THE RESPONSIBLE CORPORATE OFFICER DOCTRINE—CAN YOU GO TO JAIL FOR WHAT YOU *DON'T* KNOW?

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The responsible corporate officer doctrine was first developed in the context of criminal law to impute knowledge of corporate activity to top corporate officers. Recently, this doctrine has been applied in environmental law enforcement. Courts, however, differ on the mens rea requirement for the responsible corporation officer in the context of environmental law. Corporate officers have a duty to protect the public health and welfare from their corporation's activities, but they cannot be convicted for their corporation's wrong-doings simply because of their title.

I. INTRODUCTION

What happens to the deterrence we talk about? . . . Who is the corporation? . . . I think the public is entitled to know who's responsible. . . I want the top officer here.[1]

On August 9, 1989, Edwin Tuttle, Chairman and Chief Executive Officer (CEO) of Pennwalt Corporation, delivered the corporation's guilty pleas before U.S. District Judge Jack E. Tanner. Pennwalt Corporation had pleaded guilty to four misdemeanor violations of the Clean Water Act (CWA) and one misdemeanor violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The violations stemmed from the rupture of a corroded and unmaintained storage tank that leaked toxic and suspected carcinogenic effluents into the Hylebos Waterway.[2] Although Tuttle was not charged in the information, his appearance represented a symbolic acknowledgement of a CEO's responsibility to maintain environmental compliance.

Other CEOs have not been as fortunate. In October 1982, the Environmental Crimes Section[3] of the Environment and Natural Resources Division of the U.S. Department of Justice (DOJ) was established. Since then, 838 individuals and corporations have been indicted for federal environmental crimes.[4] Although a number of those matters are still pending, there have been 605

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1. See Timothy Egan, *Putting a Face on Corporate Crime, N.Y. Times*, July 14, 1989, at B8 (quoting U.S. District Court Judge Jack E. Tanner demanding that the chief executive officer of Pennwalt Corporation, Edwin E. Tuttle, appear before he would allow Pennwalt Corporation to plead guilty to charges of spilling more than 75,000 gallons of carcinogenic chemicals into a waterway that flows into Puget Sound).

2. *See* Plea Agreement, No. CR 88-55T, *United States v. Pennwalt Corp.*, (W.D. Wash. May 2, 1989).

3. The Environmental Crimes Section coordinates the national criminal enforcement effort from its headquarters at the U.S. Department of Justice (DOJ), develops policy and training programs, and counsels the U.S. Environmental Protection Agency (EPA) on criminal investigations. In 1987, in recognition of increased environmental enforcement activity, the U.S. Attorney General upgraded its predecessor, the Environmental Crimes Unit to the status of section. Today, less than 10 years after its founding, the Section has a permanent place in the environmental enforcement community. Memorandum from F. Henry Habicht II, Assistant Attorney General, to the employees of the Lands and Natural Resources Division (May 8, 1987), *discussed in* John Seymour, *Civil and Criminal Liability of Corporate Officers under Federal Environmental Laws*, 20 Env't. Rep. (BNA) 337, 343 (June 9, 1989).

4. The following statistics track the dramatic increase in environmental criminal enforcement and criminal penalties since the Environmental Crimes Unit was established by the DOJ in the fall of 1982:

	Indictments	Pleas/Convictions
FY83	40	40
FY84	43	32
FY85	40	37
FY86	94	67
FY87	127	86
FY88	124	63
FY89	101	107
FY90	134	85
FY91	125	88
total	824	605

See Memorandum of Peggy Hutchins, paralegal, to Neil S. Cartusciello, Chief, Environmental Crimes Section, U.S. Department of Justice 1 (Oct. 9, 1991) [hereinafter Hutchins].

convictions, either through guilty pleas or trials.[5] The conviction rate runs higher than eighty percent.[6] As of October 1, 1991, more than $74.5 million in criminal fines and penalties had been levied, and more than 173 years of jail time had been imposed.[7] Since October 1988 alone, more than $61 million in criminal fines and penalties have been levied, and more than 108 years of jail time has been imposed.[8] These results clearly reflect the DOJ's longstanding view that responsible individuals as well as corporations must be prosecuted. Put another way, DOJ understands that incarceration is the one cost of doing business that cannot be passed along to the consumer.

It is now well established that environmental laws fall within the realm of health and welfare statutes,[9] whose purpose is to protect the general public. For instance, the Resource Conservation and Recovery Act's (RCRA)[10] legislative history evidences its purpose of protecting the health and welfare of the general public:

> [t]he overriding concern of the Committee, . . . is the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic or lethal. Unless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment.[11]

Moreover, the statutes themselves evidence a health and welfare intent.[12] In light of the congressional directive and the corresponding increase in criminal enforcement, courts have begun developing a unique body of jurisprudence, using both existing and newly formulated legal doctrines, to ensure that the environmental statutes' underlying public health policies are met.

This Article traces the development of one such doctrine, the responsible corporate officer doctrine. The Article examines this doctrine from its origins as a means of holding corporate officers criminally liable for violations by their subordinates of the Federal Food, Drug, and Cosmetic Act (Food and Drug Act)[13] to the various forms of the doctrine promoted in environmental crimes cases by prosecutors and defense attorneys and announced by courts in recent cases. Further, the article demonstrates how the responsible corporate officer doctrine, in its present incarnation, provides an additional piece of circumstantial evidence with which to prove criminal knowledge, but does not provide a means by which criminal knowledge may be imputed from a corporate employee charged with environmental violations to a supervising corporate officer who was unaware that the violations were occurring. Finally, the Article identifies other sources of confusion as to the scope and applicability of the doctrine, and clarifies each by proposing a pattern jury instruction.

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5. *Id.*
6. *Id.*
7. *Id.* These figures do not include the criminal penalties paid by Exxon and its subsidiary, Exxon Shipping, for the March 1989 Exxon Valdez oil spill in Prince William Sound, Alaska totalling $125 million. *See* Memorandum of Joseph G. Block, former Chief of the Environmental Crimes Section of the U.S. Department of Justice and Special Assistant for Criminal at the U.S. Environmental Protection Agency to Environmental Group Attorneys (Oct. 24, 1991).
8. *See* Hutchins, *supra* note 4 at 1.
9. *See Wyckoff Co. v. EPA*, 796 F.2d 1197, 1198 (9th Cir. 1986) (the Resource Conservation and Recovery Act (RCRA) was enacted "to protect the national health and environment"); *United States v. Hayes, Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986) ("section 6928(1) of [RCRA] is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety"); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666-67 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).
10. 42 U.S.C. §§ 6901-6987 (1988).
11. INTERSTATE AND FOREIGN COMMERCE COMM., RESOURCE CONSERVATION AND RECOVERY ACT of 1976, H.R. 1491, 94th Cong., 2d Sess., pt. 1, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241.
12. See Clean Air Act (CAA), 42 U.S.C.A. § 7401(a)(2), (b)(1) (West Supp. 1991); Clean Water Act (CWA), 33 U.S.C. §1251(a) (1988); RCRA, 42 U.S.C. §§6901(a)(3), (b), 6902(a), (b) (1988); Toxic Substances Control Act, 15 U.S.C. § 2601(a)(2), (b)(2) (1988).
13. 21 U.S.C. §§301-393 (1988).

II. ORIGIN OF THE RESPONSIBLE CORPORATE OFFICE DOCTRINE: *UNITED STATES V. DOTTERWEICH* AND *UNITED STATES V. PARK*

The responsible corporate officer doctrine grew out of two U.S. Supreme Court cases decided over three decades apart, *United States v. Dotterweich*[14] and *United States v. Park*.[15] Both *Dotterweich* and *Park* involved interpretation of the Food and Drug Act, a strict liability statute imposing misdemeanor penalties for violation of its provisions.

A. *United States v. Dotterweich*

In *Dotterweich*, the Court addressed whether an individual corporate officer, not simply the company, could be prosecuted under a misdemeanor provision of the Food and Drug Act for introducing or delivering adulterated or misbranded drugs into interstate commerce.[16] The Court held that Dotterweich, President of Buffalo Pharmacal Company, was subject to criminal prosecution. The Court expressly premised its decision on the fact that the Food and Drug Act was designed to protect public health and welfare. The purposes of the Food and Drug Act "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self protection."[17]

The provision of the Food and Drug Act under which Dotterweich was convicted contained no criminal *mens rea*, or guilty mind, requirement.[18] The Court held that, absent such requirement, no proof of criminal knowledge was necessary because the Food and Drug Act "puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger."[19] The Court recognized that, when applied to individuals acting on behalf of a company, the statute might "sweep . . . within its condemnation any person however remotely entangled in the proscribed shipment."[20] Accordingly, the Court sought to narrow the range of individuals subject to liability: "[t]he offense is committed by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws."[21] However, the Court declined to define the class of employees bearing such responsible share in the offense, leaving this definition to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."[22]

Three justices dissented in *Dotterweich*. The dissenters argued that, absent express congressional authority, it was improper for the Court to impose criminal liability on a corporate officer who did not participate in and had no knowledge of the offense, solely on the rationale that imposing individual liability on corporate officers promoted the public policy goals of the Food and Drug

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14. 320 U.S. 277 (1943).
15. 421 U.S. 658 (1975).
16. 320 U.S. at 278.
17. *Id.* at 280.
18. Even in cases involving statutes that have *mens rea* requirements, exceptions have been applied where the area affects public health and welfare. *See United States v. Freed*, 401 U.S. 601, 607-09 (1971) (noting that Congress has created exceptions to the *mens rea* requirement "especially in the expanding regulatory areas involving activities affecting public health, safety and welfare").
19. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).
20. *Id.* at 284.
21. *Id.*
22. *Id.* at 285.

Act.[23] In the dissent's view, while Dotterweich could have been charged by his company "with responsibility to the corporation and the stockholders for negligence and mismanagement,"[24] the imposition of vicarious criminal liability was unfounded.

B. United States v. Park

Park[25] also involved interpretation of the Food and Drug Act. Park, who was based in Philadelphia, was CEO of Acme Markets, a national retail food operation.[26] Acme employed approximately 36,000 people and operated 874 retail outlets and 16 warehouses nationwide.[27] The criminal information against Park and Acme charged them with violation of the Food and Drug Act. The charges stemmed from the Food and Drug Administration's (FDA) discovery of rodent infestation at Acme's Baltimore warehouse. The evidence at trial showed that the FDA had previously notified Park of a similar problem at Acme's Philadelphia warehouse and that Park was also notified of the problem in Baltimore. The evidence further revealed that the same Acme vice president was in charge of sanitation for both the Philadelphia and the Baltimore facilities, and that Park had conferred with him and other Acme officers to ensure that corrective action would be taken.[28]

Park himself did not participate in the acts causing the violation. The issue before the Court was whether he could nevertheless be convicted under the same strict liability provision of the Food and Drug Act at issue in *Dotterweich*. Park claimed that the following jury instruction denied him due process by permitting the jury to convict him without proof of wrongful action on his part:

> The individual is or could be liable under the statute, even if he did not consciously do wrong. However, the fact that the Defendant is present and is a chief executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue. The issue is, in the case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.[29]

Relying on *Dotterweich*, the Court held that the government was not required to prove that Park himself engaged in wrongful conduct. Rather, the government could establish the violation by demonstrating "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."[30]

The Court emphasized that the challenged instruction did not permit the jury to convict Park solely on the basis of his corporate position, but that the jury was fairly advised it must find that Park "had a responsible relation to the situation, and by virtue of his position. . .had. . .authority and responsibility to deal with the situation."[31] The Court found significant Park's awareness that Acme's internal system for ensuring its Philadelphia and Baltimore warehouses' sanitary conditions was not working, and his failure to restructure that system once notified that similar sanitary problems had arisen at two of Acme's warehouses.[32] However, the Court recognized that even the implementation of a new internal system might fail to prevent all violations. The Court indicated

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23. Id. at 286-87 (Murphy, J. dissenting).
24. 320 U.S. 277, 286 (1943) (Murphy, J. dissenting).
25. 421 U.S. 658 (1975).
26. Codefendant Acme Markets pleaded guilty to each count in the information. *Id.* at 660.
27. *Id.*
28. *Id.* at 664.
29. *United States v. Park*, 421 U.S. 658, 665 (1975).
30. *Id.* at 673-74.

that Park could have raised an affirmative defense that he was powerless to prevent the violation, and sought a jury instruction requiring the government to prove beyond a reasonable doubt that he was capable of preventing the violation.[33]

As in *Dotterweich*, three justices in Park dissented. They argued that the challenged instruction was "nothing more than a tautology" that provided the jury no guidance as to the meaning of "responsible relation" to the offense, instead permitting them to convict Park based solely on his corporate position.[34] The dissent was particularly concerned that the majority's decision permitted the imposition of criminal liability, in contrast to a mere civil forfeiture, for conduct of which Park himself was unaware and in which he did not participate. Acknowledging that the Food and Drug Act imposed misdemeanor penalties, the dissenting justices presciently noted that:

> The standardless conviction approved today can serve in another case tomorrow to support a felony conviction and a substantial prison sentence. However highly the Court may regard the social objectives of the Food, Drug, and Cosmetic Act, that regard cannot serve to justify a criminal conviction so wholly alien to fundamental principles of our law.[35]

C. Application to Environmental Statutes

As derived from *Dotterweich* and *Park*, any corporate officer bearing a responsible relationship to conduct proscribed by a health and welfare statute, who is not powerless to prevent others from committing such conduct, can be held criminally liable for a violation of that statute. Environmental laws, like the Food and Drug Act, are health and welfare statutes. Thus, the concept of the responsible corporate officer has gradually been adopted into environmental jurisprudence. Indeed, two environmental statutes, the CWA and the Clean Air Act (CAA), expressly include the term "responsible corporate officer" in their definition of persons who can be liable.[36] Like the Court in *Dotterweich*, however, Congress did not define the class of individuals who may be considered responsible corporate officers, and the legislative history of these statutes does not provide any enlightenment.[37]

In contrast to the Food and Drug Act at issue in *Dotterweich* and *Park*, most modern environmental laws do not impose strict criminal liability, but require the government to prove the violator's criminal knowledge.[38] Though the Food and Drug Act, from which the concept of the responsible corporate officer arose, and modern environmental statutes share similar public policy goals, the statutes require vastly different proof. Therefore, the parameters of the responsible corporate officer doctrine in the environmental context have never been firmly established. The

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31. *Id.* at 674.
32. *Id.* at 678.
33. *United States v. Park*, 421 U.S. 658, 676 (1975).
34. *Id.* at 679-80.
35. *Id.* at 683.
36. *See* CWA, 33 U.S.C. §1319(c)(6) (1988) (noting that "[f]or the purpose of this subsection, the term 'person' means....any responsible corporate officer"); CAA, 42 U.S.C.A. §7413(c)(6) (West Supp. 1991) (noting that "[f]or the purpose of this subsection, the term 'person' includes. . .any responsible corporate officer"); *see also United States v. Frezzo Brothers*, 602 F.2d 1123 (3d Cir. 1979) (involving a criminal prosecution under CWA, 33 U.S.C. §1319(c)).
37. There appears to be no legislative history regarding the use of the words "responsible corporation officer" in the CWA. Congress amended the criminal provisions of the CAA in 1977 to add language identical to that of the CWA. The Committee proposing the amendment noted that it based the new language on the CWA: "[t]he Committee intends that criminal penalties be sought against those corporate officers under whose responsibility a violation has taken place, and not just those employees directly involved in the operation of the violating source." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, Clean Air Act Amendments of 1976, S. Rep. No. 717, 94th Cong., 2d Sess. 40 (1976).
38. CWA, 33 U.S.C. §1319(c)(2)(A), (B); CAA, 42 U.S.C.A. §7413(c)(1), (2), (3), (5); RCRA, 42 U.S.C. §6928(d) (1988).

Court stated *in Park* that responsibility for compliance with a health and welfare statute 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 ensure that violations will not occur."[39]

In the environmental context, the question has arisen whether the government may prove a corporate officer's criminal knowledge simply by showing that he would have known that environmental violations were occurring had he been properly fulfilling his corporate duties. The question has also arisen whether this characterization of the responsible corporate officer doctrine, in the words of the *Dotterweich* dissent, imposes vicarious criminal liability for corporate "negligence and mismanagement"[40] and reads the requirement of criminal knowledge out of environmental criminal laws.

Defense attorneys have argued that the responsible corporate officer doctrine should apply only in cases involving strict liability statutes like the Food and Drug Act.[41] Prosecutors, on the other hand, have cited *Dotterweich* and *Park* for the proposition that a reduced standard of proof applies to the element of knowledge in modern environmental crimes statutes because such laws, like the Food and Drug Act, are health and welfare statutes.[42] Broad sweeping language from some courts suggests that the responsible corporate officer doctrine may operate as a theory of substitute knowledge similar to agency theory. That is, the guilty state of mind of a subordinate employee who commits an environmental criminal offense may be attributed to the corporate officer who stood in a responsible relation to the offense but had no knowledge of the offense.[43] Alternatively, it has been posited that the responsible corporate officer doctrine simply raises the inference of actual knowledge on the corporate officer's part because of his position of responsibility.

Recent developments in the law indicate that, while the responsible corporate officer doctrine applies to cases where the health and welfare statutes contain some element of *mens rea*, its application does not act as a knowledge substitute. Rather, it merely raises the inference that the corporate officer possessed knowledge of the offense.

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39. 421 U.S. 658, 672 (1975).

40. *United States v. Dotterweich*, 320 U.S. 277, 286 (1943) (Murphy, J. dissenting).

41. *See* Brief for Appellant D'Allesandro at 16-17, *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (No. 90-1053). Appellant D'Allesandro argued: "In a nutshell, the responsible corporate officer doctrine has never been applied to impose liability for crimes with a knowledge or intent element. Indeed, its application in those contexts would be fundamentally inconsistent with the doctrine itself." *Id.* at 17.

42. *See* Brief for the Appellee at 25, *United States v. Brittain*, 931 F.2d 1413, (10th Cir. 1991) (No. 90-6202); see also Government's Response to Defendants' Motion to Dismiss Counts I, IV, V and VI on Grounds of Statutory Vagueness at 4, *United States v. Pennwalt Corp.*, (W.D. Wash. 1989) (No. CR88-55T).

43. *See* Turner T. Smith, F. William Brownell, & Mel S. Schulze, *The Responsible Corporate Officer Doctrine*, 2 Corp. Crim. Liab. Rep. 12 (1988) (suggesting that, taken to its logical extreme, the responsible corporate office doctrine might enable the government to impute criminal liability to a corporate officer who was unaware of the crime); *see also Seymour, supra*, note 3, at 343.

III. Proving Criminal Knowledge Under Environmental Statutes

A complete understanding of the responsible corporate officer doctrine as a means of proving criminal knowledge requires a review of other means by which prosecutors prove knowledge of environmental violations. It must first be noted that, in prosecuting environmental crimes, the government need only prove the alleged violator's general intent to commit the act charged. In contrast, in traditional, nonhealth and welfare crimes, the government must prove specific intent to violate the law.[44] Those who operate in a "heavily regulated area with great ramifications for the public health and safety" are charged with knowledge of regulatory provisions governing their conduct.[45] Based on this rule, when the offense prohibits "knowing" conduct, the government may prove the defendant's criminal knowledge simply by demonstrating that he did not engage in the conduct charged by accident or mistake.[46]

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44. *See generally United States v. International Minerals and Chem. Corp.*, 402 U.S. 558 (1971) (holding that persons handling hazardous materials are presumed to know their activity is heavily regulated); *cf. Liparota v. United States*, 471 U.S. 419 (1985) (holding proof of knowing transfer of food stamps in unauthorized manner requires proof of defendant's knowledge that his conduct is illegal); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986) (government need not prove defendant's unlawfully disposed waste is hazardous); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

45. *See Hayes Int'l Corp.*, 786 F.2d at 1503. Although the court in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), expressly rejected the trial court's conclusion that it was "not necessary to show that individual defendants . . . knew that they were acting. . .in violation of the law," the court later stated, somewhat confusingly, that "the government need only prove knowledge of the actions taken and not the statute forbidding them." *Id.* at 669 (quoting *International Minerals*, 402 U.S. at 558, 563). The court went on to state that "where. . .dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation. *Id.* (quoting *International Minerals*, 402 U.S. at 565).

46. There are a number of ways that *mens rea* or the knowledge requirement can be translated into an environmental criminal statute. For example, the Ohio legislature has made the conscious decision to punish individuals for reckless as opposed to knowing behavior: "whoever recklessly violates any section of this chapter, . . . is guilty of a felony and shall be fined at least ten thousand dollars, but not more than twenty-five thousand dollars, or imprisoned for at least two years, but not more than four years, or both." OHIO REV. CODE ANN. § 3734.99(A) (Baldwin 1991); *see also State v. Stirnkorb*, 580 N.E.2d 69 (Ohio Ct. App. 1990) (applying the statute to the unlawful disposal of hazardous waste).

Canadian courts recently addressed the responsible corporate officer doctrine in *Her Majesty the Queen v. Bata Indus., Ltd.*, slip op. (Provincial Offenses Court, Ontario Feb. 7, 1992). This was the first case that Ontario's Ministry of Environmental Protection criminally prosecuted a high profile CEO. In *Bata*, the corporation and three of its officers, including Thomas Bata, CEO of Bata Shoe Organization (International), and the on-site Director General Manager and President of Bata Industries, were charged with violating several environmental statutes. Specifically, the officers were charged under the following criminal statute:

> *Duty of director or officer.* Every director or officer of a corporation that engages in an activity that may result in the discharge of any material into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters contrary to this Act or the regulations has a duty to take all reasonable care to prevent the corporation from causing or permitting such unlawful discharge.

Ontario Water Resources Act, R.S.O. §75(1) (1980). In determining whether the directors were liable under the statute, the court considered the following factors:

(1) whether there was supervision or inspection by the director;
(2) whether the director instructed the corporation's officers to set up a system sufficient within the terms and practices of its industry;
(3) whether the director placed reasonable reliance on reports provided to him by corporate officers, consultants, counsel or other informed parties;
(4) whether the director promptly addressed environmental concerns brought to his attention by government agencies or other concerned parties;
(5) whether the director was aware of industry standards; and
(6) whether the director immediately reacted when notified that the system in place failed.

Her Majesty the Queen v. Bate Indus. Ltd., slip op. at 39-40. While Thomas Bata was acquitted, the two other directors were convicted. *Id.* at 38.

Certainly the most effective means of proving criminal knowledge is direct evidence that the defendant was aware of the environmental violation. A corporate officer who instructs his subordinates to perform acts that violate environmental laws is liable for such violations, even if he does not directly participate in the prohibited conduct.[47] For example, in *United States v. Hoflin*,[48] the defendant was charged under the RCRA with knowingly disposing of hazardous waste without a permit. The government presented proof that Hoflin, the Director of Public Works (DPW) for the City of Ocean Shores, Washington, instructed DPW employees to bury drums containing paint and sewage after receiving warnings that such disposal would violate certain permits.[49] Similarly, in *United States v. Carr*,[50] the defendant was convicted under the CERCLA for failure to report a release of a prohibited amount of a hazardous substance to the appropriate federal agency. There the government presented evidence that Carr instructed workers to dump a truck load of paint cans into a pond. Upon learning that the cans were leaking, and being warned that the dumping might be illegal, he further instructed the workers to cover up the paint cans by dumping earth into the pond.[51]

Direct evidence of criminal knowledge is not always available, however, and knowledge of environmental crimes, as with virtually all other crimes, can be proven by circumstantial evidence.[52] In *United States v. Hayes International Corp.*,[53] the defendants, a corporation and one of its employees, were charged with knowingly transporting hazardous waste to an unpermitted facility. The government proved, through a series of circumstances, the defendants' knowledge that the facility to which they had shipped certain paint waste was not recycling the waste. The evidence revealed that the employee knew the recycler derived no economic benefit from accepting the paint waste,[54] and that the employee failed to follow internal corporate procedures requiring disposal of wastes lacking resale value only to sites approved by the U.S. Environmental Protection Agency (EPA). Additionally, conversations between the employee and the recycler indicated that

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47. *See Johnson & Towers*, 741 F.2d at 668. The court also held that such knowledge on the part of individuals who held "the requisite responsible positions with the corporate defendant" could be inferred from the fact that they were operating in a highly regulated field. *Id.* at 669-70; *see also Hayes Int'l Corp.*, 786 F.2d at 1504 (requiring knowledge of permit status).

48. *See United States v. Baytank Houston, Inc.*, 934 F.2d 599, 608 (5th Cir. 1991); *United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989) (knowledge of permit status is not an element of the offense under the RCRA, 42 U.S.C. §6928(d)(2) (1988)). In addition, the courts have generally required the government to prove the defendant's knowledge that the material disposed of or transported was hazardous. *See United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990) (extending knowledge element of §6928(d) to knowledge of the general hazardous character of wastes); *Johnson & Towers*, 741 F.2d at 668 (requiring proof of knowledge that waste material is hazardous). *See generally International Minerals*, 402 U.S. at 563-64 (finding good faith belief that material is harmless provides affirmative defense; the term "hazardous" has been used to mean dangerous as opposed to legally hazardous within the meaning of the regulations); *United States v. Greer*, 850 F.2d 1447, 1450 (11th Cir. 1988) (government must prove defendant's knowledge that chemical waste has potential to harm others or the environment); *Hayes Int'l Corp.*, 786 F.2d at 1502 (government not required to prove defendant's knowledge that paint waste was "hazardous within the meaning of the regulations," however good faith belief that shipped materials would be recycled and made harmless was, under International Minerals, an affirmative defense).

49. *United States v. Hoflin*, 880 F.2d 1033, 1035 (9th Cir. 1989).

50. 880 F.2d 1550 (2d Cir. 1989).

51. *Id.* at 1551.

52. The following is an example of a jury instruction regarding the distinction between direct and circumstantial evidence:

> There are two types of evidence from which you may find the truth as to the facts of a case—direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS. CIVIL and CRIMINAL §15.02 at 441-42 (3d ed. 1977).

53. 786 F.2d 1499 (11th Cir. 1986).

54. *Id.* at 1506.

the employee knew that the paint wastes were not being recycled.[55] The court recognized that the employee's good faith belief that the material was being recycled was a valid affirmative defense, and the government presented no direct proof of the employee's knowledge that paint waste was not being recycled. However, the government successfully proved such knowledge through the series of circumstances set forth above.

The enforcement provisions of the environmental statutes evidence congressional intent to impose liability upon persons through the use of circumstantial evidence, as was done in *Hayes International*. Certain provisions of the CWA, CAA, and RCRA explicitly provide that knowledge may be established by the use of circumstantial evidence. For example, the knowing endangerment provision of the RCRA provides: "That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information."[56]

A. The Substitutional Doctrine

A number of criminal law doctrines used to prove knowledge circumstantially have also been adopted into environmental jurisprudence.[57] These doctrines allow proof of actual knowledge to be substituted by proof of something less than actual knowledge (substitutional doctrines). Respondeat superior or vicarious liability is a substitutional doctrine allowing proof of the defendant's criminal knowledge to be substituted by proof of someone else's knowledge. As Hayes International demonstrates, a corporation may be held liable for its employees' criminal conduct under this theory.[58]

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55. *Id.*

56. RCRA, 42 U.S.C. §6928(f)(2) (1988); *see also* CWA, 33 U.S.C. §1319(c)(3)(B) (1988) (noting that "[when] proving the defendant's possession of actual knowledge [under the knowing endangerment provision] circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information"); CCA, 42 U.S.C.A. §7413(c)(5)(B) (West. Supp. 1991) (noting that "in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information"). The provisions of the CWA, CAA, and RCRA addressing circumstantial evidence specifically fall under the knowing endangerment provisions which address violations which "place[ ] another person in imminent danger of death or serious bodily injury." CWA, 33 U.S.C. §1319(c)(3)(B); CAA, 42 U.S.C.A. §7413(c)(5)(B); RCRA, 42 U.S.C. §6928(f)(2). Though the directives to employ circumstantial evidence fall under the knowing endangerment provisions, it is clear from the case law that this mechanism for proving knowledge will be employed in cases charging violations of less onerous provisions.

57. Another developing doctrine that applies to corporations, is collective knowledge. Under this doctrine, the government may establish corporate criminal liability by demonstrating that certain employees engaged in the requisite conduct and that other employees possessed the requisite knowledge, even though no one employee both acted in a criminal manner and had sufficient criminal intent to commit the violation. *See United States v. Bank of New England*, N.A. 821 F.2d 844 (1st Cir. 1987). Traditionally, a corporation may be criminally liable for the acts of an employee, regardless of his position, who was acting within the scope of his duties and for the benefit of the corporation. This rule in combination with the doctrine of collective knowledge significantly enhances the prosecutor's ability to prove liability for environmental crimes.

58. As a general rule, a corporation may be held criminally liable for the actions of its employees if the acts are done on behalf of the corporation and are within the scope of the employees' authority. *See United States v. Marathon Dev. Corp.*, 867 F.2d 96, 1145 (1st Cir. 1989) (holding corporate defendant criminally liable for actions of its senior vice-president, who had caused a protected federal wetlands to be dredged and filled without a permit); *United States v. Basic Constr. Co.*, 711 F.2d 570 (4th Cir.), *cert. denied*, 464 U.S. 956, *and cert. denied*, 464 U.S. 1008 (1983); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (holding corporate defendant criminally liable because employees were acting within scope of their employment even though acting against corporate policy); *United States v. Little Rock Sewer Committee*, 460 F. Supp. 6 (E.D. Ark. 1978) (holding administrative committee appointed by City of Little Rock vicariously liable under the CWA for the false statements of employee acting under its supervision and direction); KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY, §3 (1984 & Supp. 1988). However, this may differ from state to state. *See e.g.*, MINN. STAT. ANN. §609.671(2)(b) (West 1992) (criminal liability for the acts of employees may be attributed to a corporation eve where the corporation has an express policy against the activity). *See generally Apex Oil Co. v. United States*, 530 F.2d 1291 (8th Cir. 1976) (holding oil company held criminally liable for failure of employees who witnessed two separate oil spills to notify the Coast Guard or the EPA, as required under CWA); Kathleen F. Brickey, *Corporate Counsel Liability: A Primer for Corporate Counsel*, 40 Bus. L. 129 (1984).

In numerous cases, courts have allowed proof that the defendant intentionally avoided learning or was willfully blind to the truth to substitute for proof of actual knowledge. In the leading case on willful blindness, *United States v. Jewell*,[59] appellant Jewell challenged his conviction for knowing possession of a controlled substance. The evidence showed that Jewell and a friend declined the offer of a stranger they met in Mexico to buy marijuana, but accepted $100 from him to drive a car across the border to Los Angeles. At trial, Jewell testified that he was aware that the vehicle had a secret compartment in the trunk. Jewell checked the glove box, under the seat, and the trunk because he thought there was probably something illegal in the car, but he did not investigate the secret compartment. The court upheld a jury instruction that permitted the government to prove Jewell's knowledge of possession by demonstrating that he had "made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth." [60]

The substitutional doctrines of willful blindness and conscious avoidance of the truth have been used in environmental cases to prove criminal knowledge.[61] In *Hayes International*,[62] the court held that a corporate employee's willful failure to determine the permit status of a facility to which hazardous waste had been shipped satisfied the requirement of knowledge of permit status under the RCRA.[63] Similarly, in *Unites States v. Hanlon*,[64] a case involving a massive bank fraud scheme with multiple counts, the court held: "[It] is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant closed his eyes to what was going on about him; 'see no evil' is not a maxim in which the criminal defendant should take any comfort." [65] Although courts have also permitted criminal knowledge to be substituted by proof of the individual's reckless indifference to the truth,[66] in *United States v. Pacific Hide & Fur Depot, Inc.*,[67] the Ninth Circuit reversed the defendant's conviction under the Toxic Substances Control Act (TSCA) where the trial court's instructions allowed the jury to convict the defendant of knowing violations on the basis of mere reckless conduct. The court held that, while liability for knowing violations of TSCA could be based upon willful blindness, "[i]t is not enough that defendant was mistaken, recklessly disregarded the truth, or negligently failed to inquire." [68]

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59. 32 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976).

60. *Id* at 700.

61. Courts, however, are not always willing to apply this doctrine absent clear evidence of willfulness. For example, in *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096 (9th Cir. 1985), the court held that absent evidence a defendant purposely avoided learning all of the facts in order to have a defense in the event of a subsequent prosecution, the doctrine of willful blindness is inapplicable.

62. 786 F.2d 1499 (11th Cir. 1986).

63. Some courts have held that under the criminal provisions of the RCRA, 42 U.S.C. §6928(d) (1988), the government must prove the defendant's knowledge that the facility to which the waste at issue was transported or at which it was stored lacked a permit. *See United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986). Other courts have held that proof of knowledge that the facility lacked a permit is not required. *See United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989).

64. 548 F.2d 1096 (2d Cir. 1977).

65. *Id.* at 1101.

66. While other courts have permitted recklessness to satisfy the knowledge requirement in criminal statutes, this most often occurs in the context of bank and mail fraud cases. *See generally Spurr v. Unites States*, 174 U.S. 728, 735 (1899); *United States v. White*, 765 F.2d 1469, 1481-82 (11th Cir. 1985); *United States v. Cyr*, 712 F.2d 729, 732 (1st Cir. 1983); *United States v. Boyer*, 694 F.2d 58, 59 (3d Cir. 1982); *United States v. Farris*, 614 F.2d 634, 638 (9th Cir. 1979), *cert. denied*, 447 U.S. 926 (1980); *United States v. Krepps*, 605 F.2d 101, 104 (3d Cir. 1979); *United States v. Schaffer*, 600 F.2d 1120, 1121 (5th Cir. 1979); *United States v. Frick*, 588 F.2d 531, 536 (5th Cir.), *cert. denied*, 441 U.S. 913 (1979); *United States v. Larson*, 581 F.2d 664, 667 (7th Cir. 1978); *United States v. DeMauro*, 581 F.2d 50, 54 (2d Cir. 1978); *United States v. Henderson*, 446 F.2d 960, 966 (8th Cir. 1971); *Bentel v. United States*, 13 F.2d 327, 329 (2d Cir.), *cert. denied*, 273 U.S. 713 (1926); *United States v. Themy*, 624 F.2d 963, 965 (10th Cir. 1980).

67. 768 F.2d 1096 (9th Cir. 1985).

68. *Id.* at 1098.

B. The Inferential Doctrine

Other criminal law doctrines permit knowledge to be proved circumstantially by inferring it from other facts (inferential doctrines).[69] In some cases, courts have determined that the defendant's failure to abide by known internal corporate policies raises the inference that the defendant knew the conduct was illegal. In *Hayes International*, the court permitted the jury to infer that Beasley, the individual defendant, knew that the disposal of the paint waste was improper from, among other facts, his knowledge that such disposal violated an internal company procedure.[70] In *United States v. Greer*,[71] defendant Greer operated a waste recycling and transportation business in Florida. He maintained a company policy of "keep[ing] the drum count down," because a local ordinance forbade storage of more than 1300 drums of waste at the site. The plant manager testified that on one occasion he questioned Greer about dumping waste on the ground, and Greer responded, "I never had any problem out of [former plant managers]. Do I see a problem out of you?"[72] When the plant manager questioned Greer about dumping the waste that was later to be the subject of the indictment, Greer responded, "you handle it."[73] The plant manager then pumped the waste onto the ground. The court held that although the evidence did not show that Greer had expressly instructed the plant manager to pump the waste onto the ground, the jury could infer from their discussions that Greer had effectively ordered him to dispose of the waste illegally.[74]

In other cases, courts have permitted the inference of criminal knowledge to be based on what the defendant would have known through the exercise of reasonable diligence. Generally, this inference applies where the defendant has some affirmative duty to know the facts or to investigate the situation. *United States v. Dee*,[75] is a prime example of a case where the inference of criminal knowledge was found from the defendant's failure to exercise reasonable diligence. In Dee, the defendants were civilian engineers involved in the development of chemical war–fare systems at the Chemical Research, Development, and Engineering Center at Aberdeen Proving Ground in Maryland. The defendants were convicted of illegally storing, treating, and disposing of hazardous wastes and appealed the convictions on several grounds.[76] The court found that knowledge could be inferred with respect to one of the defendants from evidence that he was informed by safety inspectors and employees of problems with the stored chemicals. The defendant did not respond but merely delegated the staff to "clean it up as best they could."[77] The court also found that knowledge could be inferred from evidence that the defendant was in charge of operations at the Plant, had previously taken action with respect to the storage of the chemicals, repeatedly ignored warnings, and took no actions to comply with the RCRA.[78] In effect, the court held that a defendant has the requisite knowledge for liability under the RCRA where he is responsible and aware that violations are or may be occurring.

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69. For cases employing the inferential doctrine, *see United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503-05 (11th Cir. 1986); *United States v. Weiner*, 578 F.2d 757, 787 (9th Cir. 1978) (quoting *Bentel v. United States*, 13 F.2d 320, 329 (2d Cir.), *cert. denied*, 273 U.S. 713 (1926)); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1974); *United States v. Henderson*, 446 F.2d 960, 966 (8th Cir.), *cert. denied*, 404 U.S. 991 (1971); *United States v. Simon*, 425 F.2d 796, 808 (2d Cir. 1970); *United States v. Andreadis*, 366 F.2d 423, 430 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *United States v. Laffal*, 83 A.2d 871, 872 (D.C. Mun. Ct. of App. 1951).

70. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1505-06 (11th Cir. 1986).

71. 850 F.2d 1447 (11th Cir. 1988).

72. *Id.* at 1451.

73. *Id.*

74. *Id.* at 1452.

75. 912 F.2d 741 (4th Cir. 1990).

76. *Id.* at 744-48.

77. *Id.* at 747.

78. *Id.* at 747-48.

As the court's holding in *Pacific Hide*[79] demonstrates, the wholesale application of the substitutional doctrines, such as willful blindness and respondeat superior, creates the danger that the requisite knowledge requirement will be read out of the environmental statutes. The inferential doctrines, however, acknowledge and encourage the requirement that the government submit evidence, in addition to the fact that the defendant was a responsible corporate officer, that would allow a jury to infer that the defendant possessed actual knowledge of the violation or offense. As discussed below, recent applications of the inferential doctrine evidence courts' understanding and appreciation that indeed more needs to be established than simply the defendant's corporate position.

IV. Recent Developments

Three recent environmental cases addressed the responsible corporate officer doctrine as a means of proving criminal knowledge.[80] In *United States v. White*,[81] the individual defendants and their employer, PureGro, Inc., were charged with violations of the RCRA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[82] The indictment alleged that the individual defendants loaded a truck with rinsates contaminated with pesticides and sprayed the material on a field.[83] By court order, the government filed a bill of particulars, which in pertinent part stated:

> The defendant Steven Steed is liable as a responsible corporate officer....As the responsible corporate officer for environmental safety at PureGro, the defendant Steven Steed had direct responsibility to supervise the handling of hazardous waste by PureGro employees. He is liable for the acts of all other agents and employees of PureGro in handling the hazardous waste at PureGro facilities which he knew of or should have known of.[84]

Defendant Steed moved to strike this portion of the government's bill of particulars, arguing that the charge, if upheld, would improperly permit the government to convict him of the alleged violations based on a theory of respondeat superior.[85] The court found that neither *Dotterweich*, *Park* nor *United States v. Johnson & Towers*,[86] the three cases cited by the government, supported the charge.[87] The court distinguished *Dotterweich* and *Park* on the grounds that the statute at issue in those cases contained no *mens rea* requirement. The court dismissed the language in *Johnson & Towers* that criminal knowledge of each element of the RCRA may "be inferred by the jury as to those individuals who hold the requisite responsible positions within the corporate defendant" as

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79. 768 F.2d 1096 (9th Cir. 1985).

80. The Tenth Circuit has recently addressed the use of the responsible corporate officer doctrine under the Federal Meat Inspection Act. In *United States v. Cattle King Packing Co., Inc.*, 793 F.2d 232 (10th Cir. 1986), the court, in keeping with *Park* and *Dotterweich*, held that a corporate officer, who is in a responsible relationship to some activity within a company that violates federal food laws, can be held criminally responsible even though that officer did not personally engage in the activity." Id. at 240-41 (quoting *United States v. Park*, 421 U.S. 658, 673-74 (1975)). Nevertheless, the court required the jury to find intent to commit the crime charged. *Id.* at 241.

81. 766 F. Supp. 873 (E.D. Wash. 1991).

82. 7 U.S.C. § 136(a)-(y) (1988).

83. White, 766 F. Supp. at 877.

84. *Id.* at 894.

85. *See* Defendant Steed's Motion to Strike Portions of Bill of Particulars at 6-11, *United States v. White*, 766 F. Supp. 873 (E.D. Wash. 1991) (No. 90-231AAM).

86. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

87. *United States v. White*, 766 F. Supp. 873, 875 (E.D. Wash. 1991).

"clearly dicta."[88] Significantly, the court held that inclusion of the responsible corporate officer doctrine in the charge "would allow a conviction without the requisite specific intent,"[89] and accordingly granted Steed's motion to strike.

In *United States v. Brittain*,[90] the defendant was charged with two misdemeanor counts under the CWA for unlawful discharges into navigable waters.[91] As noted above, in contrast to the RCRA, the CWA expressly includes responsible corporate officers in its definition of persons who can be held liable under the act.[92] Brittain was the public utilities director for the city of Enid, Oklahoma, and he had general supervisory authority over the operation of the city's wastewater treatment plant. The evidence showed that Brittain was advised that pollutants were being discharged into a local creek in violation of the city's permit. Brittain had observed the discharges on two occasions, but instructed the plant supervisor not to report them to the EPA, as the city's permit required.[93]

The trial court rejected the government's theory that Brittain could be held criminally liable for the violations under the responsible corporate officer doctrine,[94] therefore, this theory of liability was not submitted to the jury. Accordingly, the application of the responsible corporate officer doctrine was not an issue on appeal.

However, Brittain raised a statutory construction argument on appeal that addressed the CWA's definition of the terms "individual" and "responsible corporate officer."[95] Brittain contended that there was no evidence that he individually caused the unlawful discharge, and the only proof of his involvement with the discharge was "his relationship to the discharging entity, Enid."[96] He, therefore, could not be held liable as an "individual" under the act. Brittain argued that "[f]or criminal liability to attach to an individual who is not the discharger but is related to the discharging entity, the Government must show that the individual was a 'responsible corporate officer.' "[97]

The court rejected this argument, holding that the inclusion of the term "responsible corporate officer" in the CWA did not narrow the range of individuals subject to criminal liability.[98] The court briefly reviewed the origin of the term in *Dotterweich* and *Park*, observing that based on these cases "Congress perceived the public health interest [upon which the Food & Drug Act was premised] to outweigh the hardship suffered by criminally liable responsible corporate officers who had no consciousness of wrongdoing."[99] Noting that the same public health rationale applies to the CWA, the court stated:

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88. *Id* at 895. As discussed in Section III, *supra*, there is ample support for the proposition that corporate position raises the inference of knowledge of certain factual elements of the violation, *e.g.*, that a permit was required and not obtained. While the quoted language is overly broad, in light of the facts, *White* may have gone too far in simply dismissing the conclusion in *Johnson & Towers* as "clearly dicta." The evidence in *Johnson & Towers* showed that the defendants knew the violation had occurred. There was no issue of respondeat superior and to this extent, the court's conclusion was indeed dicta. What the court in *Johnson & Towers* actually held was that in certain circumstances such as those involving dangerous chemicals or weapons, the individual handling or dealing with them has an affirmative burden to know the regulations. 741 F.2d at 662.

89. *White*, 766 F. Supp. at 895.

90. 931 F.2d 1413 (10th Cir. 1991).

91. CWA, 33 U.S.C. §1319 (1988). Brittain was also charged with making false statements under 18 U.S.C. 1001 (1988). *Brittain*, 931 F.2d at 1414.

92. CWA, 33 U.S.C. §1319(c)(6) (definition of "person").

93. *Brittain*, 913 F.2d at 1420.

94. Brief for the Appellant at 10 n.9, *United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991) (No. 90-6202); brief for the Appellee at 1, 3 n.2, 25, *United States v. Brittain*, 913 F.2d 1413 (10th Cir. 1991) (No. 90-6202).

95. Brief for the Appellant at 9-10, *United Sates v. Brittain*, 931 F.2d 1413 (10th Cir. 1991) (No. 90-6202).

96. *Id.* at 9.

97. *Id.* at 9-10.

98. *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991).

99. *Id.*

> We think that Congress perceived this objective [restoration of the integrity of the nation's waters] to outweigh hardships suffered by "responsible corporate officers" who are held criminally liable in spite of their lack of "consciousness of wrongdoing."... 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 by virtue of his position of responsibility.[100]

As noted above, the defendant's criminal intent was not an issue in the *Brittain* appeal. For this reason and because Brittain was charged with misdemeanors under the CWA, which may be proved by negligence, the court's broad language about imputing willfulness or negligence may arguably be dismissed as "clearly dicta." Nevertheless, it indicates where the court may be headed should the precise issue of the use of the responsible corporate officer doctrine to prove criminal knowledge eventually come before it.

The most recent case interpreting the scope of the responsible corporate officer doctrine is *United States v. MacDonald & Watson Waste Oil Co*,[101] in which two corporations and three of their employees, were convicted under the RCRA of knowingly transporting contaminated soil to an unpermitted facility. The evidence at trial showed that toluene-contaminated soil was transported to a site operated by MacDonald & Watson, under the supervision of one of its employees. The evidence further showed that the president of MacDonald & Watson, defendant Eugene D'Allesandro, participated in the day-to-day management of that site and had been warned on other occasions that his company had disposed of toluene-contaminated soil and that such disposal was illegal.[102] However, there was no direct evidence that D'Allesandro knew of the particular unlawful shipment at issue.

The trial court instructed the jury as follows on the responsible corporate officer doctrine:

> When an individual Defendant is also a corporate officer, the Government may prove that individual's knowledge in either of two ways. The first way is to demonstrate that the Defendant had actual knowledge of the act in question. The second way is to establish that the defendant was what is called a responsible officer of the corporation committing the act. In order to prove that a person is a responsible corporate officer three things must be shown. First, it must be shown that the person is an officer of the corporation, not merely an employee.
>
> Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person had a responsibility to supervise the activities in question.
>
> And the third requirement is that the officer must have known or believed that the illegal activity of the type alleged occurred.[103]

D'Allesandro argued on appeal that the responsible corporate officer doctrine was wholly inapplicable to crimes requiring proof of knowledge, and that the prosecution had transmuted the doctrine "into a substitute for proof of scienter."[104] The government argued that the trial court's instruction preserved the requirement of proof of criminal knowledge, and simply permitted the

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100. *Id.*
101. 933 F.2d 35 (1st Cir. 1991).
102. *Id.* at 42.
103. *Id.* at 50-51.
104. Brief for Appellant D'Allesandro at 20, *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (No. 90-1053).

jury to infer from D'Allesandro's knowledge of prior illegal disposal that he was aware of the disposal at issue.[105]

The court vacated D'Allesandro's conviction, holding that the district court improperly applied the responsible corporate officer doctrine "as a substitute means of proving the explicit knowledge element of this RCRA felony."[106] The court held the charge's defect was that it instructed the jury "that proof that D'Allesandro was a responsible corporate officer would conclusively prove the element of his knowledge" because the instruction described the responsible corporate officer as one of two ways to prove knowledge.[107]

In rejecting the government's argument that the jury instruction merely permitted the responsible corporate officer doctrine to raise the inference of guilty knowledge, the court observed that the jury instructions on willful blindness and circumstantial evidence.[108]

> would have sufficed had it merely been the court's purpose to point out that knowledge could be established by circumstantial evidence, although 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 [illegal disposal].[109]

The court held that it is not enough to simply show that a defendant is a responsible corporate officer to establish the requisite knowledge under the RCRA.

V. Current Status of the Responsible Corporate Officer Doctrine and Proposed Jury Instruction

The dictum in *Brittain* indicates that the responsible corporate officer doctrine may be used a substitute for proof of criminal knowledge, that is, criminal knowledge of the conduct of others may be imputed to the officer solely by reason of his position.[110] In contrast, *White* took the view that the responsible corporate officer doctrine is not a doctrine of responseat superior.[111] *MacDonald & Watson* elaborated on *White*, indicating that the responsible corporate office doctrine is an inferential doctrine, that is, while corporate position may not act as a substitute means of proof, it may raise the inference of criminal knowledge.[112]

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105. Brief for the Appellee at 51-52, *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (No. 90-1051). The Government relied heavily on the language in *Johnson & Towers* that "knowledge . . . may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant." Id. at 55 (quoting *United States v. Johnson & Towers*, 741 F.2d 662, 670 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985)). In *White*, this language was deemed "clearly dicta." 766 F. Supp. 873, 895 (E.D. Wash. 1991). *See* Brief for Appellant D'Allesandro at 55-56, *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (No. 90-1051).

106. *MacDonald & Watson*, 933 F.2d at 52. D'Allesandro was retried and acquitted on November 18, 1991. The trial judge granted the defendant's motion for judgment of acquittal under Fed. R. Crim. P. 29 finding the government's evidence insufficient to support a guilty verdict.

107. *Id.* at 52-53.

108. *See supra*, note 50 (instruction on circumstantial evidence) and text p. 14-15 (*Jewell* instruction on willful blindness).

109. *Id.*

110. *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991).

111. *United State v. White*, 766 F. Supp. 873, 894-95 (E.D. Wash 1991).

112. *United States v. MacDonald & Watson Waste Oil Co.*, 933 F2.d 35, 55 (1st Cir. 1991).

Almost two decades ago, the dissenting justices in Park warned against imposing felony liability for health and welfare violations of which the defendant was unaware.[113] The *Dotterweich* dissent warned against imposing vicarious criminal liability for corporate negligence and mismanagement.[114] Use of the responsible corporate officer doctrine as a theory of imputed, or substitute knowledge, as advanced by *Brittain*, reads the *mens rea* requirement out of environmental statutes and should be rejected. A corporate manager who knows that his subordinates are working with hazardous, highly regulated substances and who fails to supervise them closely should be subject to termination, or civil liability.[115] However, he should not be subject to automatic criminal liability for subordinates' misconduct that he might have prevented, had he been aware of it. As *MacDonald & Watson* suggested, corporate rank may raise the inference that the corporate officer actually knew of environmental criminal violations committed by his subordinates; nevertheless, it is not a substitute for actual knowledge.

Consequently, under the law as it now stands, corporate managers and officers who have the responsibility for environmental compliance need not be concerned about criminal liability simply because of their title or job description. Their position of authority or responsibility over their subordinates does not, in and of itself, provide enough evidence on which to impose criminal liability for their subordinates' misconduct. The law, in effect, takes into account modern day management principles promoting the delegation of authority. It recognizes that managers may not always know what their subordinates are about, and while courts presume that these managers know the requirements of the law, the responsible corporate officer doctrine does not presume they will always know when their subordinates violate the law.

On the other hand, the public policy considerations dictate an affirmative responsibility, and greater potential exposure, for those whose business activities can reach, and possibly harm, an innocent public. As first expressed by the Supreme Court in *Park* and *Dotterweich*, and then legislated by Congress in the CWA and the CAA, prosecutors should focus their efforts beyond the principal actors and seek the person in the corporation one who is responsible for detecting problems affecting the public's safety, health, and welfare and has the authority for correcting them. This will deter misconduct, assure accountability, and protect an innocent public. While *MacDonald & Watson* indicates that one's title by itself may not serve as a basis to impose criminal liability,[116] the corporate officer responsible for environmental compliance nevertheless faces a greater likelihood of potential criminal liability than do the officer's counterparts responsible for matters that do not affect the public's well-being.

Indeed, the *MacDonald & Watson* decision provides but a small safe harbor in cases where there is no circumstantial evidence, other than corporate position, that would evidence criminal knowledge. The judicial and legislative mandate that environmental criminal prosecutions should be targeted to the highest possible level of corporate management remains. Thus, even after *MacDonald & Watson*, the corporate officer responsible for environmental compliance, whose company has been involved in an environmental violation, will continue to be targeted for criminal investigation, required to mount a vigorous and often costly defense, and subjected to public scrutiny solely based upon the officer's corporate position, regardless of whether evidence of criminal knowledge is ultimately found to exist.

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113. 421 U.S. 658, 679-80 (1975) (Stewart, J. dissenting).

114. 320 U.S. 277, 286-87 (1943) (Murphy, J. dissenting).

115. Gerald Hellerman, Chief Financial Analyst, Corporate Finance Unit, Antitrust Division, Remarks of Department of Justice to National Association of Corporate Directors Governance Review (Oct. 14, 1991) (on file with author) (discussing environmental liability of corporate directors). With respect to civil liability, one court has applied a strict liability standard to a corporate officer charged with violating the RCRA in a civil suit. *See United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 745 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

116. *MacDonald & Watson*, 933 F.2d at 55.

Proof of such an individual's criminal liability still rests on traditional concepts of proof of knowledge, whether actual knowledge or knowledge based upon circumstantial evidence. However, a jury may consider one's position, authority, and responsibility as one circumstance from which to infer guilty knowledge.

Based on the history of the responsible corporate officer doctrine and *MacDonald & Watson*, the following pattern jury instruction would appropriately preserve the mens rea element in environmental criminal statutes without undercutting their health and welfare policies:

> The government may prove the individual's knowledge by direct or circumstantial evidence. Knowledge may be inferred from circumstantial evidence including the position and responsibility of the defendant, the defendant's conduct, as well as information provided to the defendant relating to the violation on prior occasions. Merely proving that the defendant was a responsible corporate officer is not enough to establish that the defendant had knowledge of the violation. More is needed.
>
> The government may also prove the individual's knowledge by establishing that the defendant was willfully blind to the facts constituting the offense. It is not enough, however, that the defendant acted recklessly or negligently with respect to not learning of the facts constituting the offense. The defendant must have purposely ignored them.

VI. Conclusion

In the environmental enforcement arena, the responsible corporate officer doctrine has taken on heightened importance. As the number of criminal enforcement proceedings increase, it has become correspondingly more important that the responsible corporate officer doctrine be properly interpreted in conjunction with the environmental statutes. Though only the first chapter of the book on the responsible corporate officer doctrine has been written, the recent decisions of *White* and *MacDonald & Watson* evidence a clear understanding that simply being the responsible corporate officer is not and should not be enough to garner a felony conviction under environmental statutes.