to criminal liability for the actions of subordinates, despite the actual knowledge requirement.

192. In declaring that actual and not constructive or vicarious knowledge is required, RCRA adds the condition, "[p]rovided, that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information." 42 U.S.C. § 6928(f) (1988 & Supp. 1992).

193. *See* Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 WM. MITCHELL L. REV. 987, 990-96 (1990).

194. For application of the "willful blindness" doctrine, albeit in a non-RCRA setting, see United States v. Jewell, 532 F.2d 697 (9th Cir. 1976).

knowledge requirement in RCRA.[195] These courts had little trouble grouping the hazardous materials regulated by RCRA with the dangers posed by the drugs, firearms and hand grenades at which the public welfare statutes were first directed. Treating RCRA offenses like public welfare offenses did not remove the scienter requirement, as it has for the traditional public welfare statutes. Traditional public welfare statutes were based on express strict criminal liability while RCRA has an express "knowledge" requirement. What these courts did instead was substantially soften the scienter requirement and reduce the prosecution's burden of proving knowledge to a very low level. This is largely accomplished by treating violations of RCRA's general criminal penalty provision as a general intent rather than a specific intent crime and restricting how far the knowledge requirement reaches into the statutory elements of a RCRA offense.

As a result of using general intent as the necessary criminal culpability and attenuating the scienter requirement in element analysis, the government found its burden of proof as to the defendant's actual knowledge eliminated or sharply reduced. When RCRA is treated as a general intent statute, the prosecution does not have to show that the defendant knew what RCRA required or that he acted with the specific purpose of violating RCRA. The prosecutor need only prove the defendant's conduct was intentional or voluntary, as opposed to accidental.[196]

1. Johnson & Towers--*Opening the Door to the RCO Doctrine in the Federal Circuits*

In its landmark decision *United States v. Johnson & Towers, Inc.*,[197] the Third Circuit became the first federal circuit court to directly address the issue of whether the RCO doctrine applies to RCRA. While the Third Circuit opened the door for the RCO doctrine's application to RCRA in the federal courts, its interpretation of the knowledge requirement for a violation of RCRA is one of the most cautious readings among the circuits. The narrowness of the opening provided in *Johnson & Towers* is not surprising since this was the first time a federal circuit considered the RCO doctrine for use with environmental legislation. Nevertheless, *Johnson & Towers* was significant

195. *See* United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502-03 (11th Cir. 1986); United States v. Johnson & Towers, Inc., 741 F.2d 662, 667 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

196. *See* Frederick W. Addison III & Elizabeth E. Mack, *Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time*, 44 SW. L.J. 1427, 1433-35 (1991).

197. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

exactly because it did open the door to the RCO doctrine, and once opened it was pushed open wider by other federal circuits.

Johnson & Towers held that knowledge of every element of the crime is necessary for a conviction under RCRA[198] and that such knowledge must encompass both the regulation and the violation.[199] This interpretation alone makes the decision appear restrictive, not permissive. In the particular case before the Third Circuit, the regulation and violation concerned, respectively, whether the defendant managers knew the company was required to have a permit, and whether they knew the company failed to obtain this permit.[200] The court provided entry for the RCO doctrine by declaring that while the government must prove knowledge of RCRA's permit requirement and its violation, this knowledge "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."[201] The court permitted knowledge of a RCRA violation to be imputed to a corporate manager via the RCO doctrine. It cited *Dotterweich*,[202] and signified that RCRA was a public welfare statute.[203]

The Third Circuit's debut decision for the RCO doctrine is restrictive compared to the other circuits which have made the prosecution's burden even lighter.[204] Unlike the more permissive line of cases which subsequently developed, *Johnson & Towers* allows the defense of ignorance of the law, that is, ignorance of the permit requirement.[205] This would appear to increase the burden on the prosecution. However, in realistic terms, the defense has little hope under the Third Circuit's analysis. While the government must prove knowledge of RCRA's permit requirement, this burden is relatively light because the court allows the jury to infer this knowledge from an employee's corporate position.[206]

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198. *Id.* at 668-69.

199. *Id.* at 669.

200. *Id.*

201. *Id.* at 670.

202. 320 U.S. 277 (1943).

203. *Johnson & Towers*, 741 F.2d at 670. The public welfare status of RCRA was likewise used by the Third Circuit to justify defining corporate officers and employees as within the statute's definition of "person." RCRA does not expressly include "corporate employee" or "responsible corporate official" within its definition of "person." RCRA § 1004(15), 42 U.S.C. § 6903(15). Because of RCRA's public welfare status, the Third Circuit gave a liberal construction of the term "person" to include mid-level managers and responsible corporate officers. 741 F.2d at 664-65; *see also* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 745 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

204. *See* United States v. Hoflin, 880 F.2d 1033, 1039 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986).

205. 741 F.2d at 669-70.

206. *Id.* at 669.

In *Johnson & Towers*, the federal government instituted a criminal prosecution under RCRA, inter alia,[207] against a corporation, a plant foreman, and a service manager at a motor vehicle repair facility.[208] They were charged with pumping solvents without a hazardous waste permit into a trench that flowed into a creek, in violation of section 6928(d)(2)(A).[209] The company did not apply for a RCRA permit. The corporation pleaded guilty. The employees pleaded not guilty, and the district court dismissed the indictment on the grounds that the employees were not culpable under the statute because only an "owner" or "operator" like the company could obtain a RCRA permit.[210] On appeal by the government, the Third Circuit focused on the "knowledge" requirement of RCRA and allowed itself to go beyond the traditional view that only owners or operators of the facility could be held responsible if they "knew or should have known" their firm had failed to comply with RCRA's permit requirement.[211]

The Third Circuit reached the conclusion that section 6928(d)(2)(A) "covers employees as well as owners and operators of the facility who knowingly treat, store or dispose of any hazardous waste."[212] It perceived a problem with the ambiguous use of the word "knowingly" in section 6928(d)(2) when read in relation to its three other subsections, two of which included the additional term "knowing" and one which did not.[213] The individual defendants were charged with violation of subsection (A), which dealt with violations for an unpermitted site. Subsection (A) omitted the term "knowing." Subsections (B) and (C), which respectively dealt with offenses at a permitted site and in connection with interim status regulations, included the word "knowing."[214]

This language implied the government had a greater burden of proof for violations under subsections (B) and (C) because they expressly contained the term "knowing." The Third Circuit found this conclusion did not make sense. Instead, the court determined the omission of "knowing" in subsection (A) was either inadvertent or

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207. The defendants were also charged with a criminal violation of the Clean Water Act. *Id.* at 663-64. Prosecutions under RCRA for discharges of hazardous waste into bodies of water are frequently accompanied by charges under the Clean Water Act, as well.

208. *Id.* at 664.

209. *Id.* at 664 (specifically 42 U.S.C. § 6928(d)(2)(A) (1982)).

210. *Johnson & Towers*, 741 F.2d at 664-65 (referring to 42 U.S.C. § 6925 (1982)).

211. *Id.* at 664.

212. *Id.* at 664-65.

213. *Id.* at 667-68.

214. *Id.*

that "knowingly" in section 6928(d)(2) reached down to apply to the entire subsection.[215]

For the Third Circuit, the solution to the confusion lay in determining "how far down the sentence the word 'knowingly' is intended to travel" in section 6928(d)(2).[216] It therefore engaged in element analysis of section 6928, an exercise which typified subsequent decisions by other circuits but with varying and sometimes contrary results. The Third Circuit concluded that the term "knowingly" in section 6928(d)(2) applies to every subsection of the provision, including subsection (A).[217]

What makes *Johnson & Towers* different than the majority of federal circuit decisions is the court's determination that the term "knowingly" applied to every element of a RCRA offense.[218] The Third Circuit reasoned that "[a]t a minimum" the word "knowingly" which introduced subsection (A) must encompass knowledge that the defendant knew the waste was hazardous, knew a permit was required, and knew the corporation did not have a permit.[219] This contrasts with most other circuits which do not follow the reasoning that every element of the offense must be proven. Rather, other circuits conclude that proof of scienter under RCRA dictates only that the defendant knew activities such as discharge, treatment, storage, and disposal as described by RCRA had occurred and the waste held the prospect of being harmful.[220] In the simplest terms, some other more permissive circuits appear to support the imposition of strict liability to key elements of RCRA's general criminal provision and do not require the government to prove the defendant knew the waste was hazardous and subject to RCRA's provision that a permit was required.

Because it treats RCRA like a public welfare statute, *Johnson & Towers* imposes a relatively light burden of prosecutorial proof of the defendant's knowledge of the regulation and violation. With one hand, the Third Circuit dictates that the prosecution bear the burden of proof for the scienter requirement in a RCRA prosecution. With the other, it lightens the prosecution's burden by minimizing the scienter requirement, allowing knowledge to be imputed to responsible corporate officials. In conducting its analysis, the Third Circuit

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215. *Johnson & Towers*, 741 F.2d at 668-69.

216. *Id.* at 667-68.

217. *Id.*

218. *Id.* at 668-69.

219. *Id.* The Third Circuit stated, "in order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit." *Id.* at 669.

220. *See infra* notes 226-301 and accompanying text.

started with the proposition that RCRA was a public welfare statute and noted that had it lacked an explicit mens rea requirement there would still have been "a reasonable basis for reading the statute without any *mens rea* requirement."[221] The *Johnson & Towers* court found that lightening the mens rea construction for RCRA is made possible by the statute's public welfare status. It stated that "criminal penalties attached to regulatory statutes intended to protect the public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose."[222] The Third Circuit cited *International Minerals* for the proposition that "under certain regulatory statutes requiring 'knowing' conduct the government need prove only knowledge of actions taken and not the statute forbidding them."[223] The Third Circuit pointed to *Dotterweich* and stated that because RCRA was a public welfare statute, the "knowledge" requirement under the statute could be inferred for mid-level managers like the defendants as a result of their holding responsible positions in the company.[224]

Johnson & Towers is valuable because it introduced the RCO doctrine to RCRA, in particular, and environmental law in general. Several federal circuits subsequently embraced the RCO doctrine, but they either explicitly or implicitly rejected the particular path taken in *Johnson & Towers*, which lightened the scienter requirement, and the government's burden of proof with it. These later decisions declined to adopt the reasoning of *Johnson & Towers*, which required that the prosecution prove the defendant had knowledge of every element of the RCRA offense. Therefore, they diminish the scienter requirement and lighten the government's burden of proof even more.[225] By requiring knowledge of both the violation and the regulation, the *Johnson & Towers* decision gave the surface appearance of retaining traditional criminal mens rea in the form of specific intent. The trend which subsequently developed in other federal circuits was to regard violations of RCRA as general intent crimes in which criminal liability is based only on awareness of one's actions.

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221. United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984) (citing United States v. Behrman, 258 U.S. 280, 288 (1922); United States v. Balint, 258 U.S. 250, 252-54 (1922)).

222. *Id.* at 666.

223. *Id.* at 669.

224. *Id.* at 670.

225. *See infra* notes 226-301 and accompanying text; *see also* James S. Lynch, *The Criminal Provisions of RCRA: Should Strict Liability be Applied to its Permit Requirements*, 5 ST. JOHN'S J. LEGAL COMMENT. 127, 135-36 (1989) (criticizing the approach of *Johnson & Towers* as contrary to the congressional policy of promoting enforcement and compliance through the criminal provisions of RCRA).

2. *Permissive Line of Federal Appellate Decisions*

a. United States v. Hayes International Corp.

The Eleventh Circuit was the second federal circuit court to address the knowledge requirement for the criminal penalties section of RCRA. It was the first of a group of circuits which rejected the cautious approach of *Johnson & Towers* and pushed the door wide open for a permissive RCO doctrine. In its most extreme form it made the prosecution's burden of proof nearly insubstantial. The more lenient scienter requirement adopted by the Eleventh Circuit was presented in the 1986 decision *United States v. Hayes International Corp.*[226] *Hayes* accepted the idea of general intent or constructive knowledge for a violation of RCRA, meaning the prosecutor need not prove the defendant had knowledge of the violation and the regulation. Such knowledge is necessary if a court requires knowledge of every element of the offense, as required in *Johnson & Towers.* Instead, the court required that the prosecutor need merely show the defendant's *conduct* was intentional or voluntary, as opposed to simply accidental.

In *Hayes,* the Eleventh Circuit reinstated a guilty verdict rendered against a company and one of its employees prosecuted for violating RCRA provision 42 U.S.C. § 6928(d)(1), which makes it a felony to knowingly transport hazardous waste to a facility which does not have a hazardous waste permit.[227] Hayes International operated an airplane refurbishing plant in Alabama. An employee of Hayes, H.L. Beasley, had contracted with another company, Performance Advantage, Inc. (Performance), to remove drums of hazardous wastes.[228] On eight occasions Performance picked up a total of 600 drums of the wastes.[229] Performance did not have a RCRA disposal facility permit, and the government subsequently found the hazardous wastes had been disposed of by Performance at seven illegal dumping sites in two different states.[230]

The defendant corporation and employee argued they lacked sufficient mens rea to constitute a "knowing" violation of the act.[231] The defendants offered two defenses to make their case that they did not "knowingly" violate RCRA. The first defense was that the defendants did not knowingly commit a violation, essentially arguing that

226. 786 F.2d 1499 (11th Cir. 1986).

227. The jury verdict had been set aside by the trial judge on a motion for judgment notwithstanding the verdict. *Id.* at 1500.

228. *Id.*

229. *Id.* at 1500-01.

230. *Id.* at 1501.

231. *Hayes,* 786 F.2d at 1501.

knowledge of illegality, in this case a knowing violation of a regulation, was a necessary element of the offense. The defendants alleged they simply "misunderstood the regulations,"[232] claiming they did not know the mixture of paints and solvents were deemed hazardous wastes within the meaning of EPA regulations and that they did not know that Performance was required to have a permit.[233] The defendants claimed they believed Performance was a recycler of hazardous wastes and that RCRA's permit requirement did not apply to recycled material.[234] This ignorance of the law defense, in particular, was ignorance of RCRA's definition of hazardous waste.

For the second defensive attempt to show insufficient mens rea, the defendants argued they did not "know" waste handler Performance lacked a RCRA permit.[235] This amounted to a mistake of fact defense. They argued that the scienter requirement compelled the government to prove the defendants were aware the facility did not have the required RCRA permit. In sum, the defendants were arguing that the knowledge requirement of section 6928(d)(1) compelled the government to prove knowledge of the regulations and their violation. Namely, they argued the government must prove the defendants knew what the law required and that they acted with the specific purpose of violating the law.

The Eleventh Circuit rejected the ignorance of law defense put forward by the corporation and employee. The Court conceded that the wording of RCRA was ambiguous as to "how far down the sentence of [RCRA Section 6928(d)] 'knowingly' travels."[236] Notwithstanding the unclear reach of the word "knowingly," the court concluded the Act requires only that the defendant was aware the discharge, disposal, storage, treatment, or other activity described by the statute had occurred and that the waste was not harmless.[237] The court also concluded the Act does not require that the defendant know the waste was classified as hazardous or that RCRA required a permit.[238] The government's burden of proof required only that it prove the defendant was aware of his conduct, which clearly reduces the knowledge requirement in this element to a general intent crime.

The defendants relied upon the Supreme Court decision in *Liparota* for the argument that the knowledge requirement in RCRA

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232. *Id.* at. 1507.
233. *Id.* at 1505-07.
234. *Id.* at 1501.
235. *Id.* at 1505-07.
236. *Hayes*, 786 F.2d at 1503.
237. *Id.* at 1505-07; *see also* United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 107 (1991); United States v. Greer, 850 F.2d 1447, 1450-53 (11th Cir. 1988).
238. *Hayes*, 786 F.2d at 1505-07; *see also Dee*, 912 F.2d at 745; *Greer*, 850 F.2d at 1450-53.

dictates that the government must prove the defendants know of both the regulations and of their violation. The Eleventh Circuit differentiated the two cases, saying the food stamp legislation reviewed by the Supreme Court in *Liparota* clearly required a "knowing violation of a regulation," while RCRA was ambiguous.[239] The court also stressed the public welfare status of RCRA.[240] It noted the Supreme Court had long made it clear that it was proper public policy that those who operate within heavily regulated industries of the kinds covered by these statutes should be charged with knowledge of these laws.[241]

The *Hayes* court found ineffective the mistake of fact defense offered by the defendants, in which they claimed they were unaware their contracted waste handler did not have a RCRA permit.[242] The court found the defendants had an affirmative duty to attempt to determine the permit status of the facility and whether the waste hauler was properly permitted.[243] It conceded the existence of the knowledge requirement by declaring the government bore the burden of proving the defendants knew the contracted waste handler had no permit.[244] However, the court declared this knowledge could be demonstrated by the willful failure to determine permit status.[245] In other words, requiring knowledge of the permit status of a facility does not excuse deliberate ignorance. The government could use circumstantial evidence to satisfy its burden, and this would allow the jury to infer deliberate ignorance about permit status.

The court indicated that corporate officers' knowledge of company operations is a basis for inferring their knowledge about the disposal of hazardous wastes.[246] In the defendants' case, willful failure to determine permit status was relatively easy to infer because the cost of their waste hauling contract was very low.[247] Proper waste disposal is normally very expensive.[248] The *Hayes* court noted the

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239. *Hayes*, 786 F.2d at 1503.

240. *Id.*

241. *Id.*

242. *Hayes* indicated a mistake of fact defense could be used to protect a person who reasonably believes that a facility has a permit but has been mislead by the people at the site. *Id.* at 1505-06.

243. *Id.* at 1504-05.

244. United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503-04 (11th Cir. 1986).

245. *Id.* at 1504.

246. *Id.*

247. *Id.*

248. "It is common knowledge that properly disposing of hazardous waste is an expensive task, and if someone is willing to the take away wastes at an unusual price or under unusual circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permit facility." *Id.*

duty to determine permit status was hardly difficult, for it simply requires that people who generate or handle hazardous wastes request a copy of the facility's permit and confirm the permit with EPA.[249]

b. United States v. Hoflin – *Pushing Scienter Toward Strict Liability*

The third federal appeals court to address the RCO doctrine for a RCRA violation was the Ninth Circuit in its 1989 decision *United States v. Hoflin*.[250] The Ninth Circuit moved to the far edge, softening the knowledge requirement and pushing it as close to strict liability as possible without calling it that. The *Hoflin* court essentially treated the permit requirement as a strict liability element. There is a point when the knowledge requirement is so reduced, to the near absence of intent, that it resembles strict liability more than it resembles a scienter requirement. In a continuum of the approaches to liberalizing the intent requirement of RCRA for application of the RCO doctrine, the *Hoflin* court is at the end which represents the most permissive view. The *Hayes* court is in the middle, and the seminal *Johnson & Towers* case is at the other end.

The *Hoflin* court outright rejected *Johnson & Towers*, holding instead that knowledge by the defendant about the lack of a required RCRA permit was not an essential element of the RCRA crime.[251] In *Hoflin*, the director of a municipal public works department was charged with disposing hazardous waste without a RCRA permit, a violation of the same RCRA provision, § 6928(d)(2)(A),[252] at issue in *Johnson & Towers*.[253] The defendant in *Hoflin* had instructed the manager of the municipal sewage treatment plant and its employees to bury drums of surplus paint on the grounds of the plant.[254]

Hoflin's appeal of his conviction was based upon his claim of ignorance that the waste was hazardous under RCRA, and that he was unaware the sewage treatment plant did not have a RCRA permit.[255] He argued that knowledge of a lack of permit was an essential element of the crime under 6928(d)(2)(A).[256] The Ninth Circuit upheld his conviction, declining to follow the reasoning of *Johnson & Towers*, which held the omission of "knowing" in subsection 6928(d)(2)(A)

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249. *Hayes*, 786 F.2d at 1505.

250. 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

251. *Id.* at 1038-39.

252. *Id.* at 1036.

253. United States v. Johnson & Towers, Inc., 741 F.2d 662, 664 (3d Cir. 1984).

254. United States v. Hoflin, 880 F.2d 1033, 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

255. *Id.*

256. *Id.*

was either inadvertent or that "knowingly" in section 6928(d)(2) extended to subsection 6928(d)(2)(A).[257] Adopting a strict constructionist reading of the statute to achieve a liberalized result, the *Hoflin* court held the addition of "knowing" in subsections 6928(d)(2)(B) and (C) required knowledge of the permit status of the facility for those subsections, but not for subsection (A), where Congress had omitted the term.[258] Basing its position on congressional intent, the court declared, "if Congress intended knowledge of the lack of a permit to be an element of the offense under subsection (A), it could have easily said so."[259]

Not only did the Ninth Circuit declare that RCRA did not require the prosecution to prove the defendant knew a permit was required, but also that the prosecutor did not have to prove the defendant knew no permit had been obtained or that the materials were considered hazardous wastes.[260] The only knowledge the Ninth Circuit required of the defendant was that he was aware his actions could be harmful.[261] The presumption established for public welfare statutes in *International Minerals* was cited with approval by the Ninth Circuit, which said that a person whose business handles hazardous materials should be presumed to be aware that they are likely to be subject to regulation.[262] In sum, the Ninth Circuit in *Hoflin* would allow the government to satisfy the scienter requirement by proving merely that the defendant was aware of the actions that allegedly violated RCRA. In light of *International Minerals*, the Ninth Circuit decided that because the defendants were dealing with potentially harmful materials, for which knowledge of regulations is presumed, ignorance of the law was no defense.[263]

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257. *Johnson & Towers, Inc.*, 741 F.2d at 668-69.

258. *Hoflin*, 880 F.2d 1033 at 1033.

259. The court then stated "[Congress] specifically inserted a knowledge element in subsection (B), and it did so notwithstanding the 'knowingly' modifier which introduces subsection (2)." *Id.* at 1038.

260. *Id.* at 1037-39.

261. The Ninth Circuit concluded the statute required only that the defendant "knew that the chemical wastes had the potential to be harmful to others or to the environment, or in other words, it was not an innocuous substance like water." *Id.* at 1039.

262. *Id.* at 1038 (citing United States v. Int'l Mineral & Chem. Corp., 402 U.S. 558, 565 (1971)). In *International Mineral*, the Supreme Court held the government need not prove the defendant's knowledge of a violation of the hazardous materials transportation regulations of the Department of Transportation, reasoning that when "obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *International Mineral*, 402 U.S. 558 at 565.

263. United States v. Int'l Mineral & Chem. Corp., 402 U.S. 558, 565 (1971).

c. United States v. Dee – *The RCO Doctrine at Federal Facilities*

The Fourth Circuit provided one of the most direct and stringent applications of the RCO doctrine to RCRA in its 1990 decision *United States v. Dee*.[264] It was also one of the most unique decisions because it concerned application of the doctrine to high-echelon managers at a federal facility. In affirming the conviction of the defendants for illegally storing and disposing lab wastes, the Fourth Circuit held the defendants had "knowingly" violated RCRA.[265] It rejected their ignorance of the law defense, that they did not know that violating RCRA was a crime and that they were unaware RCRA regulations considered the chemicals they handled to be hazardous wastes.[266]

The *Dee* case was quite controversial. The defendants were civilian employees of the Army, and they accused the federal government of conducting a witch hunt and making them scapegoats for the environmental problems at the military facility where they worked.[267] The *Dee* defendants, Gepp, Lentz, and Dee, were engineers employed at the Army's Aberdeen Proving Grounds in Maryland, where they worked on the development of chemical warfare systems.[268] For the most part, they were being held responsible as managers for widespread illegal dumping that had been carried out by other employees of the facility.[269]

The three defendants were department heads and had varying degrees of managerial responsibility.[270] Gepp was directly in charge of operations and maintenance at the facility, and Dee and Lentz were his superiors and department heads.[271] All were responsible for ensuring that members of their departments abided by various facility compliance policies and the requirements of federal regulations, including RCRA.[272] Employees at the facility were storing and dumping lab wastes in a manner that violated RCRA.[273]

The managers at Aberdeen essentially protested that they were being prosecuted for conduct many people would consider innocent, and that while their conduct might be regarded as a regulatory

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264. 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

265. *Id.* at 745.

266. *Id.* The Fourth Circuit also rejected the defendants' claim that as federal employees at a federal facility they were entitled to governmental immunity. *Id.* at 744.

267. *Baltimore Sun*, Jan. 11, 1989, at B3, col. 1.

268. United States v. Dee, 912 F.2d 741, 743 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Dee*, 912 F.2d 741 at 743.

offense, it did not amount to a crime.[274] Dee was aware of the dumping for more than two years and had received warnings that cleanup was necessary.[275] However, Dee and Lentz claimed they did not know the dumping of the lab wastes was truly a serious problem and a violation of the law.[276] Gepp asserted there was insufficient evidence to prove he was in charge of storage and disposal operations for the facility.[277] He also argued that, at worst, the sloppy procedures were not criminal acts.[278] All three were found guilty of various counts of violating RCRA.[279]

Adopting the now familiar approach from *Hoflin* of sharply reducing the knowledge requirement of RCRA to general intent, the *Dee* court easily dispensed with the defendants' ignorance of the law defense.[280] The Fourth Circuit treated RCRA like a public welfare statute applied to the problem of hazardous waste. It quoted *International Minerals,* that "anyone who is aware that he is in possession of [obnoxious waste materials] or dealing with them must be aware of the regulation."[281] More simply, the defendants are presumed to know hazardous wastes are subject to regulation; actual knowledge need not be proven. The *Dee* court conceded that while the knowledge requirement of section 6928(d)(2) extended to the general hazardous character of the waste, the government need not prove the defendants knew the wastes were specifically considered hazardous under RCRA.[282] They need only prove the defendants were generally aware of the dangerous or obnoxious nature of the materials.[283] The Fourth Circuit also dismissed as harmless error a jury instruction that failed to declare the defendants had to at least know the hazardous nature of the chemicals.[284] It did so because

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274. *Id.*

275. On cross examination Dee was pointedly asked, "is it possible, Mr. Dee, that when [the environmental coordinator at Aberdeen] raised these issues that you simply turned off your ears because environmental compliance was not something that was important to you?" Record of Trial at 3729, United States v. Dee, No. HAR-99-0211 (D. Md. May 11, 1989).

276. *Dee,* 912 F.2d at 745.

277. *Id.* at 747.

278. *Id.* On this point, the Fourth Circuit disagreed, noting that negligent and inept storage of hazardous waste is one of the evils RCRA was created to prevent and section 6928(d) made such behavior an egregious crime. They found there was sufficient evidence against Gepp, as it had been shown he was in charge of operations at the facility, ignored repeated warnings about the dangerous situation posed by the improper storage of the lab wastes, and did little to comply with RCRA requirements. *Id.* at 748.

279. *Id.*

280. *Id.*

281. *Dee,* 912 F.2d at 745 (quoting United States v. Int'l Minerals & Chem. Corp., 420 U.S. 558, 565 (1971)).

282. *Id.*

283. *Id.* at 747.

284. *Id.* at 745-46.

overwhelming evidence presented at trial showed they were dealing with such materials.[285]

d. United States v. Sellers: *Possible Hospitality in the Fifth Circuit for the RCO Doctrine*

The RCO doctrine, as applied to RCRA's general criminal provision, has turned on interpretation of the knowledge requirement in this section. While the Fifth Circuit has not specifically dealt with the RCO doctrine in RCRA, it issued an illuminating decision focusing on RCRA's knowledge requirement in *United States v. Sellers*.[286] *Sellers* indicates the Fifth Circuit is likely to be hospitable to a liberalized, minimum-scienter RCO doctrine. The Fifth Circuit treated proof of intent under RCRA as the kind of proof necessary for a general intent crime where knowledge of the conduct that led to the violation, as opposed to knowledge of the violation itself, was the standard for proof of guilt.[287]

The previously discussed decisions that reduced scienter in RCRA to a general intent level were either implicitly or explicitly based on the perceived public welfare nature of RCRA.[288] Thus, these cases give a special twist to general intent, or diminished scienter, and do not just require that violators be aware of their conduct. More specifically, they require that violators be expected to "know" their conduct had the potential to harm society. While it did not specifically deal with the RCO doctrine, the *Sellers* decision agrees with other circuit court decisions that have concluded proof of scienter under RCRA requires only that the defendant "knew" the treatment, storage, disposal or any other activity concerned with hazardous waste and covered by the statute had the potential to harm persons or the environment.[289]

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285. *Id.*

286. 926 F.2d 410 (5th Cir. 1991). The Fifth Circuit upheld the conviction of James Sellers on sixteen counts of violating RCRA for the disposal of hazardous wastes without a permit. The Fifth Circuit held it was not plain error for the trial court to refuse instructing the jury that the prosecution must show Sellers knew or reasonably should have known the waste was hazardous or potentially harmful to humans or the environment. *Id.* at 414-417. Like other circuits, the Fifth Circuit held that given the dangerous nature of the materials Sellers was handling, "it should come as no surprise . . . that the disposal of that waste is regulated," and therefore he could be presumed to know the wastes are harmful to humans and the environment. *Id.* at 417.

287. *Id.*

288. United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989); United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

289. *Sellers*, 926 F.2d at 414-17; *see also* United States v. Greer, 850 F.2d 1447, 1450-53 (11th Cir. 1988). Like *Sellers*, a number of decisions appear to be primarily concerned with the nature of the harm or potential harm, rather than the conduct of the defendants.

e. United States v. Brittain--*The RCO Doctrine and the Clean Water Act*

One of the most permissive applications of the RCO doctrine is found in the Tenth Circuit's 1991 decision of *United States v. Brittain.*[290] This interpretation of the doctrine verges on imposing strict criminal liability upon the responsible corporate officer. The holding only suggests how it might apply the doctrine to RCRA, since the appellate review in question was under the Clean Water Act (CWA). Nevertheless, the *Brittain* decision provides insight into one of the most permissive interpretations of the RCO doctrine. Here, the scienter requirement got read out of a federal environmental statute.

In *Brittain,* a city public works director appealed his conviction for "willfully or negligently" discharging pollutants into a waterway in violation of the municipal treatment plant's NPDES permit under the CWA.[291] The willful element in the CWA is akin to "knowingly" in RCRA. The prosecution showed the defendant had been informed by the waste water treatment plant manager that during heavy rains, sewage was being diverted to an outfall for which there was no NPDES permit.[292] The defendant had seen these discharges on two occasions and had directed the plant manager not to report the discharges to EPA as required by the plant's permit.[293]

On appeal, the defendant argued he was not a "person" subject to criminal liability under the Clean Water Act, because he was not a mittee or a responsible corporate officer of the permittee.[294] Summarizing *Dotterweich* and *Park,* the Tenth Circuit found the public welfare status recognized by the Supreme Court for the FDCA was applicable to the Clean Water Act.[295] This is because the Tenth Circuit viewed the inclusion of responsible corporate officers as potentially criminally liable parties under the Clean Water Act as an expansion of liability that warranted public welfare status.

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290. 931 F.2d 1413 (10th Cir. 1991).

291. *Id.* at 1418. The applicable section at the time of the indictment stated in part:

> (1) Any person who willfully or negligently violates section 1311 [unlawful discharge of pollutants] . . . or any permit condition or limitation . . . in a permit . . . shall be punished . . . (3) . . . [T]he term "person" shall mean, in addition to the definition contained in section 1362(5) of this title ["'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body"] any responsible corporate officer.

33 U.S.C. § 1319(c) (1982).

292. *Brittain,* 931 F.2d at 1418.

293. *Id.*

294. *Id.* at 1413.

295. *Id.* at 1419.

The court noted that for both the Clean Water Act and the FDCA, Congress weighed the hardships that arose from making responsible corporate officials criminally liable for wrongdoing they might not actually be aware of, against the public welfare objectives of the statutes.[296] The public welfare objectives came out on top.[297] The Tenth Circuit maintained that Congress added responsible corporate officers to the group of criminally liable persons in furtherance of the public welfare character of the Clean Water Act.[298] The *Brittain* court held that under its interpretation, a responsible corporate officer would not have to "willfully or negligently cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility."[299]

The Tenth Circuit's decision expands the RCO doctrine in federal environmental statutes far beyond that of any other court. It gives some credence to the concern of business executives that the RCO doctrine can be transformed into what has been sarcastically called the "designated corporate felon rule."[300] Other decisions favorable to the doctrine considerably lightened the prosecution's burden of proof by reducing the scienter requirement and permitting knowledge of the crime to be inferred from the responsibility, position, or authority of the corporate official. In *Brittain*, the court took the concept of the RCO doctrine from a strict public liability statute like the FDCA and applied it to the Clean Water Act, despite, and in negation of, its express scienter requirement.

Too much can be made of prospectively applying the decision to RCRA, since the holding may be restricted to statutes like the Clean Water Act and the Clean Air Act which expressly add responsible corporate officers to the statutory definition of persons who are subject to criminal liability.[301] This is a direct contrast to RCRA's language, which does not expressly make them liable. Nevertheless, a decision like *Brittain* cannot help but strike fear into the hearts of corporate officers.

C. *Retreating From the RCO Doctrine--Restrictive Decisions*

The line of cases discussed in the previous section represents an unfolding expansion of the RCO doctrine based on a permissive interpretation of the scienter requirement. At first it appeared the

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296. *Id.*
297. *Id.*
298. *Brittain*, 931 F.2d at 1419.
299. *Id.*
300. *See Better Communication, supra* note 34.
301. *See supra* note 61.

doctrine would follow a linear path of increasing expansion and that the federal circuits would generally follow this line.

A counterview has emerged as some federal courts have exhibited second thoughts about a strong RCO doctrine for RCRA in particular, and possibly environmental laws in general. These courts apparently do not want to completely close the door on the RCO doctrine, but rather seem to want to narrow the opening, letting the RCO doctrine through in fewer instances. The sense one gets when considering these cases is that the courts believe the RCO doctrine has gone too far. One federal circuit, the Ninth, has actually come full circle, retreating recently from a liberal RCO doctrine to one that is very restrictive.

1. *United States v. MacDonald & Watson Co.* – Restrictive View Incarnate

The First Circuit provided one of the most cautious applications of the RCO doctrine in its 1991 decision *United States v. MacDonald & Watson Co.*,[302] which overturned the RCRA conviction of the head of a waste disposal firm. *MacDonald & Watson* returns to the restrained approach exhibited in the first RCRA application of the RCO doctrine, the Third Circuit's decision in *United States v. Johnson & Towers, Inc.*[303]

While the Third Circuit's slow approach to the RCO doctrine in *Johnson & Towers* can be understood because 1984 was the first time a federal court addressed the doctrine's use for environmental laws, no such justification applied to the First Circuit's 1991 ruling in *MacDonald & Watson*. *Johnson & Towers*, as noted earlier, was very conservative in its construction of section 6928(d)(2)(A) insofar as requiring that every element of the offense be proven by the government, including proof that the responsible corporate officer knew there was no permit.[304] The Third Circuit did, however, follow the tradition of interpreting public welfare statutes whereby the corporate official's knowledge was considered to include not only what he actually knew, but what he "should have known" as a result of his position and authority as a responsible corporate official.[305]

In contrast, the First Circuit in *MacDonald & Watson* seemed to fear the logical extension of the RCO doctrine from an inference of knowledge to a conclusive presumption of knowledge by reason of managerial status. Under such a presumption, merely being a responsible corporate official makes one guilty of a company's RCRA

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302. 933 F.2d 35 (1st Cir. 1991).
303. 741 F.2d 662 (3d Cir. 1984).
304. *Id.* at 667-68.
305. *Id.* at 664-65.

violations. The First Circuit apparently was attempting to prevent this radical extension of the doctrine.

In *MacDonald & Watson*, the president (who was also the owner), two employees of a waste transportation and disposal company, and the corporation itself were convicted under RCRA for knowingly transporting hazardous waste to an unpermitted facility.[306] These facts illustrate the often shady operations of waste disposal firms. MacDonald & Watson leased a site from Narragansett Improvement Co. for whom MacDonald & Watson operated a hazardous waste facility under a RCRA permit received by Narragansett.[307] The permit was restricted to the disposal of liquid hazardous waste.[308] MacDonald & Watson disposed of a customer's toluene-contaminated soil at the Narragansett facility in violation of the liquid-waste only permit. MacDonald & Watson's president, D'Allesandro, was the manager of waste operations at the facility.[309] The toluene-contaminated soil was delivered to the facility by two employees of MacDonald & Watson.[310]

The First Circuit vacated and remanded for new trial the conviction of MacDonald & Watson's president because of the trial court's responsible corporate officer instruction.[311] The First Circuit reversed the trial court because it viewed the instruction as calling for a mandatory presumption that the defendant knew of the facts constituting the offense based solely on his position as a responsible corporate officer.[312]

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306. 933 F.2d at 39-40.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. United States v. MacDonald & Watson Co., 933 F.2d 35, 50 (1st Cir. 1991).

312. *Id.* at 53. The First Circuit appears to have overstated the characterization that the trial court's instructions called for a mandatory presumption of knowledge, or strict liability. The court had issued the following instructions:

> When an individual Defendant is also a corporate officer, the Government may prove that individual's knowledge in either of two ways. The first way is to demonstrate that the Defendant had actual knowledge of the act in question. The second way is to establish that the defendant was what is called a responsible officer of the corporation committing the act. In order to prove that a person is a responsible corporate officer three things must be shown. First, it must be shown that the person is an officer of the corporation, not merely an employee. Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question. And the third requirement is that the officer must have known or believed that the illegal activity of the type alleged occurred.

Id. at 50.

The instructions requested by the government and adopted by the trial court stated that there were two ways by which the company president's knowledge could be proven. One way was by demonstrating actual knowledge of the illegal act in question. The second way was through a very liberalized RCO doctrine. The First Circuit regarded this instruction as allowing the jury to infer guilt solely on the basis that the defendant's responsible corporate officer status placed him in a position to insure compliance with the law and that he failed to perform this duty.[313]

The First Circuit found the instruction objectionable because it thought it indicated that "proof that a defendant was a responsible corporate officer, as described, would suffice to conclusively establish the element of knowledge required" under RCRA.[314] The First Circuit noted section 6928(d)(2) had an express knowledge requirement, observing that, "[i]n a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge."[315] The court found no precedent "where a jury was instructed that the defendant could be convicted of a federal crime expressly requiring knowledge as an element, solely by reason of a conclusive or 'mandatory' presumption of knowledge regarding the facts constituting the offense."[316]

The First Circuit did not view *Dotterweich* and *Park* as relevant precedents to follow because the RCO doctrine developed in those Supreme Court decisions was conceived for strict liability misdemeanors, not for felony offenses such as RCRA, which expressly required proof of knowledge.[317] For the court, a "mere showing of official responsibility" does not alone provide sufficient proof of culpability for criminal offenses such as RCRA, which have express knowledge requirements.[318]

The First Circuit rejected the prosecution's reliance upon *Johnson & Towers* to support its position that responsible corporate officer status could itself satisfy the knowledge requirement.[319] The First Circuit maintained that *Johnson & Towers* only supported the proposition that knowledge of the *law* could be inferred, namely the law regarding permit requirements.[320] The First Circuit found *Johnson &*

313. *Id.* at 51.
314. *Id.* at 55.
315. *Id.*
316. United States v. MacDonald & Watson Co., 933 F.2d 35, 53 (1st Cir. 1991).
317. *Id.* at 52.
318. *Id.*
319. *Id.* at 53.
320. *Id.*

Towers did not address knowledge of *acts*, unlike the *MacDonald & Watson* court.[321]

The First Circuit recognized that "knowledge may be inferred from circumstantial evidence, including the position and responsibility of defendants such as corporate officers."[322] Circumstantial evidence was necessary to convict D'Allesandro because the government presented no direct evidence that he had actual knowledge of the shipments in question.[323] The court, for instance, observed that the prosecution had offered evidence the defendant was not only the chief executive and owner of MacDonald & Watson, but also served as the hands-on manager of a relatively small operation.[324]

The court mentioned two other instances in which knowledge could be proven inferentially by circumstantial evidence in a prosecution of MacDonald & Watson's president. These included information provided to the corporate official on prior occasions,[325] and "willful blindness" to the facts.[326] There was evidence the defendant had been advised by a consultant on two earlier occasions about illegal shipments of toluene-contaminated soil that had been delivered to the defendant's facility by other customers.[327] It was possible the firm's president deliberately closed his eyes to the violations to avoid liability.

Moreover, given the defendant's corporate position, the small operation he managed in a hands-on manner, and prior warnings of violations, there appeared to be sufficient circumstantial evidence to infer D'Allesandro had actual knowledge of the violation and also to convict him. The First Circuit's concern was that it was also conceivable, in the face of the instructions on the RCO doctrine as a substitute means to show knowledge, that the defendant could have been

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321. *MacDonald*, 933 F.2d at 53 (noting the prosecution's attempts to prove the defendant was aware of his company's waste shipments to a non-permitted site).

322. *Id.* at 55.

323. *Id.* at 50.

324. *Id.*

325. *Id.* at 55.

326. Part of the trial court's jury instructions the Third Circuit found acceptable for D'Allesandro's prosecution included language pertaining to willful blindness:

> Whether a Defendant acted knowingly or with knowledge of a particular fact may be inferred from the Defendant's conduct, from the Defendant's familiarity with the subject matter in question or from all of the other facts and circumstances connected with the case. In determining whether a Defendant acted knowingly, you also may consider whether the Defendant deliberately closed his eyes to what otherwise would have been obvious. If so, the element of knowledge may be satisfied because a Defendant cannot avoid responsibility by purposefully avoiding learning the truth.

Id. at 52 n. 15.

327. United States v. MacDonald & Watson Co., 933 F.2d 35, 51 (1st Cir. 1991).

convicted even if he had taken reasonable actions to prevent a recurrence of violations or where there might not have been sufficient circumstantial evidence to infer culpability. The First Circuit in *MacDonald & Watson* seemed intent on sending the clear message that mere status as a responsible corporate officer will not suffice to conclusively establish the element of knowledge expressly required in RCRA.[328] If anything, this court did not want the doctrine transformed into a designated corporate felon rule.

2. *Retreat from the RCO Doctrine in the Ninth Circuit*

a. United States v. White--*Portent of Things to Come*

In its 1989 *Hoflin* decision, the Ninth Circuit provided one of the most liberalized readings of the knowledge requirement in RCRA, along with one of the most permissive applications of the RCO doctrine to the statute.[329] The Ninth Circuit has since seemed to have reversed course.

A sign of things to come in the Ninth Circuit can be seen in *United States v. White*,[330] a 1991 decision rendered by a federal district court in Washington state. *White* is similar to the cautious decision in *Johnson & Towers*, which required every element of a RCRA offense to be proven.[331] *White* is significant because it doubts the status of RCRA as a public welfare statute, a status which is the foundation for application of the RCO doctrine. The district court in *White* held that both RCRA and the Federal Insecticide, Fungicide, and Rodenticide Act[332] permit a corporate officer to be subject to criminal prosecution only if he or she knowingly participated in the illegal acts.[333] *White* rested upon the proposition that corporate managers could not be criminally liable under these environmental laws solely because their subordinates acted illegally.[334]

In *White*, an executive of PureGrow, Inc., John Steed, was charged with violating section 6928(d)(2)(A), which made it a crime for knowingly treating, storing, or disposing of hazardous waste without a RCRA permit.[335] Steed did not actually participate in the mishandling of the wastes, but was charged because he was directly responsible for all of the company's environmental safety concerns. The

328. *Id.* at 55.
329. United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989).
330. 766 F. Supp. 873 (E.D. Wash. 1991).
331. United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984).
332. 7 U.S.C §§ 136 (1988 & Supp. 1992).
333. *White*, 766 F. Supp at 895.
334. *Id.*
335. *Id.* at 894.

district court viewed the federal government as pressing for the most stringent application of the RCO doctrine by maintaining that Steed could be convicted *solely* because of his position as the responsible corporate officer.[336] According to the government, Steed was liable for certain conduct of employees which he knew or "should have known of."[337]

The district court rejected RCRA's public welfare statute status as the basis for analyzing the elements of a RCRA offense.[338] The *White* court distinguished the elements of a criminal violation under RCRA and its express knowledge requirement from the strict liability crimes associated with the FDCA, one of the founding public welfare statutes and the focus of the Supreme Court in *Park* and *Dotterweich*. The *White* court determined the RCO doctrine does not apply to crimes with a knowledge requirement like RCRA.[339] The court held that in order to convict Steed, the government must show Steed had actual knowledge of the regulations and the violation.[340] Namely, it must be shown that Steed knowingly treated, stored, or disposed of wastes he knew were hazardous, or that he aided or abetted employees who committed the violations.[341] The court declared it was not enough that Steed *should have known* about the illegal disposal of hazardous wastes, but instead required a showing that he *must have known*.[342]

b. United States v. Speach--*An About-face by the Ninth Circuit*

The strangest turn in the development of the RCO doctrine in the federal circuit courts is the seemingly sudden, sharp swing of the Ninth Circuit from expanding the doctrine to contracting it. As already noted, in its 1989 decision in *United States v. Hoflin*,[343] the Ninth Circuit rejected the *Hayes International*[344] requirement enunciated by the Eleventh Circuit that a defendant must have knowledge of a facility's non-permit status before RCRA liability could be imposed.[345] In the March 1992 decision of *United States v. Speach*,[346] the

336. *Id.*
337. *Id.*
338. 766 F. Supp. 873, 895 (E.D. Wash. 1991).
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989).
344. United States v. Hayes Int'l, 786 F.2d 1499 (11th Cir. 1986).
345. United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989).

Ninth Circuit restated its rejection of *Hayes*. In May 1992, however, the Ninth Circuit withdrew its opinion and issued another. This decision appeared to embrace the Eleventh Circuit's position in *Hayes* by ruling that in order to be criminally liable, the defendant must know a disposal site did not have a permit.[347]

At first glance, the *Speach* decision would seem an about-face by the Ninth Circuit. The Court of Appeals attempted to explain that it was not departing from its own precedent, reasoning that while the result was different, the approach was the same.[348] According to the court, strict statutory construction was being applied, but with a different result than in *Hoflin* because the applicable statutory provision was different.[349]

Speach was the president of ENV, a company that operated vans that treated the wastes of electroplaters.[350] ENV shipped hazardous wastes to another company, which lacked a RCRA permit.[351] Because his company shipped waste to an unpermitted facility, Speach was convicted of violating §6928(d)(1), which provides that a person is subject to criminal penalties if he "knowingly transports or causes to be transported any hazardous waste . . . to a facility which does not have a permit."[352]

In its initial decision, the Ninth Circuit ruled it was not necessary for the jury to find Speach knew the receiving firm lacked a permit.[353] The decision followed the Ninth Circuit's own 1989 ruling in *United States v. Hoflin*, where the court found that knowledge of a lack of permit was not needed for imposition of criminal liability under RCRA.[354] The *Hoflin* decision had construed a different RCRA provision, § 6928(d)(2)(A), which addressed the crime of knowingly treating, storing, or disposing of waste at one's own facility.[355] Speach, however, argued the Ninth Circuit should follow the *Hayes* decision of the Eleventh Circuit because it construed the exact provision under which he was convicted, § 6928(d)(1), which covered

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346. No. 90-50708, 1992 WL 51181 (9th Cir. Mar. 20, 1992), *opinion ordered withdrawn* May 11, 1992.

347. 968 F.2d 795 (9th Cir. 1992).

348. *Id.* at 797.

349. *Id.*

350. *Id.* at 796.

351. *Id.*

352. Speach was also convicted for violating § 6928(d)(2)(A) for his company's storage of hazardous waste on its own property without a permit. His appeal only challenged his conviction for unlawful transportation of the hazardous waste in violation of § 6928(d)(1). United States v. Speach, 968 F.2d 795, 796 (9th Cir. 1992).

353. No. 90-50708, 1992 WL 51181.

354. United States v. Hoflin, 880 F.2d 1033, 1033 (9th Cir. 1989).

355. *Id.*

shipping wastes to another's facility.[356] The Eleventh Circuit held that under this section a defendant must know about the lack of a permit.[357]

In the first *Speach* decision, the Ninth Circuit recognized that the *Hayes* court reached its conclusion out of a concern that "removing the knowing requirement from this element would criminalize innocent conduct; for example, if the defendant reasonably believed that the site had a permit, but has been mislead by the people at the site."[358] The Ninth Circuit rejected that rationale, instead declaring it was bound to follow its own precedent in *Hoflin* and thus read "knowingly" literally in 6928(d)(1) to modify only "transports or causes to be transported any hazardous waste," and not to extend "knowingly" to the permit language.[359] The Ninth Circuit observed that it reached a different result than the Eleventh Circuit in *Hayes* because its reading of the statute was consistent with RCRA's purpose of protecting people and the environment from hazardous waste dangers.[360] In other words, it was emphasizing the public welfare nature of RCRA as the basis for its initial statutory construction.

In its revised *Speach* decision, the Ninth Circuit concluded that the jury instructions were flawed because they stated that the prosecution was not required to prove the defendant knew the receiving facility lacked a RCRA permit.[361] This time the Ninth Circuit distinguished its earlier ruling in *Hoflin* because it was brought under a different section of RCRA, and embraced the Eleventh Circuit decision in *Hayes* which construed the same statutory section at issue in *Speach*.[362] It rejected the prosecution's argument that the *Hoflin* rule should apply by analogy. The Ninth Circuit determined this analogy inapplicable, maintaining that the structure of 6928(d)(2)(A) was different from 6928(d)(1).[363]

The court also reasoned the different provisions targeted different groups of defendants.[364] For section 6928(d)(2)(A), the defendant was a party who did not have a permit for his own facility, in which case "it was not unreasonable to put such a defendant at risk for failing to ascertain accurately the permit status of the very facility with which

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356. United States v. Speach, 968 F.2d 795 (9th Cir. 1992).

357. United States v. Hayes Int'l, 786 F.2d 1499 (11th Cir. 1986).

358. United States v. Speach, No. 90-50708, 1992 WL 51181 (9th Cir. Mar. 20, 1992) (quoting United States v. Hayes Int'l, 786 F.2d 1499 (11th Cir. 1986)).

359. *Id.*

360. United States v. Speach, 968 F.2d 795, 796 (9th Cir. 1992).

361. *Id.* at 796-97.

362. *Id.* at 797.

363. *Id.*

364. 968 F.2d 795, 797 (9th Cir. 1992).

he was connected."[365] The court noted that, in contrast, section 6928(d)(1) does not deal with a defendant's own lack of a permit, but with the lack of a permit by another person to whom the waste was shipped.[366] The key distinction noted by the court is that section 6928(d)(1) does not focus upon the person who is in a position to know the facility's permit status, but instead requires transporters like Speach to ensure that other parties have permits.[367] Referring to *Hayes*, the Ninth Circuit noted that requiring the government to prove the transporter knew the receiving facility lacked a permit did not impose an insurmountable burden of proof on the government, because such knowledge could be inferred through circumstantial evidence.[368]

One judge on the three-member panel in the second *Speach* decision dissented, arguing that the Ninth Circuit should follow its own precedent in *Hoflin*.[369] The dissent claimed the literal construction used to read statutory language employed in *Hoflin* for section 6928(d)(2)(A) yields the same result for section 6928(d)(1), namely, that the knowledge requirement does not extend to permit status.[370] The dissent also noted that in *Hoflin*, the Ninth Circuit rejected the *Hayes* argument that the knowledge requirement must be read into the statute to avoid criminalizing innocent conduct.[371] Instead, the *Hoflin* court insisted on reading the statute literally because this approach was considered consistent with fulfilling RCRA's principal goal of protecting people and the environment.[372]

V. CONCLUSION

The RCO doctrine is presently straining under the pull of two opposing perspectives in the federal courts. One line of cases, adopting the permissive approach, is highly receptive to the doctrine and is inclined toward expanding its application. While this line of cases is presently the majority view, it does not appear to represent the trend in federal case law. The trend is better reflected in the Ninth Circuit's shift from the permissive view it exhibited in its 1989

365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 798 (Rymer, J., dissenting).
370. "The word 'knowingly' is used in the same way in § 6928(d)(1) as in § 6928(d)(2)(A). 'Knowingly' in § 6928(d)(2)(A) modifies 'treats, stores, or disposes of any hazardous waste,' but does not modify 'without a permit.' The language of § 6928(d)(1) is parallel to that of § 6928(d)(2)(A) and the word 'knowingly' in §6928(d)(1) only modifies 'transports or causes to be transported any hazardous waste.'" 968 F.2d 795, 798 (9th Cir. 1992).
371. *Id.*
372. *Id.*

decision in *Hoflin* to the restrictive view expressed in its final decision in 1992 for the multi-ruling *Speach* litigation. The restrictive approach is a counterview reticent about the RCO doctrine that seeks to contain, if not contract, its application.

The contest over the permissive versus the restrictive approach can have a potentially profound impact upon environmental enforcement. Corporate executives have reason to shake in their boots and fear becoming "designated felons" if the permissive approach becomes the dominant view among the federal circuits. Corporate executives can rest easier if the restrictive approach gains support from most of the circuits, and if other circuits retreat from the permissive approach, as did the Ninth. So far, virtually all conflict over the application of the RCO doctrine has focused upon enforcement of RCRA. The RCO doctrine question has spread to the Clean Water Act and will probably also spread to other major federal pollution control statutes. Environmental law would become truly and deeply criminalized for the corporate official if the permissive approach could achieve broad coverage across several statutes.

The final consequence of the relative strength or weakness of the RCO doctrine in the federal courts is its effect upon the capability of EPA and DOJ to undertake strong and broad criminal prosecution of corporate environmental offenders. Easing the burden of proof for federal prosecution, as a permissive RCO doctrine does, can help offset the perpetual federal problem of limited investigative and litigation resources. Too few resources chasing too many criminals results in too little prosecution. In a sense, a lessened burden of proof is a subsidy to the prosecution. The easier it is to prove a violation, the less resources are necessary for prosecution.

This article does not take a position on which approach for the RCO doctrine is correct as a matter of law or public policy. In the author's mind, both sides present credible arguments. The article does wish to emphasize that the approach which prevails could have significant consequences for environmental enforcement. Several interesting years lie ahead in the federal courts' development of the RCO doctrine. In the meantime, corporate managers can be expected to lose some sleep over the fear of being prosecuted for environmental offenses as a "responsible corporate officer."