Pace Environmental Law Review

Volume 8
Issue 2 *Spring 1991*

Article 8

April 1991

Brief for the United States: Third Annual Pace National Environmental Moot Court Competition

Arizona State University College of Law

No. 90-453

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CANNER,

and

BERNARD BARKER,

Appellee.

On Appeal from the United States District Court
for the district of New Union

BRIEF FOR THE UNITED STATES*

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* The winning briefs published in this issue are reprinted in thier original form. No changes have been made by the editorial staff of the *Pace Environmental Law Review.*

QUESTIONS PRESENTED

I. Whether knowingly omitting material information about a hazardous waste spill in an oral report to the Environmental Protection Agency violates section 3008(d)(3) of the Resource Conservation and Recovery Act (RCRA).

II. Whether a plant manager who authorizes a materially incomplete report and a company president who creates conditions conducive to environmental violations, while insulating himself from environmental law requirements, are legally responsible for corporate conduct violating RCRA section 3008(d)(3).

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A. *Statement of the Facts*

Omni Manufacturing Company (Omni) builds hypercomputers, the latest generation of computer technology. (R. 1). In every sense, Omni is appellant Charles Canner's company. He founded it in 1982 and has served as its only president. (R. 1).

Omni's corporate culture embodies Canner's unmistakable bottom-line focus. Documents issuing from his office contain his famous "Three Commandments of Business Success": "1. Pay attention to profits. 2. Pay still more attention to profits. 3. If you're paying attention to anything but profits, you probably shouldn't be." (R. 2). He has instructed his staff not to distract him with correspondence unless it directly relates to Omni's suppliers, customers, or production levels. (R. 3).

Canner handles other matters, such as the plant's compliance with environmental, occupational safety, health, and civil rights regulations, by having his staff divert them to appellant Bernard Barker, Omni's plant manager. (R. 3). Canner's relative lack of interest in Omni's treatment of environmental matters is reflected in the brief two-sentence acknowledge-

ment of environmental regulations in his company's procedures manual: "Environmental laws are important. The president expects all Omni employees to comply with them at all times." (R. 3).

As plant manager, Barker's duties extend to all aspects of the manufacturing plant. (R. 2). He is in charge of fulfilling Omni's environmental responsibilities, including the handling of hazardous waste. (R. 2).

On June 26, 1989, New Union City policeman Edward Egger was on routine patrol when he noticed an Omni truck leaking a yellowish liquid onto a grassy shoulder outside the plant. (R. 2). Before he could reach the truck and speak to its driver, the truck disappeared in the City's heavy midday traffic. (R. 2).

A few days later, the Environmental Protection Agency (EPA) regional office in New Union City began receiving complaints from several neighborhood residents about chemical odors emanating from outside the Omni plant. (R. 3). EPA Inspector Durden visited the site and found the odors' source in a three-foot patch of dying vegetation near the plant's street gate. (R. 3). She sent a soil sample to the EPA laboratory for analysis. (R.3). The laboratory found a high concentration of DWE, a byproduct of Omni's manufacturing operations and also a hazardous waste within the meaning of the Resource Conservation and Recovery Act (RCRA). RCRA § 1004(5), 42 U.S.C. § 6903(5) (1988). (R. 3).

On August 2, 1989, Inspector Durden wrote a letter to Canner at Omni to inform him that the EPA was investigating the DWE spill and to ask him if he knew the spill's source. (R. 3). The letter never reached Canner because he previously had instructed his staff not to show him such correspondence. (R. 3-4). Accordingly, a staff member routed the letter directly to Barker along with a pre-printed label instructing him to take "appropriate action in accordance with standing company policies and procedures." (R. 3).

Barker summoned Arnold Adams, his twenty-three year old facilities manager, to his office to discuss the letter. (R. 4). Adams gave Barker considerable information regarding the spill. He told Barker that one of the company's trucks had

been pulled from service for repair of a leak in the cargo area. (R. 4). He thought that the truck could have been the spill's source, because Omni trucks regularly deliver DWE to a nearby hazardous waste recycler. (R. 4). Adams recalled that a load of DWE had been taken to the recycler in late June, just before the truck went in for repairs. (R. 4). In addition, he noted that other firms' trucks also delivered DWE to the recycler and in doing so sometimes passed by Omni's street gate. (R. 4).

Adams offered to interview the truck driver and service crew regarding the spill, but Barker cut him off, saying, "That's not our job." (R. 4). As to the EPA inquiry, Barker directed Adams to telephone Durden, but to say as little as possible. (R. 4). He admonished Adams to be careful of what he said and not to volunteer anything, but to stop short of an outright lie. (R. 4). Barker warned him, that if Omni spent time chasing down leads for the EPA, the company would never make money. (R. 4).

Adams obeyed Barker's instructions to a fault. On August 9, he telephoned Inspector Durden and reported, "About your letter of August 2: we do not know the source of the spill. Of course, you can always visit here if you want to." (R. 4). This abbreviated response left Durden without a single lead to pursue. (R. 4).

Her investigation might still be on hold, but for a chance occurrence during the following week. On August 16, Durden made a presentation on environmental crimes to the local police force. (R. 4) Coincidentally, Officer Egger was in attendance. (R. 4). After Durden's presentation, Egger told her about the Omni truck he had seen leaking yellowish liquid on the grass outside the plant. (R. 4).

The next day, Inspector Durden telephoned Adams and confronted him with Officer Egger's revelation. (R. 4). This time, Adams was more responsive, telling Durden, "You know, I thought that might have happened." (R. 4). He then revealed all he knew about the leaking truck, and invited her to check company records and to interview the truck's driver and service crew. (R. 4). Durden subsequently confirmed that the leaking truck had been carrying DWE on the date of the spill.

(R. 5). The EPA laboratory verified that a sample scraped from the truck's underside contained DWE. (R. 5).

The probe ultimately resulted in charges being brought against Canner and Barker. (R. 5). Because Adams cooperated with the investigation, the government did not charge him along with the other two. (R. 5). Adams resigned his position at Omni shortly thereafter. (R. 5).

B. *The Proceedings Below*

In a joint criminal trial in the United States District Court for the District of New Union, a jury convicted Charles Canner and Bernard Barker of omitting material information in a report to the EPA, a violation of RCRA section 3008(d)(3). 42 U.S.C. § 6928(d)(3). In a motion for acquittal notwithstanding the jury's verdict, the defendants unsuccessfully argued that no crime had been committed. The court struck down defendants' argument that "report" under section 3008(d)(3) only refers to written material; a telephone response to an EPA inquiry is a report. The court further found that the defendants knew or should have known that this report withheld material information. Moreover, the court determined that RCRA does not require the EPA to volunteer the specific purpose for which it needs requested information to trigger the statute's reporting requirement.

After upholding the jury's conclusion that a crime had been committed, the district court confirmed the guilt of both defendants. The court denied defendants' claim that the "responsible corporate officer" doctrine could not be applied to them under RCRA. The court upheld Canner's liability because, as Omni's president, he was ultimately responsible for his company's compliance with environmental regulations. The court found Barker's conviction reasonable under two theories. First, the court held Barker knew that an EPA report for which he was responsible omitted information material to RCRA enforcement. Second, the court also recognized Barker's guilt under the "responsible corporate officer" doctrine.

The district court denied defendants' motions for judg-

ment of acquittal notwithstanding the verdict. They appealed to this court.

II. SUMMARY OF ARGUMENT

Congress passed RCRA to control the serious threat of hazardous waste to the health and welfare of Americans. To achieve this goal, Congress authorized the EPA to conduct inspections and gather information, and passed section 3008(d)(3) authorizing criminal sanctions against individuals who withhold material information needed for enforcement. Criminal sanctions against corporate officers are particularly important for achieving the EPA's objectives because these officers often try to evade their responsibility for policies that result in hazardous waste pollution by blaming the actual violations on underlings. Additionally, wealthy corporations simply absorb civil sanctions and fines as a cost of doing business that is more economical than complying with environmental regulations.

In this case, an Omni employee violated RCRA section 3008(d)(3) by knowingly omitting material information in a report to an EPA inspector about a DWE spill. The inspector wrote Omni asking about the source of the spill outside its front gate. The employee knew he was concealing information from the inspector when he answered only, "[W]e do not know the source of the spill." The employee knew that a company truck had been leaking at the time of the spill, that the truck might have been carrying the specific chemical identified by the inspector in her inquiry, and that the truck might have been at the spill site. He reported these facts to his superior, plant manager Bernard Barker, and offered to make a relatively simple investigation of the matter. Barker told him specifically not to do so, and instructed him not to volunteer any information to the EPA.

Under law, this information is "material" to the EPA's enforcement of RCRA because it influences the EPA's functioning. If the employee had given the EPA inspector the information when she asked for it, she could have discovered the source of the spill quickly and easily and avoided a poten-

tial threat to public health. Omni's failure to cooperate stopped the EPA investigation in its tracks, thus impairing the agency's function.

Defendants argue that section 3008(d)(3) does not concern oral reports. Given Congress' intent to prevent misinformation regarding hazardous waste, it makes little difference whether a report is written or verbal. When enumerating the categories of information to which section 3008(d)(3) sanctions should apply, Congress encompassed the likely range of communications between agency and industry, including "reports," whether written or oral.

Nor does section 3008(d)(3) require an EPA investigator to announce that she is inquiring "for purposes of compliance with" RCRA. If defendants truly were baffled about why an EPA inspector would inquire about a toxic spill at their front gate, they could have asked. The record does not report any confusion by Omni's officers on this point. They knew the inspector was investigating a possible violation of environmental regulations.

Barker, the plant manager, is guilty of violating section 3008(d)(3) under two theories. First, Barker was directly responsible for answering the EPA inquiry and directed his subordinate to answer it in terms that amounted to a violation of RCRA. Barker cannot disown the statement because he instructed an employee to speak the words for him, or because he instructed the employee to respond verbally rather than in writing. Barker had specific knowledge of the material information omitted by this report, and acted knowingly for purposes of *scienter* because he knew his conduct would frustrate the EPA investigation.

Second, Barker is guilty as a responsible corporate officer even if he had no specific knowledge or intent to deceive the EPA. Because RCRA is a public welfare statute, individuals such as plant managers have an affirmative duty to seek out and remedy hazardous waste problems. By burying his head in the sand, Barker exhibited precisely the kind of behavior the responsible corporate officer doctrine is designed to deter.

Charles Canner is also guilty of violating RCRA section 3008(d)(3) under the responsible corporate officer doctrine. As

Omni's president, Canner had a positive duty to seek out and remedy violations of RCRA as well as to implement measures to insure that violations did not occur. Canner's self-imposed isolation from environmental matters is no defense to his failure to fulfill these duties. It is an admission of his guilt. The Supreme Court repeatedly has held that corporate officers may not escape their responsibilities to public health and welfare by delegating them to others. Additionally, Canner's indoctrination of his employees with his business philosophy enshrining corporate profit at the expense of all other considerations created the working conditions that gave rise to Omni's RCRA violation.

Barker and Canner both are responsible for Omni's violation of RCRA. Their convictions were reasonable and proper under RCRA section 3008(d)(3) and accord with both legislative intent for and judicial interpretation of the laws governing hazardous waste management. This Court should uphold both convictions.

III. ARGUMENT

A. *RCRA's Evolution Supports the Criminal Prosecution of Corporate Officers for Reporting Violations.*

Congress passed RCRA specifically to control hazardous waste, because improper management and disposal of that waste can cause devastating illness or death. RCRA § 1004(5)(A)-(B), 42 U.S.C. § 6903(5)(A)-(B) (1988). Prior to the enactment of RCRA in 1976, hazardous waste was essentially unregulated by existing federal and state law. Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 Envtl. L. 679 (1982). Noting this lack of regulation and the increasingly serious national waste disposal problem,[1] Congress instructed the EPA to conscientiously enforce RCRA's comprehensive,

1. At that time, between three and four billion tons of toxic wastes were generated each year, and were anticipated to increase rapidly. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6239.

"cradle-to-grave" federal regulatory scheme governing hazardous waste management. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6249.

In order to achieve RCRA's goal, Congress has authorized the EPA to mount inspections and to gather information from individuals and entities involved with hazardous waste. RCRA § 3007(a), 42 U.S.C. § 6927(a) (1988). Anyone who impedes the EPA's inquisitorial authority under RCRA section 3007(a) may be subject to criminal liability under RCRA section 3008. Today, any person who knowingly omits material information or makes a false material statement or representation under this subchapter is subject to a fine of up to $50,000 for each day of violation or imprisonment for up to two years. RCRA § 3008(d), 42 U.S.C. § 6928(d) (1988).

1. RCRA's enhancement of criminal enforcement is necessary to combat the serious threat of hazardous waste.

Such broad criminal penalties were absent at the inception of our country's first series of modern environmental laws. The EPA had just been born, and these new statutes were scientifically complex and difficult to administer. Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,478, 10,478 (1987). The regulated industries had not yet developed an adequate understanding of their new statutory duties, and courts initially would have had trouble instituting criminal sanctions based on these technically detailed statutes. *Id.* For these reasons, Congress originally focused mainly on civil remedies for environmental enforcement. *Id.*

The need for criminal enforcement of environmental statutes evolved with the increasing public and congressional awareness that the country's toxic waste disposal practices were out of control and rapidly becoming a real and immediate threat to public health. Harris, *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge"*

of Corporations and Their Executives, 23 Wake Forest L. Rev. 203, 205-06 (1988). Highly publicized places such as the Chemical Control site in Elizabeth, New Jersey, Love Canal in Niagara Falls, New York, the so-called "Valley of the Drums" in Shepardsville, Kentucky, and the Stringfellow Acid Pits in California had become tragic symbols of "corporate America's reckless disregard of public health." *Id.* at 206. Thus, the initial thrust of criminal enforcement was directed toward reaching these more obvious or egregious violations. McMurray & Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 Loy. L.A.L. Rev. 1133, 1141 (1986).

Concerned that RCRA violators were usually able to slip away unpunished because there was insufficient policing of such toxic waste disposal, Congress amended RCRA in 1980, greatly expanding the statute's scope of criminal enforcement. *See* House Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess., Waste Disposal Site Survey 33, (Comm. Print 1979). Most significantly, the 1980 Amendments established the first felony sanctions for any federal environmental crime. RCRA § 3008(d), 42 U.S.C. § 6928(d) (1988).

Less than one year after the enactment of the 1980 Amendments to RCRA, the United states Department of Justice and the EPA initiated vigorous efforts to enforce the stricter criminal sanctions of the federal environmental laws. Habicht, *supra* p.11, at 10,479. In January 1981, EPA created a new Office of Criminal Enforcement. McMurray & Ramsey, *supra* p.12, at 1140. Since then, the government's aggressive commitment to criminal enforcement has rapidly expanded.[2]

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2. By early 1985, EPA had a staff of 20 specialized, full-time criminal investigators who were authorized to carry firearms. Comment, *Marking Time: A Status Report on the Clean Air Act Between Deadlines*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,022, 10,038 (1985). Currently, all of the investigative methods previously reserved for more traditional crimes are commonly used in environmental crimes. Kafin & Port, *Environmental Enforcement: Criminal Sanctions Lead to Higher Fines and Jail*, Nat'l L.J., July 23, 1990, at 20, col. 4. For example, grand juries, electronic surveillance, and secret informants help environmental criminal investigators to gather evidence against polluters. *Id.*

This dedication of law enforcement resources already has had substantial impact.[3]

2. Criminally prosecuting corporate officials deters environmental violations.

Deterrence through criminal prosecution is now a crucial element in EPA's environmental enforcement policy. Kafin & Port, *supra* p. 12, at 20. Criminal enforcement is directed not only to corporations, but to individuals within corporations who might be personally culpable. Habicht, *supra* p.11, at 10,480. EPA regulators now more commonly use the threat of jail instead of fines as an enforcement weapon. Lavelle, *Enforcement and the EPA*, 13 Nat'l L.J. 1, 48, Sept. 24, 1990. The rationale is straightforward: individuals commit crimes, corporations do not; individuals can go to jail, corporations cannot. Habicht, *supra* p.11, at 10,480. Significantly, the imposition of fines often does not affect corporate violators, because they may view even substantial fines as simply a cost of doing business. Many such corporations may conclude that paying the fine is more economical than the cost of complying with certain environmental statutes. *See* Lavelle, *supra* p.13, at 1.

To enhance deterrence of future environmental crimes, EPA and the Department of Justice have recently adopted a policy of charging the highest corporate officials with violations. Habicht, *supra* p.11, at 10,480. Over one half of all indictments have been against corporate directors, presidents, vice-presidents, or other policy-level officials. *Id.* The argument that managers "didn't know what their employees were doing" is not a valid defense. *Id.* Moreover, the new Federal Sentencing Guidelines Manual requires judges to deal much more harshly than they have in the past with convicted envi-

3. Criminal prosecution of environmental crimes has recently soared. In fiscal year 1989, the U.S. Department of Justice indicted 101 corporations and individuals, and 107 pleas and convictions were entered. Kafin & Port, *supra* p. 12, at 20. These prosecutions (half of which have been for RCRA violations) resulted in $12.7 million in fines and more than 53 years of imprisonment. *Id.* In contrast, in 1985 fines amounted to only $565,000 and prison sentences totalled five years. *Id.*

ronmental criminals, regardless of how high their corporate rank. U.S. Sentencing Commission, Guidelines Manual, § 201.1 (Nov. 1989). *See also* Starr & Kelly, *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). By threatening the highest-ranking responsible corporate officials with imprisonment, and by capitalizing on their fear of jail and the social stigma of criminal status, enforcement authorities are able to achieve compliance more effectively. Kafin & Port, *supra* p. 12, at 21.

3. Criminally prosecuting bad faith reporting enhances good faith compliance.

Enforcement activity is the key to voluntary compliance. Kafin & Port, *supra* p. 12, at 20. The success of the EPA's hazardous waste management enforcement policies depends largely on voluntary reporting from the regulated industry. *Id.* Because bad faith reporting violations threaten the integrity of the entire reporting system, prosecution of bad faith reporting is necessarily one of EPA's highest enforcement priorities. *Id.* Industry's failure to abide by RCRA's reporting requirements could undermine RCRA's primary goals and seriously threaten public health and the environment.

To prevent such a result, the regulated industry must not deprive EPA of information material to its hazardous waste investigations. In response to this concern, Congress, in the 1984 Amendments to RCRA, broadened section 3008(d)(3), which penalizes false reporting, by imposing criminal penalties upon one who knowingly omits material information. Congress reasoned that these omissions "could obviously cause grave harm to regulatory process. The conduct can be as serious in nature as falsification of information submitted." H.R. Rep. No. 198, 98th Cong., 2d Sess. 54-55, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5613-14. Congress enacted these amendments to clarify that the knowing omission of material information in a report to the EPA is a criminal offense. *Id.*

B. *Omni Violated RCRA Section 3008(d)(3) When Adams Omitted Material Information in His Telephone Report to Inspector Durden.*

Defendants Barker and Canner were convicted of violating RCRA section 3008(d)(3), 42 U.S.C. § 6928(d)(3). The statute reads, in pertinent part, that any person who

> knowingly omits material information or makes any false material . . . 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 . . . shall, upon conviction, be subject to a fine . . . or imprisonment.

42 U.S.C. § 6928(d)(3).

A jury found both defendants responsible for the knowing omission of material information in a report used for compliance with RCRA regulations. The district court denied defendants' motions for acquittal notwithstanding the verdict, reasoning that Adams' omission of information relevant to a hazardous waste spill in his telephone report to the EPA fulfilled the elements of the crime. Because Barker and Adams knew that omitting this information could influence Durden's investigation, the information was material. Because they chose to respond orally to an official EPA inquiry, their response constituted a report within the meaning of the statute. Because the announced purpose of Durden's inquiry was to investigate a hazardous waste spill, both men knew or should have known that their report was to be used for compliance with EPA regulations.

Defendants argue here for the same restrictive interpretation of RCRA section 3008(d)(3) that was rejected by the district court. In particular, they argue that "material information" is only the ultimate fact or final answer to an EPA investigation; that "report" means only a written and not an oral report; and that no duty to comply with an EPA inquiry exists unless that inquiry states a specific regulation with which compliance is sought. The district court correctly rejected all three of these defense theories.

1. Information omitted in Omni's report to Durden was "material" to the EPA.

Both Barker and Adams knew an Omni truck had been leaking around the time of the DWE spill. They knew the leaking truck sometimes carried DWE, and that the truck might well have been at the site of the spill at the time of the spill. Whatever epistemological arguments defendants make regarding the certainty of conclusions that might be drawn from these facts, defendants cannot dispute the relevance of this information to the investigation that Durden told them she was conducting.

Omitted information is material to a government agency when it has a "tendency to influence [a]gency action." H.R. Rep. No. 198, 98th Cong., 2d Sess. 55 (construing RCRA section 3008), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5614; *see also United States v. Markham*, 537 F.2d 187, 196 (5th Cir. 1976) (information material when it has a "natural tendency to influence, or be capable of affecting or influencing, a governmental function"), *cert. denied*, 429 U.S. 1041 (1977); *United States v. Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982) (information material when it has the capacity to "impair or pervert" the agency's functioning). For an omission to be material, the government does not necessarily have to rely on it, and in fact may ignore it altogether. *Diaz*, 690 F.2d at 1357-58.

By this standard, the information withheld from Durden was clearly material. Had Adams been more forthright, Durden could have actively continued investigating the spill. Instead, Adams volunteered only that he did "not know the source of the spill." (R. 4). This grudging lack of candor effectively smothered Durden's investigation. Had Officer Egger not come forward with his information about the leaking truck, Durden's investigation might have died right there.

2. The scope of RCRA section 3008(d)(3) covers oral statements as well as written documents.

Inspector Durden requested information from Omni, and defendants chose to report that information orally. Nothing in

Durden's written request or in Omni's telephone reply suggests that Omni's reply was not a formal report in response to a formal inquiry.

Nevertheless, defendants contend that section 3008(d)(3) only pertains to written reports and not to oral communications such as Adams' August 9 phone call. In support, they point to the statute's own language, which applies to "any application, label, manifest, record, report, permit, or other document." 42 U.S.C. § 6928(d)(3). They argue that each item in this list, with the possible exception of "report," refers to a writing. They then conclude that section 3008(d)(3) therefore must refer only to writings. They suggest that Congress' appending "or other document" to the itemized list underscores its intent to restrict application of the statute to written documents.

Defendants' argument is only literal and not logical. Most importantly, it discounts RCRA's underlying purpose.

Congress passed RCRA to regulate toxic materials because it viewed the improper disposal of these hazardous substances as a "serious national problem." *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666-67 (3d Cir. 1984). The House Energy and Commerce Committee believed it imperative that the EPA conduct its enforcement program "in a manner that controls and prevents present and potential endangerment to public health and the environment." H.R. Rep. No. 198, 98th Cong., 2d Sess. 20, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5579. This court therefore should interpret the section 3008(d)(3) criminal sanctions to effect their protective purpose and apply them with a view toward achieving "maximum adherence." *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6, 8 (E.D. Ark. 1978) (broadly construing the Clean Water Act's "false statement" provision, 33 U.S.C. § 1319(c)(2), to achieve "maximum adherence").

The United States does not ask the court to stray from the statute's own language, but urges a reading of section 3008(d)(3) that is more consistent with RCRA's purpose. Had Congress intended to limit section 3008(d)(3) to written instruments only, it could have done so by using the single word

"document," instead of the more cumbersome "application, label, manifest, record, report, permit, or other document." 42 U.S.C. § 6928(d)(3).

But Congress was not trying with this language to define a class of "writings" or "documents." Instead, Congress was trying to capture the probable range of situations in which persons would be likely to exchange information with the EPA. Almost all of these interchanges will take written form, so naturally most of the statute's language refers to written documents. *E.g.*, 42 U.S.C. § 6925 (applications, permits); § 6922(a)(2) (labels); § 6922(a)(5) (manifests); § 6922(a)(1) (records); § 6922(a)(6) (reports).

But this observation does not lead inevitably to the conclusion that section 3008(d)(3) be limited to writings. The term "report," for example, may include communications in both written and oral form. The EPA's own RCRA regulations, when describing procedures to be followed in the event of a release, fire, or explosion, use "report" to mean both written and oral communication. *Compare* 40 C.F.R. § 264.56(j) (1989) (owner must "submit a written report on the incident to the Regional Administrator" within 15 days) *with* 40 C.F.R. § 264.56(d) (1989) (if necessary to protect human health, or the environment outside the facility, the emergency coordinator immediately should make a telephone report to National Response Center). The EPA has insisted on oral reports under other environmental acts as well. *E.g.*, Texas Discharge Permit Notice, 55 Fed. Reg. 23,405 (1990) (permit conditioned on inclusion of "oral reporting" requirement under the Clean Water Act section 402, 33 U.S.C. § 1342).

The only logical basis for exempting oral reports from RCRA's sanctions might be that parties' recollections of unrecorded conversations may be unreliable. That is not a problem here, because the wording of Omni's report is undisputed.

RCRA's purpose, its underlying regulations, and its statutory language all counsel against restricting section 3008(d)(3) to written documents. The consequences of a false or misleading report can be devastating, whether given orally or in writing. Nevertheless, defendants urge an interpretation of a statute that allows them to escape compliance with RCRA

whenever they use a telephone instead of a typewriter. The court should deny this implausible construction.

3. The subject matter of Omni's report falls within the scope of RCRA section 3008(d)(3) because it involves compliance with RCRA regulations.

RCRA section 3008(d)(3) penalizes the omission of material information in a report to be "used for purposes of compliance with [RCRA] regulations." 42 U.S.C. § 6928(d)(3). Durden's letter to Omni flatly stated that the purpose of the EPA's inquiry was to investigate the source of a hazardous waste spill. Investigating spills to enforce compliance with waste management requirements is a basic EPA function. *See* 42 U.S.C. § 6927.

The law charges corporate officers with the knowledge that their hazardous wastes are subject to EPA regulation. The United States Supreme Court has declared that, whenever "obnoxious waste materials" are involved, "the probability of regulation is so great that anyone who is aware that he is . . . dealing with them must be presumed to be aware of the regulation." *United States v. International Minerals Corp.*, 402 U.S. 557, 565 (1971). Thus, when Omni's officers received Durden's inquiry, they were presumptively presented with a request for information to be "used for purposes of compliance with [RCRA] regulations." 42 U.S.C. § 6928(d)(3).

Defendants' claim that their duty of candor to the EPA is triggered only when the Agency can cite to the specific regulation with which it seeks compliance is unreasonable and self-serving. They would have this court believe that, when a company experienced in handling and disposing of hazardous waste receives an inquiry from the EPA about a toxic spill that causes its front lawn to die, its officers had no idea that the inquiry concerned possible RCRA violations.

If defendants truly had been uncertain about the precise nature and purpose of the EPA's inquiry, they should have raised these questions before Adams responded to Durden's letter. Because they did not, the court should deem them to

have waived, or at least estop them from asserting, this defense. *See United States v. Charles George Trucking Co.*, 823 F.2d 685, 691 (1st Cir. 1987) (failure to respond in a timely fashion to EPA inquiry under RCRA section 3007(a) can be seen as proof of intent to waive the opportunity).

Handlers of hazardous waste have an affirmative duty to "furnish information relating to [hazardous] wastes" upon request of any EPA "officer, employee or representative." RCRA § 3007(a), 42 U.S.C. § 6927(a). This duty both facilitates enforcement of RCRA statutes and assists in the development of their underlying regulations. *Id.*; *see also Charles George Trucking Co.*, 823 F.2d at 689 (failure to honor EPA's "inquisitorial authority" under RCRA section 3007(a) would unduly handicap its ability to regulate hazardous waste). Accepting defendants' claim that they are only required to respond to EPA inquiries under the very narrowest of circumstances would almost always prevent the EPA from enforcing compliance with the reporting requirement.

When she wrote her letter, Durden knew only that DWE had been spilled near the Omni plant and that several citizens had complained of chemical odors from the spill. At that time she did not know how the spill had happened, so she could not know who had violated which regulations. The violation of any of a broad spectrum of regulations could have been associated with the spill. *E.g.*, 40 C.F.R. § 264.14 (1989) (security requirements for the facility); § 264.15 (1989) (requirements for proper inspection of the facility); § 264.50 (1989) (contingency plan and emergency procedures requirements).

Durden could have cited to any of these regulations, or all of them, or even to the entire body of RCRA regulations, for all she knew at the time. She could not know if any specific regulation had been violated until she completed her investigation. Defendants' assertion that no duty to cooperate with an EPA investigation arises until the investigation has been completed is absurd.

This argument is analogous to a driver refusing to stop at a police barricade because he does not know the precise purpose for which the barricade has been erected. Defendants' tactic here is nothing more than a bald-faced attempt to evis-

cerate a critical provision of RCRA's pollution prevention arsenal.

A jury convicted Barker and Canner of violating RCRA section 3008(d)(3). The district court considered RCRA's purpose and rejected their suggestions that no crime had been committed. This court should do the same.

C. *Barker and Canner Violated RCRA section 3008(d)(3) Because They Were Responsible for Withholding Material Information in a Report to the EPA.*

Canner and Barker are both responsible for conduct that violated RCRA section 3008(d)(3). Evidence at trial established that Barker, the plant manager, directed and knew of this conduct. Canner, Omni's president, whose well-known corporate philosophy apparently inspired his employees to violate RCRA, cannot avoid responsibility for the acts of those employees. Both officers were aware or should have been aware of that conduct and are liable for it under the "responsible corporate officer" doctrine.

1. Barker violated RCRA section 3008(d)(3): (a) when he knowingly instructed an employee to omit material information in a report needed by the EPA; and (b) because he is a "responsible corporate officer."

The district court determined that Barker knew the contents of Adams' statement to the EPA and that he knew or should have known that statement omitted information material to the EPA's investigation of a hazardous waste management violation. The court found the charge against Barker could be fully sustained under either of two theories: first, that Barker actually knew of and directed Adams' omission of material information; or, second, that Barker is liable under the "responsible corporate officer" doctrine.

a. Barker is guilty because he ordered Adams to withhold information Inspector Durden needed for her investigation.

The trial record shows that Barker instructed his employee, Arnold Adams, to omit material information in a report to the EPA concerning the Agency's investigation of a hazardous waste management violation. The violation is aggravated by the fact that Barker actively instructed Adams *not* to obtain information requested by the EPA and, effectively, to stonewall the EPA by not reporting relevant information already known to both men.

Barker received a specific inquiry from EPA Inspector Durden concerning a hazardous waste spill just outside the street gate of the Omni plant. Durden informed Barker she was investigating and asked him if he knew the source of the spill. Barker specifically instructed Adams not to obtain the information necessary to make a good faith answer to this inquiry. Barker instructed Adams to say as little as possible, and acknowledged Adams' cursory report to the EPA without voicing any disapproval or reservation. If Barker had disapproved of Adams' answer or felt that Adams had misunderstood his directions, Barker easily could have corrected or supplemented the report or told Adams to do so.

Barker does not dispute that he knew what Adams had reported. He does not deny that he knew DWE was a regulated hazardous waste, that an Omni truck was leaking at the time of the spill, that the truck sometimes carried DWE, and that the truck might have been at the spill site at the time of the spill. The court found, therefore, that Barker was a person who knowingly violated RCRA section 3008(d)(3).

At trial, Barker did not contest his knowledge, but argued that the prosecution must prove that he "willed" or "intended" his employee to make a "false statement." Barker's assertion is patently fanciful. First, a false statement is not required. The statute explicitly sanctions "[a]ny person who . . . knowingly *omits material information*" from an EPA inquiry. RCRA §§ 3008(d), 3008(d)(3) (emphasis added). Barker's instructions to Adams show he intended Adams to omit information material to the EPA investigation.

Second, proof of Barker's guilt does not require a showing that he purposefully intended to deceive the EPA. In *United States v. United States Gypsum Co.*, the United States Supreme Court stated that a defendant acts knowingly for purposes of *scienter* if he is aware that a result is practically certain to follow from his conduct, whether or not he intends that result. 438 U.S. 422, 445 (1978). In *Gypsum*, defendants argued that telephone conversations ultimately having the effect of fixing prices were made in a good faith attempt to meet pricing standards allowed by law. *Id.* at 444, 444 n.21. The Court rejected this defense, refusing to require the prosecution to prove defendants consciously desired to fix prices or violate the law; such proof is "both unnecessarily cumulative and unduly burdensome." *Id.* at 446. Because the defendants were sufficiently sophisticated to know that price-fixing was a likely consequence of their telephone calls, they could be held to have knowingly fixed prices. *Id.* at 445-46.

The district court's application of the law to the facts in this case is completely consistent with *Gypsum*. Barker did not want the EPA to learn anything about Omni's possible involvement in the hazardous waste spill because an investigation might disrupt or curtail profits. Under the logic of *Gypsum*, Barker is guilty even if he did not intend to mislead the EPA, but only to enhance Omni's productivity; he acted "knowingly" simply because he knew or should have known that his actions would almost certainly frustrate the EPA's investigation of the hazardous waste spill. Barker's "knowledge" of a material omission was culpable even under the restrictive definition of "knowledge" that he himself proposes.

A fact finder may infer intent to violate RCRA from actions that are far less conclusive than these. In *United States v. Hayes International Corp.*, for instance, a corporate officer received particularly advantageous terms in a hazardous waste disposal contract. 786 F.2d 1499, 1504 (11th Cir. 1986). That, and his failure to inquire into the contractor's disposal methods, were sufficient bases for the jury to infer the officer knew the contractor was disposing of the wastes illegally. *Id.*

Here, similarly to *Hayes*, the jury reasonably could have found that Barker knew or should have known that his orders

to Adams would result in a RCRA violation. The record does not support the theory that Adams, rather than Barker, was responsible for this omission. When Adams suggested a more appropriate response to Durden's inquiry, Barker told him not to make it. Claiming that Barker is innocent because he himself did not pronounce the offending words directly to the EPA, but rather spoke them through his employee, is tantamount to claiming that no employer can ever be guilty under this statute because he can always instruct his secretary or assistant to answer any EPA inquiry for him. That a master is accountable for the actions of his servant is a basic principle of the law of agency. Restatement (Second) of Agency § 25. The master may be criminally liable for the authorized acts of his servant even when the master had no criminal intent. *Id.* § 217D comment b. A master is normally penalized for violation of statutory provisions by a servant acting within the scope of his authority, even when master had no reason to anticipate servant's conduct. *Commissioner, Dep't of Transp. v. Cox*, 83 Pa. Commw. 260, 262, 476 A.2d 1012, 1014 (1984). Barker instructed his employee to make the report in exactly the manner it was made. He confirmed his approval of that report by failing to disapprove, supplement, or correct it in any way. He is responsible for the results of that report.

b. Even if Barker did not knowingly instruct Adams to violate RCRA, Barker is guilty as a responsible corporate officer for failing to require the employee to comply with RCRA.

The "responsible corporate officer" doctrine subjects responsible corporate officers to criminal liability without proof of knowledge or intent. *United States v. Park*, 421 U.S. 658, 670 (1974). The doctrine is applicable whether or not the crime requires "consciousness of wrongdoing," and is applicable "to those who by virtue of their managerial positions or other similar relation to the actor [actually committing the wrong] could be deemed responsible for its commission." *Id.*

The doctrine is founded on the recognition that public welfare statutes often "touch phases of the lives and health of

people which, in circumstances of modern industrialism, are largely beyond self-protection." *United States v. Dotterweich*, 320 U.S. 264, 280 (1943). Enforcement of such a statute requires the abrogation of the conventional requirement of awareness of wrongdoing: "In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.* at 280-81. The Supreme Court has explained that the nature of modern corporations requires self-censorship, and therefore that corporate officers are criminally accountable for failing to exercise their authority and supervisory responsibility. *Park*, 421 U.S. at 671. Public welfare statutes may punish "neglect where the law requires care, or inaction where it imposes a duty." *Id.* (quoting *Morissette v. United States*, 342 U.S. 246, 255 (1952)). By their very nature, these statutes impose an affirmative duty on responsible corporate officers to seek out and remedy violations. *Park*, 421 U.S. at 672.

The responsible corporate officer doctrine need not be incorporated explicitly into a statute in order to apply to violations of the statute. *Dotterweich*, 320 U.S. at 283-85. The statutes under which corporate officers were convicted in *Dotterweich* and *Park* did not mention the doctrine. *Id.*; *cf. Park*, 421 U.S. at 670 (case law establishes availability of "responsible corporate officer" doctrine). Courts traditionally apply the responsible corporate officer doctrine when the purpose of a statute is to protect the public health and welfare. *Park*, 421 U.S. at 668. RCRA is such an act, and courts recognize that the doctrine applies to its enforcement. *See, e.g., United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666-68 (3d Cir. 1984).

Barker alleges that he is not a corporate officer responsible for Omni's conduct violating RCRA section 3008(d)(3). The government has proven Barker is wrong. The prosecution establishes a *prima facie* case that a defendant is in "responsible relationship" to such conduct

> 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 au-

> thority either to prevent the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

Park, 421 U.S. at 673-74.

Barker was in charge of environmental compliance at the Omni plant; he was informed of the EPA inquiry; he directly authorized the response that omitted information necessary to the EPA inquiry; and he failed to correct that omission. Moreover, Congress' amendment of section 3008(d)(3) to prohibit expressly the omission of material information from a report indicates legislative recognition that corporate officers must not be allowed to hide behind a restrictive understanding of reporting requirements. H.R. Rep. No. 198, 98th Cong., 2d Sess. 54-55, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576, 5613-14. Congress imposed a broad reporting duty because it recognized that RCRA's vital mission can only be carried out successfully with the full and active cooperation of corporate officers. As the district court correctly determined, Barker's position of responsibility in the corporate hierarchy makes him doubly liable.

2. Canner is guilty because he is the officer ultimately responsible for Omni's compliance with the EPA's request.

In "providing sanctions which reach and touch the individuals who execute the corporate mission," a legislative act

> imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations do not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

Park, 421 U.S. at 672.

In *Park*, the Supreme Court upheld the conviction of the chief executive officer of a retail food chain for violating health standards set by the Federal Food, Drug, and Cosmetic Act. *Id.* Although the officer testified that his management system required his reliance on subordinates, the Court found him accountable, "because of the responsibility and authority of his position, for the conditions which gave rise to the charges against him." *Id.* at 675.

Likewise, Canner cannot escape responsibility for Omni's violation of RCRA section 3008(d)(3) merely by asserting that he had delegated responsibility for plant management to Barker. Canner's well-known business philosophy places every emphasis on profitability and directs employees not to pay attention to anything else. His "Commandments of Business Success" are: "1. Pay attention to profits. 2. Pay still more attention to profits. 3. If you're paying attention to anything but profits, you probably shouldn't be." This business philosophy, in which he indoctrinated his employees through frequent memos and a company newsletter, created "the conditions which gave rise to the charges against him." *Park*, 421 U.S. at 675. These conditions affected Barker, who as a result gave the direct orders violating section 3008(d)(3). Barker admonished Adams that, "if we spent time chasing down leads for [the EPA,] we'd never make any money."

Nor can Canner's claim that he had no knowledge of the particular EPA inquiry absolve him of responsibility. Although he was aware his business involved the handling of hazardous waste, Canner chose to reroute all correspondence concerning environmental compliance to Barker. The law imposes an affirmative duty to seek out violations and to implement measures to insure that violations will not occur. *Park*, 421 U.S. at 672. An executive cannot insulate himself from liability by willfully choosing to ignore environmental issues. *Id.*

Canner did not meet his duty to ensure the fulfillment of environmental regulations with the single, abrupt generalization in his company's procedures manual that environmental regulations are important. As a successful manager, Canner

knows well this generalization carries little weight in the face of his repeated messages to the contrary that nothing but profit is important.

Canner's conviction is not only just, it is necessary to protect the public from corporate mismanagement of hazardous waste. Strict enforcement of RCRA's criminal penalties against corporate officers is essential to the EPA's enforcement program. *See* Habicht, *supra* p.11, at 10,480. Where the dollar costs of compliance with environmental laws far exceed the cost of civil fines to a company, the threat of criminal sanction against officers who establish and carry out company policies is often the only effective means to insure that compliance. Canner's own words make clear that Omni's sole priority is to make money; nothing other than profit-making merits his consideration. This attitude can be lethal. It must be rooted out.

IV. CONCLUSION

For the reasons discussed above, the United States respectfully requests the court to affirm the district court's judgment finding both defendants guilty of violating RCRA section 3008(d)(3).