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Environmental Crimes: The Boom in “Busting” Corporations and Their Responsible Officers

Larry Howell†

Nothing so upholds the laws as the punishment of persons whose rank is as great as their crime.

—Cardinal Richelieu (1585-1642)
Chief Minister of France under Louis XIII

I. Introduction

Critics of the last decade’s seemingly exponential increase in criminal prosecutions under federal environmental laws should replace John Pozsgai, the current “poster child” for their cause, with the unfortunate polluter of whom the King of England made an example nearly 700 years ago. After all, John Pozsgai, a Hungarian immigrant whose “crime,” according to the conservative Washington Legal Foundation (WLF), consisted of nothing more than cleaning up an old dump site on land he had bought and replacing the refuse with clean fill, only received three years in prison and a $202,000 fine for violating the wetland protection provisions of the Clean Water Act.¹ The unidentified Englishman, on the other hand, was executed in 1307 for violating a royal proclamation barring the burning of coal in an already smoggy London.²

Besides, try as they might to portray Mr. Pozsgai as the victim of an environmental inquisition—and under the Bush Administration, no


less\textsuperscript{3}—the groups that have seized his case\textsuperscript{4} to support their cause have been unable to explain away the fact that Mr. Pozsgai continued to fill in the wetlands despite receiving eight warnings that he needed a permit. Those warnings included not only notices of violation along with cease and desist orders from the United States Environmental Protection Agency (EPA), but a restraining order from a federal district judge.\textsuperscript{5} While no one knows whether the coal-burning Londoner appreciated the seriousness of his crime, it seems likely that, due process being what it was in the Middle Ages, any notices he received numbered fewer than eight. In short, this anonymous Englishman, who probably was only trying to keep his family warm, makes a much more dramatic symbol of the environmental persecution feared by conservatives than does a scofflaw such as John Pozsgai.

Regardless of whether one agrees with the political perspective of groups such as the WLF, no one can dispute the fact that more environmental violators, including corporate executives with no direct responsibilities for ensuring environmental compliance, can expect to hear prison doors shut behind them. Capital punishment, though, is at least a few years away. After detailing the recent increase in environmental prosecutions, this Article discusses the criminal provisions of the major federal environmental acts and discusses recent legislative efforts to strengthen those provisions even further. Those efforts include the addition of "knowing endangerment" violations, the adoption of sentencing guidelines for environmental crimes and corporate offenders, the passage of the Criminal Fine Improvements Act and the Pollution Prosecution Act, and the, as yet, unsuccessful attempts to pass the Environmental Crimes Act. Finally, this Article examines the recent trend that the regulated community finds the most troubling: Prosecutors' largely successful efforts to extend the "responsible corporate officer" doctrine, which arose under strict liability misdemeanor statutes, to felony environmental statutes requiring a violator in most instances to act knowingly.

\begin{enumerate}
\item Adler & Lord, \textit{supra} note 1, at 785.
\end{enumerate}
II. Strengthening Criminal Penalties in Federal Environmental Laws

Despite the fact that for the last twelve years the executive branch has been dominated by conservative Republican appointees, the number of prosecutions for violations of federal environmental laws has increased greatly. As one high-level Reagan appointee stated, "It has been, and will continue to be, Justice Department policy to conduct environmental criminal investigations with an eye toward identifying, prosecuting, and convicting the highest ranking, truly responsible corporate officials."  

Department of Justice (DOJ) statistics indicate that its announced policy has succeeded quite well. Between 1982 (when the DOJ established its Environmental Crimes Unit) and the end of 1990 (by which time the unit had expanded into the much larger Environmental Crimes Section), federal environmental prosecutors obtained 703 indictments and 517 convictions. Those convictions resulted in the assessment of more than $56 million in fines, restitution and forfeitures, as well as the imposition of more than 316 years imprisonment. One-third of those indictments (234) and three-quarters of the fines, restitution and forfeitures ($43 million) came in fiscal years 1989 and 1990. In 1990 alone, the DOJ obtained 134 indictments, a 33% rise over the


7. Generally, the DOJ handles criminal prosecutions rather than the EPA. For a good explanation of the respective roles of the two agencies in criminal cases, see Judson W. Starr, Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains, 59 GEO. WASH. L. REV. 900 (1991); see also Adler & Lord, supra note 1; Roger J. Marzulla & Brett G. Kappel, Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s, 16 COLUM. J. ENVTL. L. 201 (1991). For an account of how the EPA and the DOJ sometimes do not see eye-to-eye on particular cases, see LaFraniere, supra note 6.

8. Dick Thornburgh, Criminal Enforcement of Environmental Laws—A National Priority, 59 GEO. WASH. L. REV. 775, 778 (1991). Mr. Thornburgh was Attorney General of the United States when he wrote this article.

9. Id.

10. Id. at 778 n.19.
previous year. Furthermore, of the 134 indictments in 1990, the DOJ claims that an astonishing 98% of the indictments named corporations responsible as well as their owners, officers, or managers.

Recent news accounts suggest the pace has yet to slacken, at least as far as fines are concerned. On March 26, 1992, the DOJ announced that Rockwell International Corporation had agreed to plead guilty to five felonies and five misdemeanors in connection with hazardous waste violations at the Rocky Flats nuclear weapons plant near Denver, Colorado. Rockwell, which runs Rocky Flats for the United States Department of Energy, agreed to pay a fine of $18.5 million, the second largest fine ever assessed for environmental crimes. The largest fine came last year when Exxon agreed to pay $125 million to settle the criminal charges that arose out of the Exxon Valdez oil spill. In just two cases in the last two years, the DOJ almost tripled the total dollar amount in fines for the previous nine years combined.

While the Reagan and Bush administrations might like to take much of the credit, this dramatic increase in environmental prosecutions is largely attributable to Congress upgrading the status of many environmental crimes from misdemeanors to felonies, which in turn resulted in increased emphasis by the EPA and the DOJ on the use of criminal sanctions instead of civil proceedings. Of the major federal environmental laws in existence two decades ago, not one contained felony provisions. However, since the enactment of the 1990 amendments to the Clean Air Act, all environmental laws now contain such provisions. Because of the complexity of investigating and litigating environmental cases, Congress upgraded misdemeanors to felonies in order to "justify the considerable resources" needed to prosecute such

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11. Id. at 778 n.20.
12. Id. at 778 n.21.
14. Id.
15. Id.
17. Thornburgh, supra note 8, at 776-77 n.3.
Congress's decision to increase the penalties resulted from a widespread belief that many businesses had come to view civil sanctions as simply a cost of doing business—one that could be passed on to consumers regardless of the amount. This perception was realized after Exxon's highest officer commented on his corporation's agreement to pay approximately $1.2 billion to the Alaskan and federal governments over ten years to settle the criminal and civil charges resulting from the Exxon Valdez supertanker's encounter with Bligh reef. When asked about the settlement's impact on Exxon, Chairman Lawrence G. Rawl, according to the New York Times, suggested the effects would be minimal. "'We're talking about stretching a bill out over [ten] years. . . . It will not curtail any of our plans.'" One is left to wonder whether Exxon's behavior will change as a result.

A. Criminal Provisions of Major Environmental Acts

The major federal environmental acts providing for criminal prosecutions are the Federal Water Pollution Control Act, better known as the Clean Water Act (CWA); the Clean Air Act (CAA); the Toxic Substances Control Act (TSCA); the Solid Waste Disposal Act, better known as the Resource Conservation and Recovery Act (RCRA); the Comprehensive Environmental Response, Compensation, and Liability

19. Strock, supra note 1, at 916.
Act (CERCLA);\textsuperscript{26} and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).\textsuperscript{27}

1. Clean Water Act

Under the CWA, the contamination of a body of water with virtually any pollutant without having a permit to do so, or in violation of a permit condition or other limitation, is considered a crime.\textsuperscript{28} Negligent violations are punishable by fines ranging from $2,500 to $25,000 per day and by up to a year in prison.\textsuperscript{29} Knowing violations are punishable by fines of $5,000 to $50,000 per day and by up to three years in prison.\textsuperscript{30} For second or subsequent convictions, the fines and imprisonment for both negligent and knowing violations double. The CWA also provides for harsher sentences for "knowing endangerment" violations, which occur when someone knowingly violates the Act with the actual knowledge that doing so "places another person in imminent danger of death or serious bodily injury."\textsuperscript{31} Such violations are punishable by up to fifteen years in prison and fines of $250,000 for individuals and $1 million for organizations.\textsuperscript{32} False statements under the CWA are punishable by up to two years in prison and a $10,000 fine.\textsuperscript{33}

2. Clean Air Act

The CAA parallels closely the CWA in the structure of its criminal provisions, in that it also has four types of violations: negligent, knowing, knowing endangerment, and false statements.\textsuperscript{34} Prohibited acts include

\textsuperscript{29} Id. § 1319(c)(1).
\textsuperscript{30} Id. § 1319(c)(2).
\textsuperscript{31} Id. § 1319(c)(3)(A).
\textsuperscript{32} Id.
\textsuperscript{34} 42 U.S.C.A. § 7413(c) (Supp. 1992).
violating any implementation plan and releasing hazardous air pollutants into the ambient air. The CAA defers to Title 18 of the United States Code on the range of fines available for individual violators. The possible prison sentences are also the same as in the CWA, except that knowing violators face up to five years instead of three.

3. Toxic Substances Control Act

Under TSCA a crime occurs when one knowingly or willfully fails to comply with any order issued under TSCA concerning the manufacture or testing of chemical substances, uses for commercial purposes a chemical substance that was manufactured or distributed in violation of the TSCA, violates the required record-keeping provisions of TSCA, or fails to permit entry or inspection as the Act requires. Criminal violations are punishable by up to a $25,000 fine for each day of violation and a year in prison.

4. Resource Conservation and Recovery Act

RCRA, one of the more heavily enforced acts by environmental prosecutors, was designed to provide "cradle to grave" record keeping on the generation, storage, transportation, handling, and disposal of hazardous waste. No negligent criminal violations exist under RCRA, only knowing ones. Among other things, RCRA considers the following to be crimes: (1) to knowingly transport hazardous waste to an unlicensed facility; (2) to knowingly treat, store, or dispose of hazardous waste either without a permit or in knowing violation of the material conditions of any permit or standards; (3) to knowingly omit material information or make false statements in any required record; (4) to knowingly generate, store, treat, dispose of, or otherwise handle any hazardous

35. Id.
38. Id.
waste while knowingly failing to keep and file the proper documentation; 
(5) to knowingly transport or cause to be transported any hazardous 
waste without a manifest; and (6) to knowingly export any hazardous 
waste without the receiving country's consent or in violation of any 
international agreement. Fines under RCRA can be up to $50,000 
per day and jail terms generally can be up to five years, except in some 
cases where the maximum is two years. As in the CWA, violations 
of the knowing endangerment provisions are punishable by up to fifteen 
years in prison and fines of $250,000 for individuals and $1 million 
for organizations.

5. Federal Insecticide, Fungicide and Rodenticide Act

FIFRA provides for the registering, the labelling, and the testing of 
pesticides. Knowing violations of any of the Act's provisions by pesticide 
producers are punishable by up to a year in prison and a $50,000 fine. 
Knowing violations by commercial applicators are punishable up to 
a year in prison and a $25,000 fine. Knowing violations by a private 
applicator are punishable up to 30 days in jail and a $1,000 fine.

6. Comprehensive Environmental Response, Compensation, and 
Liability Act

Under CERCLA, which was enacted to identify and clean up sites 
contaminated with hazardous substances, a person who knowingly falsifies 
or destroys any required record, or who is in charge of a facility and 
fails to report a spill of which he is aware, or who files a false claim 
for reimbursement from the Superfund can be punished by up to three

40. 42 U.S.C.A. § 6928(d) (Supp. 1992). Section III of this Article examines in detail 
how the DOJ and the courts have construed the knowledge requirement of RCRA's criminal 
provisions.

43. Id. § 136i(b)(1)(B).
44. 7 U.S.C.A. § 136i(b)(2) (West 1980).
years (five years on a second conviction) and fined, pursuant to Title 18.\textsuperscript{45}

B. Knowing Endangerment Violations

As noted earlier, most of the felony provisions of these statutes were added after the initial passage of the various acts. The most recent addition to the criminal provisions is the serious crime of knowingly endangering another person, included in RCRA, the CWA, and the CAA. RCRA’s knowing endangerment provision, for example, states “[a]ny person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste... who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury” faces up to fifteen years in prison and a $250,000 fine.\textsuperscript{46} Organizations convicted under this provision can be fined up to $1 million.\textsuperscript{47}

If the offender is a natural person, the statute limits its application to situations in which the offender had actual awareness or belief that his action placed another in risk of serious bodily injury, but allows the use of circumstantial evidence to establish that knowledge, “including evidence that the defendant took affirmative steps to shield himself from relevant information.”\textsuperscript{48} A defendant has the requisite knowledge “if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.”\textsuperscript{49}

The Tenth Circuit, in upholding RCRA’s knowing endangerment provision against a challenge that it was void for vagueness, succinctly summarized the essence of a knowing endangerment violation.\textsuperscript{50} The defendant, Protex Industries, recycled barrels and drums used to store chemicals. Protex was convicted of knowingly endangering its employees, several of whom suffered from solvent poisoning due to lack of protective

\textsuperscript{46} Id. § 6928(e).
\textsuperscript{47} Id.
\textsuperscript{49} Id. § 6928(f)(1)(C).
\textsuperscript{50} United States v. Protex Indus., 874 F.2d 740 (10th Cir. 1989).
On appeal, Protex challenged the statute as vague on its face and as applied, but the court of appeals disagreed, stating, "The gist of the 'knowing endangerment' provision of the RCRA is that a party will be criminally liable if, in violating other provisions of the RCRA, it places others in danger of great harm and it has knowledge of that danger."  

C. Impact of Sentencing Guidelines

Another major change that illustrates the increased importance attached to the prosecution of environmental crimes is the inclusion of a separate section on these crimes in the complicated Federal Sentencing Guidelines Manual. This manual is in effect for all federal crimes committed after November 1, 1987. As widely discussed in connection with other crimes, these guidelines eliminate much of the judicial discretion involved in sentencing, abolish parole altogether, and restrict suspended sentences to the least serious offenses. Perhaps in no area of criminal law will the increase in sentences under the guidelines be felt more harshly than in environmental violations. Where pre-guideline defendants routinely received suspended sentences, post-guideline defendants will just as routinely go to prison.

Under the new sentencing guidelines, it is difficult to predict a jail sentence with absolute certainty unless all the sentencing materials and facts are available. One fact, however, that can be stated with complete certainty is that many people convicted for environmental offenses are now going to be sentenced to jail. The question is no longer whether a defendant in environmental cases will go to prison, but rather for how long.

51. Id. at 741-42.
52. Id. at 744.
53. FEDERAL SENTENCING GUIDELINES MANUAL §§ 2Q1.1 to 2Q2.1 (1992) [hereinafter GUIDELINES MANUAL].
55. Id.
The guidelines establish three categories of environmental violations that cover most offenses within the major environmental acts: knowing endangerment, mishandling hazardous or toxic substances or pesticides, and mishandling other pollutants. For each category, a “base offense level” is assigned, followed by a list of “specific offense characteristics” that either add or subtract points from the base offense level to reach a defendant’s point level. The sentence imposed is determined within a narrow range for that point level taking into account the defendant’s criminal history. For example, the base offense level for mishandling hazardous or toxic substances is eight, but that level is quickly increased by six if the offense resulted in an ongoing discharge of the substance. If the offense resulted in the substantial likelihood of death or serious injury, another nine points is added. But if the offense involved is merely a record keeping violation, two points are subtracted. Additionally, other sections of the guidelines concerning the defendant’s role in the violation also apply. For instance, if the person involved is a ring leader, organizer, supervisor or manager, another two to four points could be added to the offense level. Perhaps the most important factor to consider about the guidelines is that for a first offender any offense level above six requires incarceration.

The impact of the guidelines is best illustrated by comparing what a pre-guidelines defendant in an actual case received to what he would receive under the guidelines. In United States v. Hoflin, the former director of Public Works for the City of Ocean Shores, Washington, was convicted of directing an employee to illegally bury drums of paint

56. GUIDELINES MANUAL, supra note 53, § 2Q1.1.
57. Id. § 2Q1.2.
58. Id. § 2Q1.3.
59. Id. § 2Q1.2(a).
60. Id. § 2Q1.2(b)(1)(A).
61. GUIDELINES MANUAL, supra note 53, § 2Q1.2(b)(2).
62. Id. § 2Q1.2(b)(6).
63. Id. § 3B1.1.
64. Id. § 5B1.1(a)(1).
65. 880 F.2d 1033 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990); see infra text accompanying notes 111-37 for its holding on RCRA’s knowledge requirement.
waste, in violation of RCRA, and of illegally disposing of grease, in violation of the CWA. He was placed on probation for two years. Had the offenses occurred after November 1, 1987, the result would have been notably different. Because the RCRA violation involved mishandling of a hazardous substance, Hoflin’s base offense level would be eight. The violation would be increased by four levels because an actual release of the substance occurred. In addition, four more levels would be added because Hoflin disposed of the substance without a permit. As director of public works, Hoflin also would almost certainly face another increase of at least two levels for his position of authority. Therefore, his offense level would have been at least 18, which requires 27 to 33 months in prison. Additionally, at the time, the CWA violations were misdemeanors and thus not considered aggravating factors during sentencing. Now, however, that violation is also a felony and could result in an additional increase in Hoflin’s sentence. The guidelines also require the sentencing judge to impose a fine unless the defendant cannot pay it or it would severely impact his dependents. An offense level of 16, for example, requires a fine of at least $5,000 and not more than $50,000.

D. The Criminal Fine Improvements Act

Organizations, including corporations, that violate environmental laws are expressly excluded from the sentencing guidelines provisions for determining how much an organization should be fined. Instead, environmental violations by corporations are subject to fines in accord with Title 18 of the United States Code, which gives judges considerably

66. GUIDELINES MANUAL, supra note 53, § 2Q1.2(a).
67. Id. § 2Q1.2(b)(1)(B).
68. Id. § 2Q1.2(b)(4).
69. Id. § 3B1.1(c).
70. Id. § 5A.
71. Starr & Kelly, supra note 54, at 10099.
72. Id. at 10100
73. Id.
74. GUIDELINES MANUAL, supra note 53, § 8C2.1.
more latitude than the sentencing guidelines. The key provisions regarding the amount of such fines are contained in 18 U.S.C.A. § 3571, which was enacted as part of the Criminal Fine Improvements Act of 1987. This Act provides that an organizational defendant can be fined an amount greater than the maximum allowed by the specific statute the organization has violated, unless that statute expressly exempts the offense from being included under the Criminal Fine Improvement Act.

The Act instead allows a corporation to be fined the greater of: $500,000 for felony convictions; $200,000 for Class A misdemeanor convictions, the maximum set by the statute violated; or twice the amount of any person's pecuniary gain or loss from the offense. The last method of calculating fines has the greatest potential impact on corporate environmental violators, given the great expense of cleaning up environmental disasters. While few corporations have been sentenced to date under this law for environmental violations, one cannot help but wonder what effect it might have had on the willingness of Exxon and Rockwell International to settle the criminal cases against them for $125 million and $18.5 million, respectively.

E. The Pollution Prosecution Act

Another piece of recent legislation that will no doubt lead to even more prosecutions of environmental crimes is the Pollution Prosecution Act of 1990. In 1988-89, the EPA had only sixty criminal investigators, known as special agents, compared to two thousand for the Secret Service, three thousand for the IRS, and over nine thousand for the FBI. Recognizing that this shortage severely hampered the EPA's ability to conduct criminal investigations, the Pollution Prosecution Act

77. Id.
78. See Rockwell Pleads Guilty, supra note 13.
requires the EPA to boost its number of special agents to two hundred by October 1, 1995.\textsuperscript{81} Obviously, more than tripling the EPA’s number of criminal investigators should dramatically increase the number of cases it refers to the DOJ for prosecution.\textsuperscript{82} The same Act also creates a national center to train federal, state and local investigators, prosecutors, and technical experts in the enforcement of federal environmental laws.\textsuperscript{83} To fund these requirements, Congress appropriated an additional $110 million over five years.\textsuperscript{84}

F. The Proposed Environmental Crimes Act

In the wake of Exxon’s befouling of Alaska’s once-pristine Prince William Sound and the perceived inadequacy of environmental laws to adequately punish such massive environmental catastrophes, members of the House of Representatives first proposed the Environmental Crimes Act of 1989.\textsuperscript{85} The bill, which never made it out of the House during the 101st Congress,\textsuperscript{86} was reintroduced in the 102d Congress during the summer of 1991 as Senate Bill 1605.\textsuperscript{87} This bill likewise never made it out of the House. The bill created two new felonies punishable by up to 30 years in prison and maximum fines of $500,000 for individuals and $2 million for organizations.\textsuperscript{88}

\textsuperscript{82} The FBI has increasingly focused on environmental crimes, as shown by the joint FBI-EPA investigation of the Rocky Flats nuclear weapons facility outside Denver. In June 1989, 120 agents, mostly from the FBI, raided the facility with handguns drawn, seizing boxes of records and taking photographs. This joint investigation resulted in a plea bargain with Rockwell. Rockwell Plead Guilty, supra note 13; Strock, supra note 1, at 934.
\textsuperscript{84} Id. \$ 205.
\textsuperscript{86} Adler & Lord, supra note 1, at 818-19.
\textsuperscript{88} S. 1605, 102d Cong., 1st Sess. (1991). The bill would have added sections 731 through 735 to Title 18 of the United States Code. Notes 89 through 94 refer to those proposed sections.
The first new felony prohibited "knowingly or recklessly endangering life or causing an environmental catastrophe."90 "Environmental catastrophe" is defined as "death or injury to 20 percent or more of the known population of any species of fish, wildlife, or plant within a defined ecosystem; or . . . destruction of habitat or any species of fish, wildlife, plant, or other living natural resource that prohibits the ability of the habitat to support viable breeding of the affected species."90 The second new felony prohibited "endangering life or causing environmental catastrophe by a course of illegal conduct,"91 with the key phrase "course of illegal conduct" defined as two or more environmental offenses that contribute to the risk of imminent death, serious bodily injury or environmental catastrophe.92 The act also provided for a lesser offense of negligently endangering life or causing environmental catastrophe, punishable by up to one year in jail and fines of $125,000 for individuals and $500,000 for corporations.93

Another significant feature of the act required the sentencing court, upon conviction of an organization for any environmental felony, to appoint an independent expert to conduct an environmental audit aimed at determining the cause of the violation and of determining what steps should be taken to prevent future occurrences.94

III. Extending the "Responsible Corporate Officer" Doctrine to Environmental Statutes

Because virtually all felony crimes under the major environmental acts require that a violator act with knowledge,95 it is hardly surprising that much of the battle in environmental prosecutions focuses on the question of exactly what the defendant had to have known. Unfortunately for corporate officials, the answer from the courts tends to be "very

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90. Id. § 735(1).
91. Id. § 732.
92. Id. § 731(c).
93. Id. § 733.
95. See text Section II, parts A & B.
little.” Even those courts that have required a more rigorous amount of knowledge have virtually negated the requirement by allowing juries to infer the requisite knowledge from the defendant’s position of responsibility. Allowing juries to infer knowledge from a defendant’s position within a corporation is an expansion of the “responsible corporate officer” (RCO) doctrine. The RCO doctrine previously had been restricted to strict liability “public welfare” statutes that only provided for misdemeanor violations. Together, these two developments have struck fear—some would say hysteria—into the hearts of corporate executives and their highly paid counsel.

A. Court Interpretations of RCRA’s Knowledge Requirement

Nowhere has the knowledge requirement been litigated more heavily than under the knowing violations of RCRA’s restrictions on the handling of hazardous wastes. The two key felony provisions of RCRA criminalize the conduct of any person who:

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit . . . , [or]

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

(A) without a permit . . . ; or

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

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


99. Id. (emphasis added).
Courts have had to construe both subsections (1) and (2) to determine what the defendant had to know in order to be convicted. While the verdict is not unanimous, the majority rule—and, perhaps more importantly, the obvious trend—is that a defendant need only have a bare minimum of knowledge, sometimes as little as an awareness of the incident charged and that it involved a potentially harmful substance. The defendant generally does not have to know that the act in question was illegal or that the substance involved was specifically listed as a hazardous waste by the statutes.

As discussed below, however, the circuit courts are divided on what a guilty defendant had to know about RCRA's permit requirements. The three circuits that have considered the issue now agree that, under section 6928(d)(1), the prosecution must prove both that the defendant knowingly transported hazardous waste and that the defendant knew the receiving facility lacked a permit to treat, store or dispose of the waste. The second knowledge requirement, concerning the receiving facility's permit status, seemingly runs counter to a similar issue the majority of circuits have decided. Under section 6928(d)(2)(A), a waste generator defendant must only know that he or his facility lacked a permit to treat, store, or dispose of hazardous waste. A further indication of the uncertainty surrounding this area is that the most recent circuit to consider this knowledge requirement of section 6928(d)(1) first concluded that a conviction does not require proof that a waste generator defendant knew the permit status of the receiving facility in question. The court then withdrew that opinion and replaced it with one coming to the opposite conclusion.

In 1984, the Third Circuit Court of Appeals addressed for the first time the question of RCRA's knowledge requirements in United States v. Johnson & Towers, Inc. In Johnson & Towers, a company and two employees were indicted for illegally dumping hazardous waste without a permit, in violation of section 6928(d)(2)(A) of RCRA. While the company admitted its guilt, the employees filed motions to dismiss

100. Onsdorff & Mesnard, supra note 97, at 10102.
101. Id.
alleging that only owners or operators could be convicted of dumping without a permit because they were the only persons RCRA required to get permits for the corporation. The district court agreed and granted the motion to dismiss on RCRA charges.

The court of appeals reversed, holding that section 6928(d)(2)(A) forbids owners and operators of the facilities, as well as their employees, from disposing of hazardous substances without a permit. However, the court also held that because the employees were not required to obtain a permit, the Government had to establish that they "knew or should have known that there had been no compliance with the permit requirement of section 6925." Thus, the Third Circuit interpreted subsection (2)(A) of section 6928(d) to read the same as subsections (2)(B) & (C), which expressly require that a person knowingly violate the conditions of a permit or other regulation, even though subsection (A) contained no such express requirement. In effect, the court held that "knowingly" applied to each element of the violation. The Third Circuit is the only circuit court to hold in such a way on this issue.

The Ninth Circuit, in United States v. Hoflin, next faced the question of whether a defendant charged, under section 6928(d)(2)(A), with knowingly disposing of hazardous waste without a permit had to know that a permit was required. Using sound statutory analysis, the court rejected the conclusion of the Johnson & Towers court, stating:

Had Congress intended knowledge of the lack of a permit to be an element under subsection (A) it easily could have said so. It specifically inserted a knowledge element in subsection (B), and it did so notwithstanding the "knowingly" modifier which introduces subsection (2). In the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out. To adopt the Third Circuit's interpretation of subsection (A) would render the word "knowing" in subsection (B) mere surplusage.

104. Johnson & Towers, 741 F.2d at 664.
105. Id.
106. Id. at 664-65.
107. Id. at 668.
108. 880 F.2d 1033 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990).
109. Hoflin, 880 F.2d at 1038.
Due in part, no doubt, to the Ninth Circuit’s strong reasoning, at least one, and possibly two other circuit courts faced with deciding how far the word “knowingly” extends in section 6928(d)(2)(A) have chosen to follow Hoflin rather than Johnson & Towers. In United States v. Dean, the Sixth Circuit discussed the reasoning of the two cases at length in explaining that Hoflin was preferred, largely because of the ramifications for the RCRA’s regulatory scheme if ignorance of the permit requirement was a defense to permit violations.

The Ninth Circuit observed that the permit requirement is intended to give the EPA notice that oversight of a facility is necessary (and, by implication, the force of the statutory scheme would be greatly diminished by exempting all who claimed ignorance of the statute’s requirements). The difference in mens rea between the subsections [of section 6928(d)(2)] signifies the relative importance, in the estimation of Congress, of the twin requirements of obtaining a permit and complying with the permit. This ranking is consistent with the greater likelihood that compliance with the permit will be monitored.

The Fifth Circuit may possibly align itself with the Ninth and Sixth Circuits on this issue, making the split three to one in favor of not requiring the prosecution to prove that a defendant charged under section 6928(d)(2)(A) knew that he was required to have a permit to handle hazardous wastes. In United States v. Baytank, the court did not discuss this precise issue but did set out the elements necessary to convict a defendant under section 6928(d)(2)(A). The elements are “that the defendant knows factually what he is doing—storing, what is being stored, and that what is being stored factually has the potential for harm to others or the environment, and that he has no permit.” Assuming the court chose its language carefully (often a dangerous assumption),

110. See United States v. Laughlin, 768 F. Supp. 957, 965 (N.D.N.Y. 1991) (rejecting the analysis of the Johnson & Towers court, choosing instead to adopt Hoflin because it was “consistent with the general principles of statutory interpretation which have developed in the context of ‘public welfare’ offenses”).
111. 969 F.2d 187 (6th Cir. 1992).
112. Dean, 969 F.2d at 191.
113. 934 F.2d 599 (5th Cir. 1991).
114. Baytank, 934 F.2d at 613 (emphasis added).
even concerning those elements that were not being challenged, a plain reading of this language is that a defendant is only required to know that he did not have a permit, which is considerably less than knowing he needed a permit.

While most circuit courts that have considered this issue have concluded that under section 6928(d)(2)(A) a defendant need not know that he needed a permit to handle hazardous wastes, those that have construed the nearly identical knowledge provision of section 6928(d)(1) have unanimously come to the opposite conclusion. The Eleventh Circuit, in United States v. Hayes International Corp.,\(^{115}\) first concluded that section 6928(d)(1) required the prosecution to prove that a defendant knew that the facility to which he transported hazardous waste lacked a permit. Unfortunately, the opinion’s logic breaks down at a key point. In Hayes International, a company and one employee were convicted under section 6928(d)(1) of knowingly transporting hazardous waste for disposal to a facility that lacked a permit. The trial court granted j.n.o.v. holding that in addition to knowingly transporting the waste the defendants had to know that the facility that took the waste did not have the required permits. In a confusing opinion, the Eleventh Circuit reinstated the guilty verdicts, holding that while RCRA did not require that the defendants know that a disposal facility needed a permit, the law did require that the defendants know that the disposal facility lacked a permit.\(^{116}\) The court tried to explain this self-described “anomalous” holding via a less than helpful analogy to securities law: “[A] seller need not know a license is required to sell a security as long as the seller knows he does not have a permit.”\(^{117}\)

The analogy in Hayes International, however, does not work. Hayes International concerned what a person must know about a third party’s permit status, whereas a security dealer need only know his own permit status. Requiring the prosecution to prove that a defendant knew he did not have a permit is much less onerous than requiring the prosecution to prove that the defendant knew another party was not licensed. If the purpose of section 6928(d)(1) is to prevent a waste generator from

\(^{115}\) 786 F.2d 1499 (11th Cir. 1986).

\(^{116}\) Hayes Int’l, 786 F.2d at 1504.

\(^{117}\) Id. at 1504 n.6.
transferring waste to an unlicensed facility, which seems undisputable, requiring the generator to know the facility lacked a permit in order to be found guilty defeats that purpose. Instead, the waste generator should be put on inquiry notice. Thus, if a generator fails to inquire as to a hazardous waste facility’s license status and the facility lacks a license, the generator should be guilty under RCRA.

In United States v. MacDonald & Watson Waste Oil Co.,\textsuperscript{118} the First Circuit concurred with the conclusion of Hayes International, although that portion of MacDonald & Watson is dicta. Citing Hayes International approvingly, the First Circuit found “much to be said” for requiring the Government to prove that a defendant charged with shipping a hazardous waste to a facility lacking a permit knew the facility’s permit status or was at least “willfully indifferent” to the lack of a permit.\textsuperscript{119}

Recently, in a two-to-one opinion, another circuit court followed suit but in a manner that clearly reflects the strong debate surrounding this issue. In United States v. Speach,\textsuperscript{120} the Ninth Circuit rejected the Government’s logical contention that the same court’s earlier decision in Hoflin, concerning the knowledge requirement of section 6928(d)(2)(A), required a similar finding under the similar language of section 6928(d)(1).\textsuperscript{121} The court distinguished Hoflin on two grounds, the first of which, and by far the weaker of the two, was that Congress may have unwittingly neglected to put the word “knowingly” into the statute everywhere it was intended, an assumption that the dissent points out the court dismissed in Hoflin when it interpreted section 6928(d)(2)(A).\textsuperscript{122} The court’s second, and more sound reason for distinguishing Hoflin is that section 6928(d)(1) concerns what a defendant knew about a third person’s permit status, while (d)(2)(A) concerns the defendant’s own permit status.\textsuperscript{123} The court adopted the reasoning in Hayes International that “[r]emoving the knowledge requirement

\textsuperscript{118} 933 F.2d 35 (1st Cir. 1991).
\textsuperscript{119} MacDonald & Watson, 933 F.2d at 47-48.
\textsuperscript{120} 968 F.2d 795 (9th Cir. 1992).
\textsuperscript{121} Speach, 968 F.2d at 797.
\textsuperscript{122} Id. at 798 (Rymer, I., dissenting).
\textsuperscript{123} Id. at 797.
[of section 6928(d)(1)] would criminalize innocent conduct, such as that of a transporter who relied in good faith upon a recipient's fraudulent certificate. 124 However, as the dissent also points out, that reasoning ignores the fact that "reading the statute literally here, as in Hoflin, is consistent with RCRA's purpose of protecting people and the environment from hazardous waste." 125

Furthermore, the court's concerns about a waste generating defendant being prosecuted for his "good faith" reliance upon a waste facility's fraudulent assertions ignores the ease with which a waste generator can determine whether a receiving facility has the required permit. A phone call to the appropriate agency—either the EPA, or more typically, a state's environmental regulatory agency—will readily determine whether a facility has the appropriate license. Given the highly regulated nature of hazardous waste handling and the potential risk, both environmental and legal, requiring waste generators to make such a phone call or face the consequences seems a minimal burden to impose. As the United States Supreme Court unequivocally stated in rejecting ignorance as a defense to charges of violating Interstate Commerce Commission regulations governing transportation of hazardous liquids, that when "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." 126

Perhaps the most interesting aspect of Speech—because of the light it sheds on how unsettled this question may still be despite the appearance of unanimity among the circuits—is that the opinion initially rejected the reasoning in Hayes International. 127 Instead, the Ninth Circuit first chose, as one might expect, to follow its own analysis in Hoflin, concluding that, under section 6928(d)(2)(A), a waste generator defendant

124. Id. at 796.
125. Id. at 798 (Rymer, J., dissenting).
need not know anything about the receiving facility's permit status to be convicted.

We are bound in this case to follow our own precedent as established in Hoflin. The word "knowingly" is used in exactly the same manner in both [section] 6928(d)(1) and [section] 6928(d)(2)(A). The word "knowingly" in [section] 6928(d)(2)(A) modifies "treats, stores, or disposes of any hazardous waste," but does not modify "without a permit." The language of [section] 6928(d)(1) is parallel to that of [section] 6928(d)(2)(A), and the word "knowingly" in [section] 6928(d)(1) only modifies "transports or causes to be transported any hazardous waste."

Even more perplexing, given the court's change of mind, is that the first decision was issued per curiam and was even accompanied by a concurring opinion that gave a second reason why a conviction under section 6928(d)(1) did not require proof that the defendant knew the receiving facility was unlicensed.

Individuals may be held criminally liable under [section] 6928(d)(1) for unlawful transportation of hazardous waste even if they are unaware that the transporter or receiving facility lacks the necessary permit.

This interpretation of [section] 6928(d)(1), along with our holding in Hoflin, leaves in place a comprehensive scheme of incentives that matches the scope of regulation Congress intended for hazardous wastes under RCRA. Those covered by RCRA's [section] 6928(d) must do more than simply monitor their own conduct for compliance with permit requirements. Individuals who transport or cause the transport of regulated hazardous wastes must also verify that the receiving storage facility has the required permit. Failure to do so is a violation of both the language and purpose of RCRA.

Despite the solid reasons cited in both the per curiam and concurring opinions, the Ninth Circuit ordered the first Speach opinion withdrawn on May 11, 1992. On June 29, it replaced that decision with the current one, in which the former per curiam holding is relegated to a dissent and the sound analysis of the concurrence is nowhere to be found, the author apparently having decided he was wrong.

129. Id. at *3 (Pregerson, J., concurring specially).
While room for disagreement may still exist on the issue of whether a waste generator must know of his or a receiving facility’s permit status, circuit courts agree that a defendant does not have to know that the waste he is mishandling is expressly defined as hazardous. The Eleventh Circuit, in *Hayes International*, first decided this issue, and then fleshed out that decision in *United States v. Greer*. In *Greer*, the court approved a jury instruction stating that, to be convicted, the defendant only had to know “that the chemical waste had the potential to be harmful to others or to the environment, and, in other words, it was not an innocuous substance like water.”

The same jury instruction in *Greer* was also upheld by the Ninth Circuit in *United States v. Hoflin*. Since that time, the Fourth Circuit in *United States v. Dee* and the Fifth Circuit in *United States v. Sellers* and *United States v. Baytank*, have also held that a defendant need not know the substance in question was defined as a hazardous waste under RCRA.

B. Application of the RCO Doctrine to RCRA Violations

Finally, a trend is also developing that allows a modified version of the RCO doctrine to be applied to public welfare statutes, such as RCRA, even though they contain felony provisions requiring that a defendant act “knowingly.” Recent attempts by the DOJ to apply the doctrine have been decried by some as “contrary to due process safeguards intended to protect the innocent, as well as to RCRA’s explicit language.” Nevertheless, no doubt exists whatsoever that the DOJ will continue to use the RCO doctrine, based on its success to date.

In essence, the RCO doctrine makes corporate officers vicariously liable for the commission of offenses by their subordinates, regardless

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130. 786 F.2d at 1503.
131. 850 F.2d 1447 (11th Cir.), reh’g denied en banc, 860 F.2d 1092 (1988).
132. *Greer*, 850 F.2d at 1450.
133. 880 F.2d 1033, 1039 (9th Cir. 1989).
135. 926 F.2d 410, 415-416 (5th Cir. 1991).
136. 934 F.2d 599, 613 (5th Cir. 1991).
of whether the officers personally committed the violations.\textsuperscript{138} The theory behind the doctrine is that some statutes, such as those controlling the processing of food, are so important to the public welfare that strict liability must be imposed to protect a public that has no way of protecting itself from violations.\textsuperscript{139} Little question exists that RCRA and other environmental laws qualify as public welfare statutes.\textsuperscript{140}

\textit{United States v. Johnson \& Towers}\textsuperscript{141} is credited with first applying the RCO doctrine to RCRA. In \textit{Johnson \& Towers}, the Third Circuit held that RCRA’s criminal provisions applied to any corporate officer who “knew or should have known that there had been no compliance with the permit requirement,”\textsuperscript{142} and not just those with direct responsibilities for waste disposal. Additionally, the court further lessened the prosecution’s burden by stating that such knowledge “may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant,” given the highly regulated nature of the hazardous waste industry.\textsuperscript{143}

In effect, allowing this inference of knowledge from a defendant’s position extends the RCO doctrine to environmental felonies, even though the doctrine as initially developed only applied to misdemeanor public welfare statutes in which Congress intended to impose strict liability.\textsuperscript{144} The result is obviously significant to any corporate official, no matter how high, who has any authority over environmental compliance. “Because knowledge may be inferred on the basis of the defendants’ position within the corporate structure, actual knowledge becomes irrelevant. In other words, the \textit{mens rea} requirement was almost read out of the statute.”\textsuperscript{145}

An analysis of the key Supreme Court case on the RCO doctrine, \textit{United States v. Park},\textsuperscript{146} under the \textit{Johnson \& Towers} standard, illus-

\begin{footnotes}
\item[138.] Barrett \& Clarke, \textit{supra} note 97, at 882-83.
\item[139.] Id. at 872.
\item[140.] United States v. Hayes Int’l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986) (RCRA “is undeniably a public welfare statute”).
\item[142.] \textit{Johnson \& Towers}, 741 F.2d at 665.
\item[143.] Id. at 670.
\item[144.] Barrett \& Clarke, \textit{supra} note 97, at 883-84.
\item[145.] Hogeland, \textit{supra} note 2, at 120.
\item[146.] 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed. 2d 489 (1975).
\end{footnotes}
irates that little difference exists between the two cases. Park concerned the conviction of the chief executive officer of a company with 36,000 employees for a violation of a strict liability misdemeanor statute governing the proper storage of food.\textsuperscript{147} Park had personally received several notices of previous violations and had delegated the responsibility of fixing the problem to another official.\textsuperscript{148} In affirming the conviction, the Supreme Court held that it was not necessary that Park know of the violation charged, only that he 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."\textsuperscript{149}

Although the statute under which Park was charged was a strict liability misdemeanor containing no knowledge requirement, had the same situation arose concerning a RCRA violation, Park might well have been convicted under \textit{Johnson & Towers} despite RCRA's knowledge requirement. After all, Park had been told a problem existed, even if he thought it had been corrected and did not know of the exact incident that led to the charge. Arguably, a jury could find all the elements necessary to convict a defendant under the \textit{Johnson & Towers} version of the RCO doctrine. These elements include: (1) the RCRA violation occurred within the defendant's area of authority; (2) the defendant had the authority to prevent or correct the violation; and (3) the defendant knowingly failed to prevent or correct the violation.\textsuperscript{150}

For the jury to infer that a corporate officer had knowledge of the violation he is alleged to have committed, the government must establish that the officer was aware of a preexisting violation or potential violation. Failure to act upon the violation he is charged with, despite this prior notice, in conjunction with the first two factors set forth above, satisfies the "knowing" requirement under section 6928(d) of RCRA.\textsuperscript{151}

Although in the \textit{Park} situation, a RCRA defendant could claim that by delegating responsibility he had acted on the notice of prior violations, the prosecution could just as easily argue that the law required the

\begin{footnotes}
\item[147.] \textit{Park}, 421 U.S. at 660.
\item[148.] \textit{Id.} at 663.
\item[149.] \textit{Id.} at 673-74.
\item[150.] Barrett & Clarke, \textit{supra} note 97, at 884.
\item[151.] \textit{Id.}
\end{footnotes}
defendant, by virtue of his position, to make sure that the problem had indeed been corrected.

Subsequently, a growing list of circuit courts have also allowed juries to infer that a corporate defendant knew of the violations from his position of authority. The Eleventh Circuit in *Hayes International* held that: "Transporters of waste presumably are aware of [RCRA’s] procedures, and if a transporter does not follow the procedures, a juror may draw certain inferences. Where there is no evidence that those who took the waste asserted that they were properly licensed, the jurors may draw additional inferences."\textsuperscript{152} In *Baytank*, the Fifth Circuit held similarly in reinstating the RCRA convictions of two corporate officials: "Given the evidence of [the defendants’] detailed knowledge of and control over the storage operations at Baytank, the jury was entitled to conclude that they participated in the illegal storage. . . ."\textsuperscript{153}

Perhaps the case that caused the most worry among corporate officials, however, was *United States v. Dee*.\textsuperscript{154} *Dee* concerned the RCRA convictions of three high-level civilian supervisors in the U.S. Army’s chemical weapons program for illegally storing hazardous wastes without a permit. The case reportedly "sparked a panic among managers in fields related to environmental compliance"\textsuperscript{155} because two of the defendants had no hands-on responsibilities for handling hazardous wastes, although they admitted that they were aware of "storage problems" at the facility.\textsuperscript{156} In *Dee*, the court explicitly instructed the jury on RCRA’s knowledge requirement with language directly from the RCO doctrine, stating:\textsuperscript{157}

> Among the circumstances you may consider in determining the defendant’s [sic] knowledge are their positions in the organization. . . . Thus you may, but need not, infer that a defendant knew facts which you find that they [sic] should have known given their positions in the

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\textsuperscript{152} United States v. Hayes Int’l, 786 F.2d 1499, 1504 (11th Cir. 1986).

\textsuperscript{153} United States v. Baytank, 934 F.2d 599, 617 (5th Cir. 1991).


\textsuperscript{155} Barrett & Clarke, \textit{supra} note 97, at 881.

\textsuperscript{156} \textit{Id.} at 870.

\textsuperscript{157} \textit{Id.} at 884-85.
organization, their relationship to other employees, or any applicable policies or regulation.\footnote{158}

The court then stated the elements necessary for a conviction, elements that unmistakably bear the stamp of the RCO doctrine:

First, that each defendant has a responsible relationship to the violation. That is, that it occurred under his area of authority and supervisory responsibility.

That each defendant had the power or the capacity to prevent the violation. That each defendant acted \textit{knowingly} in failing to prevent, detect or correct the violation.\footnote{159}

Since \textit{Dee}, only one other circuit court has expressly considered the RCO doctrine as it applies to environmental violations. In \textit{United States v. MacDonald & Watson Waste Oil Co.},\footnote{160} the First Circuit purported to prohibit the prosecution from relying on the RCO doctrine in statutes requiring knowing violations.\footnote{161} However, the instructions that the First Circuit objected to differed considerably from those used in \textit{Dee}. "[T]he district court permitted the prosecution to constructively establish defendant's knowledge if the jury found the following: (1) that the defendant was a corporate officer; (2) with responsibility to supervise the allegedly illegal activities; and (3) knew or believed 'that the illegal activity of the type alleged occurred.'"\footnote{162}

The third element in the \textit{MacDonald & Watson} instruction allowed the jury to convict without finding that the defendant knowingly failed to correct the illegality charged; instead the jury only had to find that the defendant knew previous incidents, similar to the one charged, had occurred. The \textit{Dee} instruction would not allow a conviction under that circumstance. Therefore, it seems premature to proclaim, as some commentators have, that the First Circuit has actually prohibited applica-

\footnotesize{\begin{enumerate}
  \item Id. at 885.
  \item Id. (emphasis added).
  \item 933 F.2d 35 (1st Cir. 1991).
  \item \textit{MacDonald & Watson}, 933 F.2d at 55.
  \item Id. at 52.
\end{enumerate}
tion of the RCO doctrine.\textsuperscript{163} That is especially true in light of the fact that MacDonald \& Watson approved of instructions allowing the jury to infer the requisite knowledge from a corporate officer's "position and responsibility."\textsuperscript{164}

IV. Conclusion

Although this author doubts many corporate executives aware of the situation are in the mood to appreciate it, a certain irony exists in the fact that during the last twelve years, while two extremely pro-business presidents have controlled the Justice Department, federal criminal prosecutors have declared war on environmental violations by corporations and their officers. Even the generally sacrosanct Pentagon and its legion of dependents, which usually find refuge from scrutiny of every sort behind the cloak of national security, have taken casualties. Rockwell International pleaded guilty to felony hazardous waste charges and paid an $18.5 million fine after 120 armed federal agents conducted an early morning raid at a federal nuclear weapons facility run by the huge defense contractor.\textsuperscript{165} As yet, the grand jury has not handed down any indictments of the individual officers of Rockwell.\textsuperscript{166}

Although those corporations and executives targeted undoubtedly feel otherwise, one can hardly quibble with such results when the John Pozsgais, with their less lofty positions and correspondingly reduced capabilities of severely damaging the environment, receive lengthy prison terms. If this were seventeenth century France, Cardinal Richelieu, as arbiter of public morality, would surely approve . . . unless, of course, his responsibilities as virtual dictator happened to include overseeing the servants who "treated, stored, or disposed of" the copious palace wastes.

\textsuperscript{163} See Onsdorff and Mesnard, supra note 97, at 10103.
\textsuperscript{164} MacDonald \& Watson, 933 F.2d at 55.
\textsuperscript{165} Rockwell Pleads Guilty, supra note 13.
\textsuperscript{166} Id.