Proof of Knowledge Under RCRA and Use of the Responsible Corporate Officer Doctrine

Barbara DiTata*
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INTRODUCTION

Section 6928(d) of the Resource Conservation and Recovery Act ("RCRA") imposes criminal liability for "knowingly" storing, treating, disposing or transporting any hazardous waste without a permit or in violation of any existing RCRA permit condition. The penalty for violation of this provision is a fine of not more than $50,000 for each day of violation and imprisonment for up to five years. The maximum penalty for subsequent convictions is dou-


2. 42 U.S.C. § 6928(d) provides, in pertinent part, as follows: Any person who . . . (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. § 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 . . . shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.
bled for both the fine and imprisonment. Moreover, if an individual violates the criminal proscriptions of RCRA, and in doing so knowingly places another person in imminent danger, the maximum penalty increases to $250,000 or imprisonment for up to 15 years.

The ambiguous language of RCRA, however, has left doubt as to what the term "knowingly" actually means. Moreover, several federal court decisions have considered whether, and in what manner, the responsible corporate officer doctrine may be employed to establish a knowing violation of § 6928(d). This Article analyzes the level of criminal liability which the government must prove for a "knowing" violation of the provisions of subdivision (d) of § 6928. Particularly, it examines whether the knowledge requirement is to be applied to all elements of the offense, and whether such knowledge may be proven by reliance on the responsible corporate officer doctrine.

RCRA imposes a "cradle to grave" regulatory scheme designed to protect the public and the environment. It has been recognized as a public welfare statute designed to provide "nationwide protection against the dangers of improper hazardous waste disposal." Several circuit court opinions have recognized that RCRA's purposes are similar to that of other public welfare statutes, such as the Food Drug and Cosmetics Act. It is "undeniably a public welfare stat-

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4. 42 U.S.C. § 6928(d), SWDA § 3008 (d).
5. 42 U.S.C. § 6928(e), SWDA § 3008 (e). For examples of prosecutions involving these provisions, see United States v. Protex Indus., Inc., 874 F.2d 740 (10th Cir. 1989) (involving a prosecution for violation of RCRA's "knowing endangerment" provision). Unlike § 6928(d), the special rules contained in subdivision (f) expressly detail the knowledge requirement under subdivision (e). 42 U.S.C. § 6928(f).
7. United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990); Wyckoff Co. v. EPA, 796 F.2d 1197, 1198 (9th Cir. 1986) (holding that RCRA "was enacted to protect the national health and environment"). This article does not, however, address criminal liability under RCRA's "knowing endangerment" provision, 42 U.S.C §§ 6928(e)-(f), SWDA §§ 3008 (e)-(f).
9. See, e.g., United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir.
ute, involving a heavily regulated area with great ramifications for the public health and safety.” Furthermore, courts have reasoned that the probability of regulation of this public welfare concern is so great, those who deal with hazardous material are presumed to be aware of its regulation.  

Unlike other public welfare statutes that impose a standard of strict liability for their violation, RCRA expressly requires a “knowing” act in order to find criminal liability. RCRA prosecutions under § 6928(d) have focused on which elements of the offense the term “knowingly” modifies, and whether the responsible corporate officer doctrine may be used to satisfy the knowledge requirement. Part I of this Article considers whether knowledge of the statutory scheme itself, knowledge of the nature of the substance, or knowledge of the requirement and status of the permit of the facility in question is necessary to establish a ‘knowing’ violation as defined by RCRA. Part II of this Article will examine the responsible corporate officer doctrine, and its applicability to this area of the law.

I. REQUIREMENT OF PROVING KNOWLEDGE UNDER SECTION 6928(d)

The criminal provisions of RCRA specifically require that the government prove a knowing violation before a person may be convicted. “Knowingly”, however, is not expressly defined, and the statute’s legislative history provides little insight into the congressional intent. Moreover, when RCRA was amended in 1980, Congress explained that it “ha[d] not sought to define ‘knowing’ for offenses under subsection (d); that process ha[d] been left to the courts under general principles.”

10. Hayes Int’l Corp., 786 F.2d at 1503; see also Hoflin, 880 F.2d at 1038.
13. 42 U.S.C. §§ 6928(d)-(f), SWDA §§3008 (d)-(f).
The Supreme Court has not specifically ruled on the definition of "knowingly" in regard to environmental crimes. However, in the context of a prosecution for food stamp fraud, the Court found that "Congress certainly intended by use of the word 'knowingly' to require some mental state with respect to some element of the crime . . . . Beyond this, the words themselves provide little guidance."\(^{15}\)

The criminal penalties attached to regulatory statutes intended to protect the public health, in contrast to those statutes based on common law crimes, are to be construed to effectuate their regulatory purpose.\(^{16}\) As such, knowledge, under public welfare statutes such as RCRA, must be construed in a fashion so as to effectuate the statute's underlying regulatory purpose. This may provide for a broader view of knowledge than in traditional areas of criminal law.

In determining the extent of this broader view, the courts have generally looked at the conduct to be regulated, the seriousness and extent of that conduct, and the group that Congress targeted for punishment.\(^{17}\) Within this basic framework, several cases have examined RCRA's "knowing" requirement under § 6928(d) and analyzed whether the requirement of knowledge applied to each element of the offense.\(^{18}\) Specifically, courts have examined

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suggests that different subsections might involve different meanings of the word "knowing". *Id.* The definition of "knowing" under subsection 6928(e), however, was specifically laid out by Congress. As explained in the Conference Report:

[...] the basic definition for subsection (e) is that 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 the 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 serious bodily injury.

*Id.*

whether the government must prove the defendant’s knowledge of: (a) the existence of the RCRA statute; (b) the nature of the substance involved in the treatment, disposal, storage or transportation; and (c) the lack of a permit or the facility’s permit status. Several of these cases have also examined how the defendant’s knowledge may be established and whether the “responsible corporate officer” doctrine may be used to attribute knowledge to individual defendants.  

A. Knowledge of the RCRA Statutory Scheme

The defendant need not have knowledge of the existence of the RCRA statutory scheme, nor that he is violating RCRA, in order to be convicted under § 6928(d). Courts have consistently held that “ignorance of the law is no excuse” and a defendant’s lack of knowledge of the regulations, or his misunderstanding of them, is irrelevant. In United States v. International Minerals & Chemical Corp., the Supreme Court held that “where . . . 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.” In United States v. Hayes International Corp., the Eleventh Circuit held that knowledge of the statute, or knowledge of illegality, is an element of the offense. However, because the statute was undeniably a public welfare statute involving a heavily regulated area which impacted on public health and safety, it was reasonable to charge those who

(1971); see also United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990); Johnson & Towers, Inc., 741 F.2d 662.  
22. Id. at 565.  
23. 786 F.2d 1499 (11th Cir. 1986).  
24. Id. at 1504.
operated within such an area with knowledge of its regulatory provisions.  

B. Knowledge of the Nature of the Substance

The circuit courts are in general agreement that the "knowingly" reference requires the government to prove that the defendant knew that the material involved was hazardous. The defendant, however, need not know that the substance was included under the statutory scheme or regulations as a "listed" or "characteristic" RCRA waste. Rather, it is sufficient to prove that the defendant knew the substance involved had the potential to harm people or the environment and was not an innocuous substance such as water.

For example, in United States v. Baytank (Houston), Inc., the Fifth Circuit determined that "knowingly" meant the defendant knew that the nature of the material involved had potential for harm to others or to the environment. Thus, while the government must establish the defendant had knowledge that the substance was hazardous or harmful in order to convict under § 6928(d), the government is not required to prove that the defendant knew the substance had been identified as a listed or characteristic hazardous waste.

C. Knowledge of Permit Requirement & Permit Status

Unlike other sections of RCRA, § 6928(d)(2)(A) does not include an explicit requirement that the violation is committed knowingly. As such, the circuits are split regarding whether knowledge of

25. Id. at 1504-05.
26. Hoflin, 880 F.2d at 1039. This view regarding knowledge of the nature of the substance was also adopted in United States v. Greer, 850 F.2d 1447, 1452 (11th Cir. 1988).
27. Hoflin, 880 F.2d at 1039.
28. 934 F.2d 599 (5th Cir. 1991).
29. Id. In Baytank, the Fifth Circuit recognized that a majority of the circuits have adopted the view that "knowingly", as used in RCRA, 42 U.S.C. § 6928(d), SWDA § 3008(d), applies to knowledge that the substance has potential to harm others or the environment. Id. at 613.
30. Id. at 612.
31. Subsection 2 requires knowing treatment, storage, or disposal, 42 U.S.C.
the permit requirement, and knowledge of the status of the requisite permit, are a part of the criminal proscriptions of RCRA.

In *United States v. Johnson & Towers, Inc.*, the government charged the corporation and two of its employees with "knowingly" disposing of hazardous waste without a permit. The lower court dismissed the RCRA counts of the indictment against the two employees because they were not "owners/operators" under RCRA, and thus, had no obligation under the statute to obtain a permit. The Court of Appeals for the Third Circuit reversed and held that, regardless of the defendant's position within the company, the two employees could be subject to prosecution under § 6928(d).

The government in *Johnson & Towers* argued that it need only prove that there was, in fact, no permit for the disposal or treatment of the hazardous waste involved, and not that the defendants knew a permit was lacking. The term "knowingly", the government argued, applied only to the "treatment", "storage" or "disposal" of a hazardous waste and not to the permit requirement of § 6928(d)(2)(A). The court disagreed with this position and held

§ 6928(d)(2), SWDA § 3008 (d)(2), and subsections (2)(B) and (2)(C) include references to "knowing violations", 42 U.S.C §§ 6928(d)(2)(B)-(C), SWDA §§ 3008 (d)(2)(B)-(C), but subsection (2)(A) does not mention knowledge.

32. 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985). The defendant corporation was engaged in the business of repairing and overhauling large motor vehicles. *Id.* at 663. The employee defendants, the plant foreman and a service manager, were charged with one count of conspiracy, one count of violating the Clean Water Act, and three RCRA counts. *Id.* at 664. The RCRA counts stemmed from the disposal of waste de-greasing chemicals which were first stored in a tank and then pumped into a trench that discharged into the Delaware River. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 665.

that the knowledge requirement applied to all elements of the offense.\textsuperscript{38} The court explained that:

It is unlikely that Congress could have intended to subject to criminal prosecution those persons who acted when no permit had been obtained irrespective of their knowledge (under subsection (A)), but not those persons who acted in violation of the terms of a permit unless that action was knowing (subsection (B)). Thus we are led to conclude either that the omission of the word “knowing” in (A) was inadvertent or that “knowingly” which introduces subsection (2) applies to subsection (A).\textsuperscript{39}

The Third Circuit concluded, therefore, that the term “knowingly” modified all elements of the offense and that the government was required to prove knowledge of the disposal, knowledge that the material disposed was hazardous, and knowledge of the non-permit status of the disposal site.\textsuperscript{40}

The court went on to explain that knowledge could be shown by the defendant's knowledge of actions taken, and that the government need not prove knowledge of the existence of the statute forbidding such actions.\textsuperscript{41} Although such knowledge could be inferred circumstantially, the court indicated that knowledge could not be irrebuttably presumed based on corporate position alone or facts unrelated to the specific illegal activity charged.\textsuperscript{42}

Similarly, in \textit{United States v. Hayes International Corp.},\textsuperscript{43} the Eleventh Circuit reviewed RCRA's legislative history and determined that Congress intended the “knowing” requirement to apply to \textit{all} elements of the RCRA offense.\textsuperscript{44} The court decided

\begin{itemize}
\item \textsuperscript{38} \textit{Johnson & Towers}, 741 F.2d at 667.
\item \textsuperscript{39} \textit{Id.} at 668.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.} at 669 (citing United States v. International Min. & Chem. Corp., 402 U.S. 558, 563 (1971)).
\item \textsuperscript{42} \textit{Id.}; see \textit{United States v. MacDonald & Watson Waste Oil Co.}, 933 F.2d 35, 54 n.18 (1st Cir. 1991) (stating that in \textit{Johnson & Towers} the court did not indicate how knowledge of the law might be inferred).
\item \textsuperscript{43} 786 F.2d 1499 (11th Cir. 1986). \textit{Hayes} involved felony RCRA charges against an airplane refurbishing plant and a company with which the operator had contracted for waste disposal. \textit{Id.} at 1500-01. Fuel drained from the tanks of planes, and paints and solvents used on the planes, were illegally disposed of by the contractor. \textit{Id.} at 1500.
\item \textsuperscript{44} \textit{Id.} at 1503-04.
\end{itemize}
that without this stringent culpability requirement, innocent conduct would be criminalized contrary to congressional intent.\textsuperscript{45} Although the court rejected the defendant's claim that lack of knowledge of the illegality of the offense was a defense, it found that the "knowingly" standard of culpability did apply to all elements of the statute, and therefore, proof of the defendant's knowledge of the permit status of a waste disposal facility to which the waste was transported was a necessary requirement for conviction under § 6928(d).\textsuperscript{46}

The holdings in Johnson & Towers and Hayes may be contrasted with the Ninth Circuit's decision in United States v. Hoflin.\textsuperscript{47} Hoflin involved an appeal from a felony conviction for aiding and abetting the disposal of hazardous waste in violation of § 6928(d)(2)(A), which occurred during defendant's tenure as the director of public works for a municipality in Washington.\textsuperscript{48} The defendant argued that in order for his conviction to stand, there had to be proof that he knew the disposal site where the hazardous waste was taken did not have a permit, and that in its instructions to the jury the court failed to charge this as an element of the offense.\textsuperscript{49}

The Ninth Circuit affirmed the defendant's conviction, holding that knowledge of the non-existence of a permit was not necessary for a conviction under § 6928(d)(2)(A), and that the government need only prove that the defendant knew that the substance disposed of was hazardous.\textsuperscript{50} The court held that knowledge of the lack of a permit was not an element of the offense since the statute clearly distinguished between non-permit holders, and permit holders.\textsuperscript{51} The court noted that the absence of the word "knowing" in subsection (A) of § 6928(d)(2) (relating to the absence of a permit), was in contrast to its presence in subsection (B) (relating to a violation of a material condition or requirement of an existing permit) and that "to read the word 'knowingly' at

\begin{itemize}
  \item \textsuperscript{45} Id. at 1504; see also Webber, supra note 17, at 89.
  \item \textsuperscript{46} Hayes, 786 F.2d at 1504.
  \item \textsuperscript{47} 880 F.2d 1033 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990).
  \item \textsuperscript{48} Id. at 1034.
  \item \textsuperscript{49} Id. at 1036-51.
  \item \textsuperscript{50} Id. at 1038.
  \item \textsuperscript{51} Id. at 1037.
\end{itemize}
the beginning of section (2) into subsection (A) would be to eviscerate this distinction.”

The court in Hoflin declined to follow the Third Circuit’s analysis in Johnson & Towers for two reasons. First, the Ninth Circuit found that under the plain meaning of the statute, “knowingly” did not modify the phrase “without a permit.” Secondly, the Ninth Circuit viewed the analysis of Johnson & Towers as being inconsistent with the purpose and goals of RCRA as a public welfare statute. The Ninth Circuit reversed its ground, however, in United States v. Speach. In Speach, the Ninth Circuit held that proof of the defendant’s knowledge that the facility to which he transported hazardous waste lacked an appropriate RCRA permit was an element of the crime under § 6928(d)(1). The court relied on the fact that the two cases involved different subdivisions of § 6928, and therefore, the court was not bound by its earlier decision in Hoflin. Rather, the court in Speach relied on the Eleventh Circuit’s decision in United States v. Hayes Int’l Corp., and found that “knowingly” applied not only to the nature of the hazardous material, but to whether the facility had the requisite permit. The dissent in Speach, however, believed that it was bound by its earlier decision in Hoflin, since § 6928(d)(1) had the same scienter requirement as did §§ 6928(d)(2)(A) & (B), which the Hoflin court examined.

52. Id.
53. Id. at 1038.
54. Id.
55. 968 F.2d 795 (9th Cir. 1992).
56. Id. at 797.
57. Id.
58. 786 F.2d 1499 (11th Cir. 1986).
59. Speach, 968 F.2d at 797.
60. Id. at 798.
The Fourth Circuit, in *United States v. Dee*, also declined to follow *Johnson & Towers* and accepted the analysis employed by the *Hoflin* court. *Dee* held that in a RCRA prosecution under § 6928(d)(2)(A), the government need not prove either the defendant’s knowledge of the permit status of the facility or knowledge that RCRA requires treatment, disposal, and storage facilities to be permitted.

Most recently, in *United States v. Hopkins*, the Second Circuit applied the *International Minerals* “presumption of awareness of regulation” theory by applying the knowledge requirement of RCRA to violations of the Clean Water Act (“CWA”). Relying on the analysis in *United States v. Laughlin*, and other circuit court decisions interpreting RCRA criminal penalties, the *Hopkins* court concluded that Congress intended to impose criminal liability under the CWA “if the defendant’s acts were proscribed, even if the defendant was not aware of the proscription.” The court based its decision to impose criminal penalties for “knowing” ground pollution and water pollution offenses, on the similarity of the underlying Congressional intent in both

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61. 912 F.2d 741, 745 (4th Cir. 1990), cert. denied, 499 U.S. 919 (1991). The defendants in *Dee* were civil engineers for the United States Army, charged with violations of RCRA for illegally storing, treating, and disposing of hazardous waste generated during the development of chemical warfare systems at a site not covered by a RCRA permit. *Id.* at 743.

62. *Id.*; see Barrett & Clarke, *supra* note 17, at 878. Similarly, in *United States v. Laughlin*, the court, following *Hoflin*, found that the government need not prove defendants knew the facility lacked a permit, and held that *Johnson & Towers* had been incorrectly decided. 768 F. Supp. 957, 961-66 (N.D.N.Y. 1991).

63. 53 F.3d 533 (2d Cir. 1995).


65. 10 F.3d 961 (2d Cir. 1993), cert. denied, U.S. , 114 S. Ct. 1649 (1994). In *Laughlin*, the court held that under RCRA “knowing” does not require the defendant to have knowledge of the statute, but simply knowledge of the act. *Id.* at 966-67.

66. *Hopkins*, 53 F.3d at 540. The Ninth Circuit, in *United States v. Weitzenhoff*, similarly held that the government did not have to prove the defendant’s knowledge of the provisions of the permit under the CWA, but need only prove that the defendant knew he was discharging pollutants. 35 F.3d 1275, 1280 (9th Cir. 1993), cert. denied, U.S. , 115 S. Ct. 939 (1995).
RCRA and CWA.  Thus, the government need only prove that the defendant "knew the nature of [the] acts and performed them intentionally, but was not required to prove that he knew that those acts violated the CWA, or any particular provision of that law, or the regulatory permit issued. . . ."\(^\text{68}\)

Although there remains some dispute as to the need to prove the defendant's knowledge of the permit status or conditions contained in the RCRA permit, it is clear that with respect to the nature of the material being treated, stored or disposed of, the government must prove a defendant's knowledge of the general hazardous nature of the material, but need not establish knowledge that the material was either a listed or characteristic hazardous waste under RCRA.  The government must show, either by direct or circumstantial evidence, only that the defendant knew the material had the potential to be harmful to people or the environment.\(^\text{70}\) The government need not prove defendant's knowledge of the existence of the RCRA regulatory scheme, or that his or her actions were subject to RCRA.\(^\text{71}\)

II. THE RESPONSIBLE CORPORATE OFFICER DOCTRINE AND RCRA

In addition to examining which elements of RCRA require proof of knowledge, RCRA prosecutions also continue to focus on how the government can prove knowledge against officers of the corporation. Courts have looked not only at the direct or actual knowledge which the individual defendant possesses, but the knowledge that may be inferred based on his or her corporate position within the company.\(^\text{72}\)

Under the responsible corporate officer doctrine, a corporate officer may be held criminally liable if, by virtue of his or her position and authority within the company, the defendant had the

\(^{67}\) Hopkins, 53 F.3d at 538-39.

\(^{68}\) Id. at 541.

\(^{69}\) United States v. Self, 2 F.3d 1071, 1091 (10th Cir. 1993).

\(^{70}\) Id.

\(^{71}\) Id.; United States v. Goldsmith, 978 F.2d 643, 645 (11th Cir. 1992); United States v. Dean, 969 F.2d 187, 191 (6th Cir. 1992).

power to prevent or correct the conduct which gave rise to the violation.\textsuperscript{73} This liability may attach even though the officer did not personally participate in the commission of the offense.\textsuperscript{74}

The responsible corporate officer theory of liability was initially articulated in \textit{United States v. Dotterweich},\textsuperscript{75} which involved the prosecution of the president of a company under the Federal Food, Drug and Cosmetic Act ("FDCA").\textsuperscript{76} It is based on the premise that high level executive officers are responsible for the corporation's actions and inactions by virtue of their position or authority. With regard to public welfare statutes, such as the FDCA, therefore, application of the doctrine places an affirmative duty upon the corporate hierarchy to seek out and remedy violations of such statutes.\textsuperscript{77} Criminal liability may be imposed if the responsible corporate officer "knew or should have known" of the corporation's criminal conduct, even if he or she did not expressly authorize or direct their subordinates to perform such conduct.\textsuperscript{78}

The rationale underlying the doctrine is to protect the "innocent public who are wholly helpless."\textsuperscript{79} There is a difference, however, between public welfare statutes such as those involved in \textit{Dotterweich} and \textit{Park}, where there was a strict liability standard, and RCRA, where the statute expressly requires proof that the officer "knowingly" committed the offense. Prosecutors have

\begin{itemize}
\item \textsuperscript{73} See \textit{United States v. Dotterweich}, 320 U.S. 277 (1943); see also \textit{United States v. Park}, 421 U.S. 658 (1975).
\item \textsuperscript{74} See \textit{Dotterweich}, 320 U.S. at 281.
\item \textsuperscript{75} 320 U.S. 277 (1943).
\item \textsuperscript{76} \textit{Id.} at 279; see also Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-395 (1994).
\item \textsuperscript{77} \textit{Park}, 421 U.S. at 670-73. In \textit{Park}, a corporate president located in Philadelphia, Pennsylvania was convicted of violating the Federal Food, Drug and Cosmetic Act (FDCA) because of contaminated food stored in a warehouse in Baltimore, Maryland. \textit{Id.} at 658-59. The Supreme Court noted that the "Government establish[ed] a \textit{prima facie} case when it introduce[d] 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." \textit{Id.} at 673-74.
\item \textsuperscript{78} \textit{Id.} at 671.
\item \textsuperscript{79} \textit{Dotterweich}, 320 U.S. at 285.
\end{itemize}
nonetheless argued that the responsible corporate officer doctrine may be applied to hold corporate officers accountable for crimes that endanger the public welfare without abandoning the knowledge requirement of RCRA.\(^{80}\) Indeed, although *Johnson & Towers* did not deal with the application of the responsible corporate officer doctrine, the court did suggest in dicta that "knowledge . . . may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."\(^{81}\) Courts have held that knowledge may be inferred from the surrounding facts and circumstances, including: (1) the officer's area of responsibility and control over the RCRA activity involved; (2) whether the officer had the power and authority to prevent or correct the violation; and (3) whether the officer knowingly failed to do so.\(^{82}\)

The government has sought to use the responsible corporate officer doctrine in several RCRA prosecutions. In *United States v. Dee*,\(^{83}\) two high level corporate managers who did not have "hands on" responsibility for the RCRA activities involved were, nevertheless, convicted based on the court's instructions to the jury which permitted them to infer knowledge relying on the responsible corporate officer doctrine.\(^{84}\) The jury was instructed, in part, as follows:

> Among the circumstances you may consider in determining the defendants' knowledge are their responsibilities under the regulations and under any applicable policies. Thus you may, but need not, infer that a defendant knew facts which you find that they should have known given their positions in the organization, their relationship to other employees, or any applicable policies or regulation.\(^{85}\)

The application of the responsible corporate officer doctrine under *Dee* still requires the government to prove that the corporate officers had actual knowledge of the pre-existing RCRA

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82. Barrett & Clarke, *supra* note 17, at 884.
84. *Id.* at 745.
violations and knowingly failed to take actions to correct these violations where they had the power and authority to do so. Prosecutors argue that the use of the responsible corporate officer doctrine does not negate the knowing requirement under § 6928(d) of RCRA, but rather, permits the jury to consider the defendants' managerial responsibility to determine if the defendants "knowingly" acted or "knowingly" failed to act to prevent the RCRA violations. According to this view, RCRA convictions of corporate officers are based on more than the defendant's official position which he or she held within the company.

The government's application of the responsible corporate officer doctrine in Dee has been criticized by several members of the defense bar. They claim that the doctrine has been expanded past its traditional use in strict liability offenses and has obviated the element of knowledge which Congress wrote into the RCRA criminal provision. They point out that, unlike the language that appears in the Clean Water Act, RCRA has no responsible corporate officer language. Those opposing the application of the responsible corporate officer doctrine to RCRA offenses claim that it imposes a strict liability standard that was never intended, and thereby shifts the burden of proof.

Since Dee, the government has continued to argue for application of the responsible corporate officer doctrine. United States v. MacDonald & Watson Waste Oil Co., involved two shipments of toluene-contaminated soil to a facility which was not autho-

86. Dee, 912 F.2d at 745.
87. Barrett & Clarke, supra note 17, at 885 n.127.
89. See Rakoff, supra note 88; see also Arkin, supra note 88; Alan Zarky, The Responsible Corporate Officer Doctrine, 5 Toxic L. Rept. (BNA) 983 (Jan. 9, 1991). See generally Barrett & Clarke, supra note 17, at 881 n.111.
90. 33 U.S.C. § 1319(c)(6), FWPCA § 309 (c)(6), (1994) (the term "person" under the statute means "any responsible corporate officer").
92. 933 F.2d 35 (1st Cir. 1991).
rized under its permit to dispose of that specific type of hazardous waste.\textsuperscript{93} During the trial, the government acknowledged that there was no evidence that defendant D'Allesandro, the president of the company, actually knew of the RCRA violations.\textsuperscript{94} Basing its theory of criminal liability on the responsible corporate officer doctrine, the government argued that the defendant could be convicted of the RCRA felony if he knew or should have known of the two waste shipments made in violation of § 6928(d).\textsuperscript{95} The trial court accepted the government's position and instructed the jury that RCRA's knowledge requirement would be met if the jury found that: (1) the defendant was an officer of the corporation; (2) the defendant had direct responsibility for the alleged illegal activities; and (3) the defendant knew or believed that illegal activity of the type charged had occurred.\textsuperscript{96} The defendant was convicted despite his claim that use of the responsible corporate officer doctrine was improper under RCRA § 6928(d) because that provision expressly provided for proof of knowledge.\textsuperscript{97} On appeal, the First Circuit reversed the defendant's conviction, holding that the jury instructions permitted a finding of guilt without a finding of actual knowledge of the two shipments in question.\textsuperscript{98} Thus, the Court held that merely proving that the defendant was a responsible corporate officer was insufficient to establish the required "knowledge" for a conviction under § 6928(d), and any presumption of knowledge based solely on the corporate officer's position was error.\textsuperscript{99} The jury instruction was found to be erroneous because it suggested that a corporate offi-

\textsuperscript{93} Id. at 39-40.
\textsuperscript{94} Id. at 50. Evidence indicated that MacDonald & Watson was a relatively small company and that the defendant exercised "hands on" management responsibilities. \textit{Id}. There was no evidence that defendant D'Allesandro knew of the two improper shipments which were charged in the indictment, but the evidence did indicate that he had been advised of two previous shipments which were improper. \textit{Id}. at 42.
\textsuperscript{95} Id. at 50.
\textsuperscript{96} Id. at 50-51.
\textsuperscript{97} Id. at 51.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
cial could be convicted of a knowing violation under RCRA simply because he failed to ensure proper compliance with the statute. The Court did imply, however, that had the jury been instructed that it could infer knowledge of the illegal shipments based on circumstantial evidence produced at trial, the defendant's conviction could have been upheld.

The court in *MacDonald & Watson* distinguished both *Dotterweich* and *Park*. It found that those two cases reflected the well-established law relating to public welfare statutes which lack an express knowledge or other requirement of scienter. However, because § 6928(d) of RCRA contains an express requirement of knowledge, the court concluded that the responsible corporate officer doctrine could not be employed in the same fashion. Knowledge on the part of a corporate official could be proven or inferred by circumstantial evidence, but it could not, as was done by the jury in *MacDonald & Watson*, be inferred merely by proof that the defendant was a responsible corporate officer.

The court in *MacDonald & Watson* went on to hold that:

[K]nowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions. . . . [But] [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.

The government again attempted to apply the responsible corporate officer doctrine in *United States v. White*. Defendant

100. *Id.* at 51.
101. *Id.* at 54-55.
102. *Id.* at 51.
103. *Id.* at 51-52.
104. *Id.* at 52.
105. *Id.* at 51-52.
106. *Id.* at 55. Additionally, the court held that “[W]illful blindness to the facts constituting the offense may be sufficient to establish knowledge.” *Id.*
107. 766 F. Supp. 873 (E.D. Wash. 1991). The case involved the indictment of five individuals for alleged illegal storage, transportation, and disposal of hazardous waste under 42 U.S.C. §§ 6928(d) & (e), SWDA §§ 3008 (d) & (e), and
Steed, the company’s corporate officer for environmental safety, was charged with the acts of all employees of the PureGro facility on the theory that even if he did not actually know of these activities, under the analysis employed in *Dotterweich* and *Park*, he should have known of them.\(^{108}\)

The court in *White* noted, however, that *Dotterweich* and *Park* involved strict liability crimes under the FDCA and that no mens rea was required under the relevant statute.\(^{109}\) The court also treated as dicta the language in *Johnson & Towers*,\(^{110}\) in which the court suggested that knowledge of the permit requirement could be inferred to the company’s responsible corporate officers.\(^{111}\) The court in *White* concluded that under RCRA § 6928(d), the government must prove “knowing” treatment, storage or disposal, as well as knowledge that the waste was hazardous.\(^{112}\) The court refused to adopt the responsible corporate officer doctrine to support a criminal conviction without the government first establishing a “knowing” state of mind on the part of the defendant corporate officer.\(^{113}\)

Although the government did not explicitly argue for the application of the responsible corporate officer doctrine, as it did in *MacDonald & Watson* and *White*, it did argue that the holding in *Baytank*\(^{114}\) applied. The Fifth Circuit implicitly accepted the use of the responsible corporate officer doctrine when it reinstated the jury’s conviction of two individuals based upon their familiarity with the company’s operations and their involvement with the

certain violations of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136(y) (1992). *White*, 766 F. Supp. at 877. The charges centered around the defendants’ facility, PureGro, where from 1982 through 1987, an evaporator tank was used as a repository for various types of pesticide rinseates. *Id.* No records were maintained by the company of what was put into the tank. *Id.* In 1987, the material from the tank was loaded into a truck and sprayed on a field. *Id.*

108. *Id.* at 894.
109. *Id.* at 894-95.
112. *Id.*
113. *Id.*
114. 934 F.2d 599 (5th Cir. 1991).
company's environmental compliance efforts.\textsuperscript{115} The Baytank court held that "[g]iven the evidence of their detailed knowledge of and control over the storage operations at Baytank, the jury was entitled to conclude that they participated in the illegal storage charged . . ."\textsuperscript{116}

Recently, in United States v. Self,\textsuperscript{117} the Tenth Circuit affirmed the conviction of an owner/operations manager of a RCRA permitted facility for knowingly storing hazardous waste in violation of the facility's RCRA permit.\textsuperscript{118} Relying on MacDonald & Watson,\textsuperscript{119} the defendant contended that knowledge by a responsible corporate officer of the prior illegal transportation of hazardous waste did not necessarily constitute knowledge of the RCRA violation charged in the indictment.\textsuperscript{120} The Court noted, however, that MacDonald & Watson held that an individual's position within the corporation would not, in itself, be sufficient to establish his or her knowledge of the RCRA violation, but such knowledge could be inferred from circumstantial evidence, including evidence of the defendant's position and responsibility within the corporation, as well as knowledge of any prior violations.\textsuperscript{121}

The Court in Self sustained the defendant's conviction, finding that the defendant's corporate position included directing company employees to store hazardous waste and overseeing bills relating to the handling of the company's hazardous waste. The court also found that the defendant had direct knowledge of prior illegal storage and knowledge that such storage violated the company's RCRA permit.\textsuperscript{122} Further, the Court affirmed the conviction under this count based on the alternative theory that

\textsuperscript{115} See id. at 616-17.
\textsuperscript{116} Id. at 617.
\textsuperscript{117} 2 F.3d 1071 (10th Cir. 1993).
\textsuperscript{118} Id. at 1094.
\textsuperscript{119} 933 F.2d 35 (1st Cir. 1991).
\textsuperscript{120} Self, 2 F.3d at 1088.
\textsuperscript{121} Id. (quoting MacDonald & Watson, 933 F.2d at 55)("[K]nowledge may be inferred from circumstantial evidence, including the position and responsibility of defendants . . . as well as information provided to those defendants on prior occasions.").
\textsuperscript{122} Id.
the defendant, acting as a co-conspirator, had aided and abetted in
the commission of the offense.\(^\text{123}\)

Although the government's attempts to apply the responsible
corporate officer doctrine to RCRA have not been wholly suc-
cessful, there are indications that corporate officers may still be
held liable under RCRA for a "knowing" violation of § 6928(d)
in those cases where there is evidence to infer their knowledge.
While proof of "knowledge" must be shown, and will depend
upon the individual facts and circumstances of each case, such
knowledge may be proven circumstantially, relying on the posi-
tion of the individual defendant and the duties and responsibilities
he or she maintained. Prosecutors must keep in mind that merely
demonstrating the position of a particular officer within the cor-
porate hierarchy will not, in itself, impose criminal liability under
RCRA. The courts are unwilling to apply the responsible corpo-
rate officer doctrine in such a manner to permit an individual's
position and duties within a corporation to serve as the sole basis
to attribute guilty knowledge under RCRA.

III. CONCLUSION

In the area of environmental crimes, the courts seem to be
balancing the requirement of knowledge against the strong public
policy interests underlying environmental protection statutes. The
knowledge requirement under § 6928(d) of RCRA has been inter-
preted by the federal courts to effectuate the public welfare pur-
poses at which RCRA is aimed. Specific knowledge of the regu-
laratory scheme, or knowledge that such actions were unlawful,
need not be proven. Nevertheless, the courts have held that the
"knowing" requirement under RCRA § 6928(d) requires that the
government prove that a defendant had knowledge of his or her
own actions and knew that the material transported, stored or
disposed of was hazardous to the environment. Furthermore,
although the courts are unwilling to find that corporate officers
possess the requisite knowledge for conviction under § 6928(d) of
RCRA merely because of their position within the corporate
hierarchy, it is clear that corporate managers can no longer insu-
late themselves from criminal liability by delegating their respon-

\(^{123}\) Id. at 1088-89.
sibility for compliance to others or by closing their eyes to the problem.