

**WASHBURN UNIVERSITY  
SCHOOL OF LAW  
PRESENTS**

**ENVIRONMENTAL CRIME**

**EXPLORING THE  
CRIMINAL ELEMENT OF  
ENVIRONMENTAL LAW**



November 18, 1994  
Washburn University School of Law  
1700 SW College Ave  
Topeka, Kansas 66621

# INTRODUCTION TO THE *CRIMINAL ELEMENT* OF ENVIRONMENTAL LAW

by

David E. Pierce

Professor of Law  
Washburn University School of Law

Of Counsel  
Shughart Thomson & Kilroy

## OUTLINE CONTENTS

	Page
I. Environmental Protection Through Criminal Liability .....	1
A. The Basic Goal: Compliance .....	1
B. Corporate vs. Individual Liability .....	2
C. The Criminal Option .....	4
D. Statutory Overview of Selected Federal Environmental Crimes .....	5
1. Migratory Bird Treaty Act .....	5
2. Refuse Act of 1899 .....	6
3. Clean Water Act .....	6
4. Clean Air Act .....	9
5. Resource Conservation and Recovery Act .....	12
6. Comprehensive Environmental Response, Compensation and Liability Act .....	13

---

© Copyright 1994 by David E. Pierce  
All Rights Reserved

	Page
7. Emergency Planning and Community Right-To-Know Act .....	16
8. Toxic Substances Control Act .....	16
9. Federal Insecticide, Fungicide, and Rodenticide Act .....	16
E. Kansas Statutes .....	17
II. Responsible Corporate Officer Doctrine .....	18
A. "Status" Liability .....	18
B. Legislative Intent to Impose Liability .....	22

# INTRODUCTION TO THE *CRIMINAL ELEMENT* OF ENVIRONMENTAL LAW

by

David E. Pierce

Professor of Law  
Washburn University School of Law

Of Counsel  
Shughart Thomson & Kilroy

## I. ENVIRONMENTAL PROTECTION THROUGH CRIMINAL LIABILITY

### A. The Basic Goal: Compliance

1. The necessary laws to protect the environment currently exist.
2. Environmental goals will be achieved not through new laws but through enforcement of existing laws.
3. Since 1980 the trend has been to utilize "liability-forcing" techniques to achieve compliance by making it economically-devastating not to anticipate and avoid or mitigate environmental problems. See generally David E. Pierce, The Emerging Role of "Liability-Forcing" in Environmental Protection, 30 Washburn L. J. 381 (1990).
4. Since the mid-1980s Congress has required the disclosure of information concerning the use of, and potential public exposure to, toxic substances. E.g. Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C.A. §§ 11001 to 11050 (West 1994 Pamphlet). A collateral goal of such legislation is to elicit the assistance of potential tort liability and general public concern to encourage persons to voluntarily reduce their use or manufacture of toxic substances.
5. Criminal liability is viewed by many as the most effective tool for redirecting corporate priorities

to ensure environmental concerns receive the attention they require.

6. By imposing individual responsibility for corporate non-compliance, the parties who act on behalf of the corporate entity will have the incentive to ensure environmental laws are complied with and that environmental problems are addressed in a timely and forthright manner.
  - a. The motivation is not so much organizational as it is personal--the selfish desire to avoid personal criminal liability.
  - b. This selfish desire to protect one's own liberty and personal financial position converts every employee and company manager into a motivated environmental protectionist; at least in theory.

#### B. Corporate vs. Individual Liability

1. "[A] corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty *individually* of that crime." United States v. Park, 421 U.S. 658, 670 (1975).
  - a. It is not necessary to find the corporation guilty of a crime in order to find the corporation's agent or employee guilty of the criminal act. United States v. Dotterweich, 320 U.S. 277, 279 (1943).
  - b. However, the corporate entity can also be held criminally liable for the actions of its agents or employees. If a stockholder, officer, director, or employee is the actor that commits the crime, and they are pursuing corporate business at the time of their act, the corporation, and the person(s) through which it acts, are all liable for the crime. 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 34, at 572 (rev. perm. ed. 1990).
2. The environmental statutes are worded so that a class of individuals, in addition to the corporate entity, can be held criminally responsible for an act or failure to act.

3. The "Any person" approach.
  - a. Clean Water Act: "Any person" who violates the Act can be held criminally responsible.
  - b. Clean Air Act: "Any person" who violates the Act can be held criminally responsible.
  - c. RCRA: "Any person" who transports, treats, stores, or disposes of hazardous waste improperly.
  - d. Under the "any person" approach you can have several persons criminally responsible for a failure to take action, or taking improper action.
  
4. The "Any person in charge" approach.
  - a. Clean Water Act (§ 311): "Any person in charge" of a vessel or facility must report a spill of oil or a hazardous substance.
  - b. CERCLA (§ 103): "Any person in charge" of a vessel or facility must report a release of a hazardous substance.
  - c. Under the "any person in charge" approach you can also have several persons criminally responsible for a failure to take action, or taking improper action.
  
5. **EXAMPLE:** Bob works as a "pumper" for Acme Oil Company. While transferring oil from a storage tank to a tank truck, a barrel of oil was spilled in a ditch which emptied into a creek. Bob noticed a sheen on the water in the ditch. Later that day Bob told his supervisor, Lisa, that he had spilled a barrel of oil at the Jackson Lease. Lisa called and reported the spill to Mary who is the environmental coordinator for Acme. Mary decided not to report the incident because only a barrel had been involved and the creek did not connect directly with any major river or other water body.
  - a. Under the Clean Water Act "any person in charge" of a facility must report a spill of oil into the waters of the United States.
  - b. Bob arguably was "in charge" of the facility at the time the spill occurred; Lisa and Mary

may also be "in charge" since they possess the authority to respond to the situation.

**C. The Criminal Option**

1. Smoke Ordinance of 1273 under King Edward I: Made burning of coal in the city of London a crime--punishable by death.
2. The government need not pursue civil remedies before employing criminal remedies.
3. United States v. Frezzo Bros., Inc., 602 F.2d 1123 (3rd Cir. 1979).
  - a. Frezzo Brothers, Inc. and its officers, Guido Frezzo and James Frezzo, operated a mushroom growing business. Manure contaminated water was permitted to flow out of the growing boxes into a storm water run-off system that emptied into an unnamed tributary of the East Branch of the White Clay Creek.
  - b. The Frezzo group was convicted of six counts of willfully and negligently discharging pollutants into a navigable water of the United States without a permit.
    - (1) The corporate defendant was fined \$50,000.
    - (2) The individual defendants were fined a total of \$50,000 and sentenced to 30 days in jail.
  - c. Basic Defense: The Environmental Protection Agency (EPA) must either give the defendants prior notice of the alleged violations, or institute a civil action, before pursuing criminal remedies under the Act.
    - (1) Defendants assert that only in this manner can the requisite scienter be established to support a criminal prosecution.
    - (2) Court rejects this argument noting: the elements of the crime can be established by the circumstances surrounding the discharges.

d. Court states:

"[I]n view of the broad responsibilities imposed upon the Administrator of the EPA, he should be entitled to exercise his sound discretion as to whether the facts of a particular case warrant civil or criminal sanctions."

Frezzo, 602 F.2d at 1127.

e. Court holds:

"[T]he Administrator of the EPA is not required to pursue administrative or civil remedies, or give notice, before invoking criminal sanctions under the Act."

Frezzo, 602 F.2d at 1127.

**D. Statutory Overview of Selected Federal Environmental Crimes**

1. **Migratory Bird Treat Act (MBTA)**, 16 U.S.C.A. §§ 701 to 711 (West 1985 & Supp. 1994):

"[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, any migratory bird . . . ."

16 U.S.C.A. § 703 (West Supp. 1994).

a. "Migratory bird" is defined by the U.S. Fish and Wildlife Service as including any bird specie listed at 50 C.F.R. § 10.13 (1993).

b. Violation of the Act is a misdemeanor which carries up to a \$500 fine and six months imprisonment. 16 U.S.C.A. § 707(a) (West 1988).

c. However, under 18 U.S.C.A. § 3559(a)(7) (West Supp. 1994) such a violation is classified as a Class B misdemeanor to which the Alternative Fines Act would apply.

d. Under the Alternative Fines Act an "individual" violating the MBTA could be fined up to \$5,000 and an "organization" up to \$10,000. 18 U.S.C.A. § 3571(b)(6) (West Supp. 1994)

(individual) and § 3571(c)(6) (West Supp. 1994) (organization).

2. **Refuse Act of 1899, 33 U.S.C.A. § 407 (West 1986):**

"It shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . ."

a. **Penalty provision found at 33 U.S.C. § 411 which provides:**

"Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation [of § 407] . . . shall be guilty of a misdemeanor . . . ."

b. **Imposes strict liability on anyone who "violates" § 407 by discharging refuse into waters of the United States.**

3. **Clean Water Act (CWA), 33 U.S.C.A. §§ 1251 to 1387 (West 1986 & Supp. 1994).**

a. **Offers the EPA a menu of civil and criminal remedies it can use to respond to violations.**

b. **CWA § 309, 33 U.S.C.A. § 1319 (West 1986 & Supp. 1994):**

(1) **Injunctive relief. § 309(b).**

(2) **Administrative Penalties. § 309(g).**

(a) **Class I: \$10,000 per violation with cap of \$25,000.**

(b) **Class II: \$10,000 per day for each day of violation with cap of \$125,000.**

(3) **Civil Penalties. § 309(d).**

(a) **\$25,000 per day for each violation.**

(b) **No cap.**

- (4) Citizen Suits. § 505.
    - (a) Order compliance.
    - (b) Civil penalties.
  - (5) Criminal Penalties. § 309(c).
- c. CWA criminal violations:
- (1) "Negligent violations" of the CWA.<sup>1</sup> Penalizes any person who "negligently violates" the Act.
    - (a) Not less than \$2,500 nor more than \$25,000 per day of violation.
    - (b) Imprisonment for up to 1 year; or both.
    - (c) Subsequent violations after first conviction:
      - i) Up to \$50,000 per day of violation.
      - ii) Imprisonment for up to 2 years.
  - (2) "Knowing violations" of the CWA. Penalizes any person who "knowingly violates" the Act.
    - (a) Not less than \$5,000 nor more than \$50,000 per day of violation.
    - (b) Imprisonment for up to 3 years; or both.

---

<sup>1</sup>Includes violation of CWA permit and other requirements. Also includes negligently introducing a pollutant into a publicly owned treatment works (POTW):

"[W]hich such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition . . . ."

(c) Subsequent violations after first conviction:

i) Up to \$100,000 per day of violation.

ii) Imprisonment for up to 6 years.

(3) "Knowing endangerment" under the CWA. Requires a "knowing violation" plus knowledge:

"[A]t that time that he thereby places another person in imminent danger of death or serious bodily injury . . . ."

(a) Fine of not more than \$250,000.

(b) Imprisonment for up to 15 years; or both.

(c) Organization can be fined up to \$1,000,000.

(d) Subsequent violations after first conviction:

i) Fine of not more than \$500,000.

ii) Imprisonment for up to 30 years.

iii) Organization can be fined up to \$2,000,000.

(4) False statements under the CWA:

"Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained . . . or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter . . . ."

(a) Fine of not more than \$10,000.

(b) Imprisonment for up to 2 years; or both.

(c) Subsequent violations after first conviction:

i) Up to \$20,000 per day of violation.

ii) Imprisonment for up to 4 years.

(5) "For the purpose of this [criminal penalties] subsection, the term 'person' means, in addition to the definition contained in section 1362(5) of this title, *any responsible corporate officer.*"

(6) CWA § 311(b)(5), 33 U.S.C.A. § 1321(b)(5) (West Supp. 1994), requires:

"Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of a discharge or oil or a hazardous substance from such vessel or facility [into or upon the navigable waters of the United States] . . . immediately notify the appropriate agency of the United States Government of such discharge."

(a) Failure to give immediate notification is a crime.

i) Fines in accordance with Title 18.

ii) Imprisonment for not more than 5 years; or both.

(b) Statute provides: "Notification received pursuant to this paragraph shall not be used against any such natural person in any criminal case, except a prosecution for perjury or for giving a false statement."

4. **Clean Air Act (CAA)**, 42 U.S.C.A. §§ 7401 to 7671q (West Supp. 1994).

a. Civil judicial and administrative remedies available under CAA § 113(b) and (d).

b. Criminal remedies available under CAA § 113(c),

- (1) "Any person who *knowingly* violates" the operative terms of the Act, a state implementation plan, or an EPA order under the Act, or fails to pay any fee owed under the Act, is subject to the following penalties:
  - (a) Fines in accordance with Title 18.
  - (b) Imprisonment for not more than 5 years; or both.
  - (c) Subsequent violations after first conviction: double the fine and punishment.
  
- (2) "Any person who *knowingly*--"
  - (a) "Makes any false material statement" in reporting to the EPA.
  - (b) Fails to notify or report as required under the Act.
  - (c) Tamper with any monitoring device.
    - i) Fines in accordance with Title 18.
    - ii) Imprisonment for not more than 2 years; or both.
    - iii) Subsequent violations after first conviction: double the fine and punishment.
  
- (3) "Any person who *knowingly* fails to pay any fee owed the United States" under certain subchapters.
  - (a) Fines in accordance with Title 18.
  - (b) Imprisonment for not more than 1 year; or both.
  - (c) Subsequent violations after first conviction: double the fine and punishment.

(4) "Any person who *negligently* releases into the ambient air any hazardous air pollutant . . . or any extremely hazardous substance . . . and who at the time *negligently* places another person in imminent danger of death or serious bodily injury . . . ."

(a) Fines in accordance with Title 18.

(b) Imprisonment for not more than 1 year; or both.

(c) Subsequent violations after first conviction: double the fine and punishment.

(d) **Statutory defense:** when the release is authorized by a CAA emissions standard or permit issued under the CAA.

(5) "Any person who *knowingly* releases into the ambient air any hazardous air pollutant . . . or any extremely hazardous substance . . . and who *knows* at the time that he thereby places another person in imminent danger of death or serious bodily injury . . . ."

(a) Fines in accordance with Title 18.

(b) Imprisonment for not more than 15 years; or both.

(c) Organization can be fined up to \$1,000,000 for each violation.

(d) Subsequent violations after first conviction: double the fine and punishment.

(e) **Statutory defense:** when the release is authorized by a CAA emissions standard or permit issued under the CAA.

c. "For the purpose of this [criminal penalties] subsection, the term 'person' includes, in addition to the entities referred to in section 7602(e) of this title, any responsible

corporate officer."

- d. However, § 113(h) provides that when the crime at issue is a § 113(c)(4) "negligent" release:

"[T]he term 'a person' shall not include an employee who is carrying out his normal activities and who is not a part of senior management personnel or a corporate officer. Except in the case of knowing and willful violations . . . the term 'a person' shall not include any employee who is carrying out his normal activities and who is acting under orders from the employer."

- e. CAA § 113(f), 42 U.S.C.A. § 7413(f) (West Supp. 1994) creates a bounty system:

"The Administrator may pay an award, not to exceed \$10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation of this subchapter . . . ."

- 5. **Resource Conservation and Recovery Act (RCRA)**, 42 U.S.C.A. §§ 6901 to 6992k (West 1983 & Supp. 1994).

- a. Civil judicial and administrative remedies available under RCRA § 3008(a) and (g).

- b. Criminal remedies available under RCRA § 3008 (d).

(1) The following can give rise to criminal liability for any person who "knowingly":

- (a) Transports hazardous waste to a facility which does not have a permit.

- (b) Treats, stores, or disposes of hazardous waste:

- i) Without a permit.

- ii) In knowing violation of a permit.

- (c) Omits information or makes false statements in any document employed

under the Act.

(d) Generates, stores, treats, transports, disposes of, exports, or otherwise handles hazardous waste or used oil and who "knowingly destroys, alters, conceals, or fails to file" any document required by the Act or an authorized state program.

(e) Transports without a manifest a hazardous waste or used oil.

(f) Exports a hazardous waste without complying with the Act.

(2) Any of these *knowing* violations is subject to the following penalties:

(a) Fine of not more than \$50,000 per day of violation.

(b) Imprisonment for up to 2 years (5 years for items 5.b.(1)(a) and (b)); or both.

(c) Subsequent violations after first conviction: double the fine and punishment.

(3) "Any person who *knowingly* transports, treats, stores, disposes of, or exports any hazardous waste . . . or used oil . . . [as noted in item 5.b.(1) above] who *knows* at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction . . . .:"

(a) Fine of not more than \$250,000.

(b) Imprisonment for up to 15 years; or both.

(c) Organization can be fined up to \$1,000,000.

6. **Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)**, 42 U.S.C.A. §§ 9601 to 9675 (West 1983 & Supp. 1994).

- a. CERCLA § 103(a), 42 U.S.C.A. § 9603(a) (West 1983), provides:

"Any person in charge of a vessel or an offshore or onshore facility shall, as soon as he has knowledge of a release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center . . . of such release."

- b. Failure to report is a crime:

"Any person-- . . . who fails to notify immediately . . . as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall [suffer the following penalties] . . . ."

- (1) Fines in accordance with Title 18.
- (2) Imprisonment for not more than 3 years (not more than 5 years for a second or subsequent offense); or both. CERCLA § 103(b).
- (3) "Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." CERCLA § 103(b).

- c. CERCLA § 103(c) imposes an additional reporting obligation designed to identify existing hazardous waste sites:

"[A]ny person who owns or operates, or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances . . . are, or have been stored, treated, or disposed of shall, unless such facility has a permit issued . . . [under RCRA], notify the [EPA] . . . of the existence

of such facility . . . ."2

(1) "Any person who knowingly fails to notify the Administrator of the existence of such facility"

(a) Fine of not more than \$10,000.

(b) Imprisonment for up to 1 year; or both.

(c) Lose limitation on liability and any defenses you may have under CERCLA § 107.

(2) "Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case [probably under § 103(a) or RCRA], except a prosecution for perjury or for giving a false statement."

d. Recordkeeping obligations: CERCLA § 103(d).

(1) 50-year recordkeeping obligation.

(2) Crime to "knowingly destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records" which identify the "location, title, or condition of a facility" or the "identity, characteristics, quantity, origin, or condition . . . of any hazardous substances contained or deposited in a facility."

(a) Fines in accordance with Title 18.

(b) Imprisonment for not more than 3 years (5 years for a second or subsequent conviction); or both.

---

<sup>2</sup>The statute requires that these matters be reported before June 8, 1981.

7. **Emergency Planning and Community Right-To-Know Act (EPCRA)**, 42 U.S.C.A. §§ 11001 to 11050 (West Pamphlet 1994).

a. EPCRA § 325(b)(4), 42 U.S.C. § 11045(b)(4) (West Pamphlet 1994), provides:

"Any person who *knowingly and willfully* fails to provide notice in accordance with section 11004 [emergency notification] . . . shall, upon conviction, be fined not more than \$25,000 or imprisoned not more than two years, or both (or in the case of a second or subsequent conviction, shall be fined not more than \$50,000 or imprisoned for not more than five years, or both)."

b. EPCRA § 325(d)(2), 42 U.S.C. § 11045(d)(2) (West Pamphlet 1994), provides:

"Any person who *knowingly and willfully* divulges or discloses any information entitled to protection under section 11042 . . . [trade secrets] shall, upon conviction, be subject to a fine of not more than \$20,000 or to imprisonment not to exceed one year, or both."

8. **Toxic Substances Control Act (TSCA)**, 15 U.S.C.A. §§ 2601 to 2692 (West 1991 & Supp. 1994). TSCA § 16 (b), 15 U.S.C.A. § 2615(b) (West Supp. 1994), provides:

"Any person who *knowingly or willfully* violates any provision of [TSCA] shall, in addition to or in lieu of any civil penalty . . . be subject, upon conviction, to a fine of not more than \$25,000 for each day of violation, or to imprisonment for not more than one year, or both."

9. **Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)**, 7 U.S.C.A. §§ 136 to 136y (West 1980 & Supp. 1994).

a. FIFRA § 14(b)(1), 7 U.S.C.A. § 1361(b)(1) (West Supp. 1994) provides:

"(A) Any registrant, applicant for a registration, or producer who *knowingly violates* any provision of this subchapter shall be fined not more than \$50,000 or imprisoned

for not more than 1 year, or both.

"(B) Any commercial applicator of a restricted use pesticide, or any other person not described in subparagraph (A) who distributes or sells pesticides or devices, who knowingly violates any provision of this subchapter shall be fined not more than \$25,000 or imprisoned for not more than 1 year, or both."

- b. FIFRA § 14(b)(2), 7 U.S.C.A. § 1361(b)(2) (West 1980) provides:

"Any private applicator . . . who knowingly violates any provision of this subchapter shall be guilty of a misdemeanor and shall on conviction be fined not more than \$1,000, or imprisoned for not more than 30 days, or both."

- c. FIFRA § 14(b)(4), 7 U.S.C.A. § 1361(b)(4) (West 1980) provides:

"When construing and enforcing the provisions of this subchapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any person shall in every case be also deemed to be the act, omission, or failure of such person as well as that of the person employed."

#### **E. Kansas Statutes**

1. Kan. Stat. Ann. § 65-159 (1992). Failure to abate a nuisance "found on any private property or upon any watercourse," in response to an order from the Kansas Department of Health & Environment (KDHE), is a criminal offense punishable by a fine of not less than \$10 nor more than \$100 for each day the nuisance continues.
2. Kan. Stat. Ann. § 65-169 (1992). Failure to comply with KDHE water pollution requirements is a misdemeanor punishable by a fine of not less than \$25 nor more than \$100 for each day of the offense.
3. Kan. Stat. Ann. § 65-3441(a) (Supp. 1993). Lists a number of acts associated with the handling and disposal of hazardous waste which can give rise to

criminal penalties.

- a. NOTE: Although many of the acts parallel the RCRA provisions, many of the Kansas provisions do not have a "knowingly" requirement.
  - (1) For example, it is a crime to "store, collect, treat or dispose of hazardous waste contrary to the rules and regulations, standards or orders of the secretary [of the KDHE]." § 65-3441(a)(4).
  - (2) The RCRA counterpart requires that such activity be done "knowingly."
- b. The "knowingly" issue becomes relevant when considering the penalty:
  - (1) If the action is not done knowingly the crime is a class A misdemeanor.<sup>3</sup>
  - (2) If the action is done knowingly the crime is a class C felony.
  - (3) Improper transportation and disposal of a hazardous waste is a class E felony ("knowingly" is not part of the statute). See Kan. Stat. Ann. § 65-3441(a)(11) and (b) (1985).

## II. RESPONSIBLE CORPORATE OFFICER DOCTRINE

### A. "Status" Liability

1. United States v. Dotterweich, 320 U.S. 277 (1943).
  - a. Federal Food, Drug, and Cosmetic Act prohibited "the introduction . . . into interstate commerce of any . . . drug . . . that is adulterated or misbranded." "Any person" violating the statute was "guilty of a misdemeanor."
    - (1) Charges against Buffalo Pharmacal Company,

---

<sup>3</sup>Subject to a few exceptions noted in the statute.

Inc. and Dotterweich, its president and general manager.

- (2) Jury convicted Dotterweich for shipping misbranded drugs and an adulterated drug.
- (3) Dissent notes:

"There is no evidence in this case of any personal guilt on the part of . . . [Dotterweich]. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to . . . [Dotterweich] solely on the basis of his authority and responsibility as president and general manager of the corporation." Dotterweich, 320 U.S. at 285-286.

- b. Congress may "dispense with the conventional requirement for criminal conduct--awareness of some 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.*" Dotterweich, 320 U.S. at 281.
- c. "Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless." Dotterweich, 320 U.S. at 285.

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

- a. President of Acme Markets, Inc., John R. Park, convicted because there were rodent droppings at two of the company's warehouses where food was stored.
  - (1) Food chain with 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses.
  - (2) President relied upon subordinates to

remedy any sanitation problems at its warehouses.

b. Court notes the basic premise of Dotterweich:

"[To provide] sanctions which reach out and touch the individuals who execute the corporate mission--and this is by no means necessarily confined to a single corporate agent or employee--the Act imposes not only a *positive duty to seek out and remedy violations when they occur* but also, and primarily, a *duty to implement measures that will insure that violations will not occur.*" Park, 421 U.S. at 672.

(1) "The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the *highest standard of foresight and vigilance* . . . ."

(2) Court notes a possible defense:

"[B]ut the Act, in its criminal aspect, does not require that which is objectively impossible." If you can demonstrate that the corporate agent was "powerless" to prevent or correct the violation, it can be raised as a defense. Park, 421 U.S. at 673.

(3) This may also provide a defense when the corporate agent has, in effect, done everything right by taking all the proper precautions, but nevertheless, a violation occurs. Although the employee causing the violation to occur and the corporate entity may be criminally liable, the corporate agent may be able to demonstrate they have indeed been "responsible" and done everything in their power to ensure a violation would not occur.

c. Court notes that under this statute:

"[T]he Government establishes a *prima facie* case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, *by reason of his*

*position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." Park, 421 U.S. at 673-74.*

d. Defense raised by Park:

"[H]e had employed a system in which he relied upon his subordinates . . . . [H]e had found these subordinates to be 'dependable' and had 'great confidence' in them."

- (1) Government's reply: Park had been sent notices from regulatory agency that indicated his system was not working.
- (2) He failed to take action to remedy the weaknesses in the system. "At some point in time, Mr. Park has to be held responsible for the fact that his system isn't working . . . ." *Park, 421 U.S. at 675, n.16.*

e. Dissent notes:

- (1) Responsible corporate agent can be held criminally liable for their *negligent* acts but not merely because of their *status* in the corporate hierarchy.
- (2) "[T]he prosecution must at least show that by reason of an individual's corporate position and responsibilities, he had a duty to use care to maintain the physical integrity of the corporation's food products."
  - (a) "A jury may then draw the inference that when the food is found to be in such condition as to violate the statute's prohibitions, that condition was 'caused' by a breach of the standard of care imposed upon the responsible official. This is the language of negligence, and I agree with it." *Park, 421 U.S. at 678-679.*
  - (b) Dissent did not feel that the trial court's jury instructions required

a finding of negligent corporate management.

**B. Legislative Intent to Impose Liability**

1. The main focus of the dissenting justices in Dotterweich concerned:

"[I]n the absence of *clear statutory authorization* it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge." Dotterweich, 320 U.S. at 286.

2. Dotterweich and Park dealt with statutes which imposed strict liability on those who violated the Act. They also imposed misdemeanor penalties.
3. Many of the environmental statutes require "knowledge" or a "knowing" or "willful" act.
4. State v. Kailua Auto Wreckers, Inc., 615 P.2d 730 (Hawaii 1980).

- a. Statute: "[N]o person shall ignite, cause to be ignited, permit to be ignited or maintain any open fire."

- b. Kailua Auto Wreckers, Inc. was run by Roy Weber who was vice-president, general manager, secretary, and a director of the corporation.

- (1) Helen Weber was the president, treasurer, and a director of the corporation.

- (2) Roy ran the business; Helen took no active part in the business--she ran an occasional errand and occasionally attended a director's meeting.

- c. Kailua, Roy, and Helen were each convicted of 17 counts of maintaining an open fire. Roy would set the interiors of cars on fire to burn off the plastic, etc. before salvaging the metal.

- d. Court notes the statute in this case imposes "strict liability upon persons and institutions who engage in unlawful open burning."

(1) The open burning infraction is only punishable by fine.

(2) Court holds, as to Helen:

"[T]he regulation's purpose of safeguarding the public from the hazards of air pollution similarly warrants the imposition of a high standard of care upon officers of a corporation to insure corporate compliance with the law. Therefore . . . we hold that high corporate officers who possess managerial authority bear a personal responsibility to the public to exercise reasonable care to discover any violation of the open burning regulation, to remedy any such violation of which the officer knows or should have known, and to prevent future violations." Kailua, 615 P.2d at 739.

(3) However, the court notes this is a negligence standard.

(a) "[W]e find Mrs. Weber, as president and treasurer of KAW, negligent in failing to exercise reasonable care to discover, remedy and prevent corporate violations of the open burning prohibition." Kailua, 615 P.2d at 740.

(b) "Given the constant and egregious nature of KAW's violations, the slightest effort by Mrs. Weber to carry out her duties as president and to become generally informed about the corporation's affairs would have made her aware of the corporation's illegal activity." Kailua, 615 P.2d at 740.

(4) Court notes possible defenses:

(a) Only applies to violations that the responsible corporate officer "could have remedied or prevented in the exercise of reasonable care."

(b) Among the factors to consider:

- i) Degree of harm to the public.
- ii) Egregiousness of the violations.
- iii) Supervisory authority and control vested in the corporate position.
- iv) Size of the corporation.  
Kailua, 615 P.2d at 740, n.16.

5. Statutory responsible corporate officer liability:

a. Clean Water Act (CWA) § 309(c)(6), 33 U.S.C.A. § 1319(c)(6) (West Supp. 1994) provides:

"For the purpose of this subsection [criminal penalties], the term 'person' means, in addition to its definition contained in section 1362(5) of this title, *any responsible corporate officer.*"

b. Clean Air Act (CAA) § 113(c)(6), 42 U.S.C.A. § 7413(c)(6) (West. Supp. 1994) contains an identical provision defining "person" to include "any responsible corporate officer."

c. Commenting on this language under the Clean Water Act, the court in U.S. v. Brittain, 931 F.2d 1413 (10th Cir. 1991), states (dicta):

"We interpret the addition of 'responsible corporate officers' as an expansion of liability under the Act . . . . Under this interpretation, a 'responsible corporate officer,' to be held criminally liable, would not have to 'willfully or negligently' cause a permit violation. Instead, *the willfulness or negligence of the actor would be imputed to him [responsible corporate officer] by virtue of his position of responsibility.*"

(1) NOTE: this is dicta since the court notes there was enough direct action by Raymond T. Brittain to sustain his personal liability.

(2) Brittain was convicted of 18 felony counts of falsely reporting a material fact to

a government agency and two misdemeanor counts of discharging pollutants in violation of the Clean Water Act.

(3) Brittain was the public utilities director for the City of Enid, Oklahoma. He allegedly directed other employees to falsify discharge monitoring reports and to divert sewage around the city's treatment plant.

d. Note also that under the CWA and the CAA each make it a crime to negligently violate the acts.

(1) This appears to be another route for bringing in "responsible corporate officers."

(2) CWA § 309(c)(1) provides:

"Any person who . . . negligently violates [designated sections of the CWA] . . . shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or both."

(3) CAA § 113(c)(4) is more limited than the CWA provision, and provides:

"Any person who negligently releases into the ambient air any hazardous air pollutant . . . and who at the time places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both."

6. Responsible corporate officer doctrine under RCRA.

a. U.S. v. White, 766 F. Supp. 873 (E.D. Wash. 1991).

(1) Wash water in cleaning pesticide containers was collected, for five years, in a tank. The contents of the tank were taken out and sprayed on a field.

(a) Indictment charges PureGro, Inc. and

four individuals for illegal storage, transportation, and disposal of hazardous wastes.

- (b) Defendant Steven Steed moved to strike portions of the Bill of Particulars which asserted Steed was liable for RCRA violations as a responsible corporate officer.
  - (c) Court notes that under the government's theory Steed would be liable "for all the acts of all other employees of PureGro in handling hazardous wastes, even if he did not know of those activities, so long as he *should* have known of those activities."
- (2) The court rejects the government's responsible corporate officer theory noting:

- (a) The statutes involved in Park and Dotterweich require "*no mental state or action*" but RCRA applies to anyone who "knowingly" treats, stores, or disposes of a hazardous waste.
- (b) Concluding that the term *knowingly* "modifies hazardous waste, as well as treats, stores, or disposes of," the court holds:

"[T]he government must prove not only knowing treatment, storage or disposal of hazardous waste but also that the defendant knew the waste was hazardous." White, 766 F. Supp. at 895.

- (c) Applying the RCRA knowledge requirement to Steed the court holds:

"The 'responsible corporate officer' doctrine would allow a conviction without showing the requisite specific intent. None of the cases cited by the government supports the theory that a conviction may be had under a state of mind

requirement other than that specified by Congress. *In the instant case it is 'knowing,' not 'should have known' as the prosecution suggests.*" White, 766 F. Supp. at 895.

b. U.S. v. Dee, 912 F.2d 741 (4th Cir. 1990).

(1) Dee and Lentz were Gepp's superiors; they all worked as civilian employees for the U.S. Army, assigned to Chemical Research at the Aberdeen Proving Ground.

(2) Each were charged with various violations of RCRA for illegally storing, treating, and disposing of hazardous wastes.

(3) Court notes:

"[T]he government did not need to prove defendants knew violation of RCRA was a crime, nor that regulations existed listing and identifying the chemical wastes as RCRA hazardous wastes. However, we agree with defendants that the knowledge element of § 6928(d) does extend to *knowledge of the general hazardous character of the wastes.*" Dee, 912 F.2d at 745.

(4) COMMENT: Although most commentators cite Dee as being one of the "more stringent applications" of the responsible corporate officer doctrine, the facts in Dee really don't support such a conclusion.

(a) Although there is language concerning the obligations of Dee and Lentz as the heads of their departments, the facts indicate that each had a personal role in causing the improper disposal to occur.

(b) The court in Dee simply didn't need to rely upon vicarious liability to convict the supervisory personnel; there was adequate evidence to support their direct involvement and knowledge in the crimes.

c. U.S. v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991).

- (1) Waste Oil Co. and three of its employees, Slade, Ritarossi, and D'Allesandro, were convicted of knowingly transporting hazardous waste to a facility which lacked a permit for the waste, violating RCRA.
  - (a) Waste Oil Co. and Narragansett Improvement Co. (NIC) were convicted of knowingly treating, storing, and disposing of a hazardous waste in violation of RCRA.
  - (b) Waste Oil Co. and NIC were convicted of failing to report a release of a hazardous substance under CERCLA.
  - (c) Waste Oil Co. was convicted of making false statements and mail fraud.
- (2) Master Chemical discovered it had a leaking toluene tank. They hired Waste Oil Co. to remediate the site and take contaminated soil to a disposal site leased from NIC, which held a RCRA permit to dispose of certain wastes at the site.
  - (a) Master Chemical representatives negotiated with Slade, an employee of Waste Oil Co., concerning the removal of toluene contaminated soil.
  - (b) Ritarossi, an employee of Waste Oil Co., supervised the excavation of the contaminated soil and its transportation for disposal at the NIC site.
  - (c) D'Allesandro was the manager and principal of Waste Oil Co.
  - (d) The wastes were hazardous wastes that could not be legally disposed of at the NIC site.
- (3) The convictions of Slade and Ritarossi were affirmed.
- (4) Conviction of D'Allesandro is vacated.

(a) Basis for D'Allesandro's conviction was based upon his position as president and owner of Waste Oil Co.

(b) Court notes:

"The government argued that D'Allesandro was guilty of violating § 3008(d)(1) because, as the responsible corporate officer, he was in a position to ensure compliance with RCRA and had failed to do so even after being warned by a consultant on two earlier occasions that other shipments of toluene-contaminated soil had been received from other customers, and that such material violated NIC's permit." Waste Oil Co., 933 F.2d at 50.

(c) Court holds that the jury instructions:

"[I]mproperly allowed the jury to find him guilty without finding he had actual knowledge of the alleged transportation of hazardous waste on July 30 and 31, 1986, from Master Chemical Company, Boston, Massachusetts, to NIC's site, knowledge being an element the statute requires." Waste Oil Co., 933 F.2d at 51.

(d) Distinguishing Park and Dotterweich the court states:

"[W]e know of no precedent [with regard to the responsible corporate officer doctrine] for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute. . . . Especially is that so where, as here, the crime is a felony . . . ." Waste Oil Co., 933 F. 2d at 52.

(5) However, the court notes that here the requisite knowledge can be demonstrated through circumstantial evidence.

- (a) The court notes that the jury was properly instructed with regard to circumstantial evidence of knowledge and "willful blindness."
- (b) The jury was instructed as follows:
- i) "Whether a Defendant acted knowingly or with knowledge of a particular fact may be inferred from that Defendant's conduct, from that Defendant's familiarity with the subject matter in question or from all of the other facts and circumstances connected with the case."
  - ii) "In determining whether a Defendant acted knowingly, you also may consider whether the Defendant deliberately closed his eyes to what otherwise would have been obvious. If so, the element of knowledge may be satisfied because a Defendant cannot avoid responsibility by purposefully avoiding learning the truth. *However, mere negligence or mistake in not learning the facts is not sufficient to satisfy the element of knowledge.*" Waste Oil Co., 933 F.2d at 52.
- (c) The court notes: "the court could, had it wished, have elaborated on the extent to which D'Allesandro's responsibilities and duties might lead to a reasonable inference that he knew of the Master Chemical transaction." Waste Oil Co., 933 F.2d at 52.
- (6) Where the trial court committed reversible error was when it instructed the jury "that proof that D'Allesandro was a responsible corporate officer would conclusively prove the element of his knowledge of the Master Chemical

shipments." Waste Oil Co., 933 F.2d at 52.

(7) Court concludes:

"Simply because a responsible corporate officer believed that on a prior occasion illegal transportation occurred, he did not necessarily possess knowledge of the violation charged. *In 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.*" Waste Oil Co., 933 F.2d at 55.

(8) The evidence indicated that D'Allesandro participated actively in the firm's day-to-day management, and that he had been warned on other occasions that his company had illegally disposed of toluene-contaminated soil. Waste Oil Co., 933 F.2d at 42.

(a) However, there was no direct evidence that he knew of the shipments giving rise to this prosecution.

(b) In closing, the court suggests:

i) "[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."

ii) "[W]illful blindness to the facts constituting the offense may be sufficient to establish knowledge." Waste Oil Co., 933 F.2d at 55.