Mens Rea Requirements Under CERCLA: Implications for Corporate Directors, Officers and Employees

Roxanne R. Rapson
Scott R. Brown

Follow this and additional works at: http://digitalcommons.law.scu.edu/chtlj
Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/chtlj/vol6/iss2/8

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara High Technology Law Journal by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
MENS REA REQUIREMENTS UNDER CERCLA: IMPLICATIONS FOR CORPORATE DIRECTORS, OFFICERS AND EMPLOYEES

Roxanne R. Rapson†
Scott R. Brown††

TABLE OF CONTENTS

I. OVERVIEW OF CERCLA ............................ 379

II. CRIMINAL ENFORCEMENT UNDER CERCLA ........ 380
    A. Actions Giving Rise to Criminal Punishment ...... 380
    B. Exposure to Corporate Directors, Officers, and Employees to Liability Under Section 9603(b) .... 382
    C. Exposure to Corporate Directors, Officers, and Employees to Liability Under Sections 9603(c) and (d) .............................................. 383
    D. The Judicial Approach to the Mens Rea Requirements .............................................. 384
        1. The Public Welfare Statute Theory ........... 385
    E. Interpreting the Criminal Penalties of CERCLA... 391
        1. Analysis of Section 9603(b) .................. 392
        2. Analysis of Section 9603(c) ................. 396
        3. Analysis of Section 9603(d) .................. 399
    F. Implications and Suggestions .................... 402

III. CONCLUSION ........................................ 404

Copyright © 1990 by Scott R. Brown and Roxanne R. Rapson.
†  J.D., May 1990 at Santa Clara University School of Law; M.P.H., December 1986 at San Jose State University; B.A., June 1981 at the University of California at Berkeley.
†† J.D., May 1990 at Santa Clara University School of Law; B.S.E.E., June 1987 at the University of California at Santa Barbara.
MENS REA REQUIREMENTS UNDER CERCLA:
IMPLICATIONS FOR CORPORATE DIRECTORS,
OFFICERS, AND EMPLOYEES

America has produced an environmental disaster. American industry has dumped hazardous wastes for many years, with no concern for the quality of the method implemented. According to one study, “of the 77.1 billion pounds of hazardous waste generated annually in the United States, only 10% are disposed of in a safe manner.” Improperly disposed hazardous substances have left our ecosystem in serious peril.

Concern and appreciation for the need to protect the environ-


The term “hazardous waste” means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(Note: The coverage of CERCLA is not limited to hazardous wastes as defined under RCRA, it also includes hazardous substances.)


The term “hazardous substance” means (A) any substance designated pursuant to section 1321 (b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

The term “hazardous waste” will be used interchangeably in this paper with the term “hazardous substance.”
Criminal Liability Under CERCLA

In the late 1960's, the Love Canal tragedy focused national attention on the damage that occurs from exposure to hazardous substances. Contamination of the environment by hazardous waste occurs either by direct dumping or by improper methods of disposing of the substances. The health effects may be short-term or long-term. Exposure to hazardous wastes can cause cancer, genetic mutation, birth defects, miscarriages, and damage to the lungs, the liver, the kidneys, and the nervous system.

I. OVERVIEW OF CERCLA

In order to respond to the heightened concern over the contamination of the environment, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (1980) (hereinafter “CERCLA”). This Act was passed not only to prevent harm caused from exposure to hazardous wastes, but to rectify many years of unchecked improper waste disposal procedures as well.

CERCLA's first function is to clean up inactive or orphaned sites which are leaking hazardous substances before further damage occurs. The Act's second function is to create an emergency response system to clean up serious spills of hazardous substances.

There are two approaches to the enforcement of CERCLA. The main thrust of the statute is civil enforcement. In addition to the civil approach, criminal sanctions were included in CERCLA in order to address the serious threats posed by attempts to avoid the civil enforcement of CERCLA after contamination occurs. Specifically, these criminal sanctions are imposed to deter polluters from failing to notify the Environmental Protection Agency (here-
in after “EPA”) of actual and potential leaks of hazardous substances. When leaks are not revealed to the EPA, CERCLA’s purpose is frustrated because the danger will not be discovered until the hazards affect both the environment, and public health and welfare.11

CERCLA’s reporting feature is premised on the assumption that the EPA will be able to identify hazardous waste sites before those sites endanger the public health and welfare.12 Consequently, the EPA relies on mandatory reporting, by both past and present owners and operators, specifying the location of hazardous waste sites and the types of wastes stored at those sites. In addition to owners and operators, individuals who are in charge of facilities at which a release of a hazardous substance occurs must immediately report the release to the government.

Because this information is essential to the safeguarding of the public, CERCLA provides for criminal sanctions against owners, operators, and persons in charge of facilities who fail to comply with the statute by not reporting. No court has interpreted how these sanctions will be applied. In order to predict how a court will interpret criminal provisions of CERCLA, analysis of these provisions is necessary.

In this article, we will focus on the criminal aspects of CERCLA’s enforcement as it applies to directors, officers, and employees of corporations who dispose of hazardous materials. We will analyze what mens rea requirements will be applied to CERCLA’s criminal enforcement provisions based upon the Supreme Court’s interpretations of similar statutes. Additionally, we intend to propose a method to strengthen the deterrence value of these sanctions to effectuate the goals of CERCLA.

II. CRIMINAL ENFORCEMENT UNDER CERCLA

A. Actions Giving Rise to Criminal Punishment

There are several actions which constitute a violation of CERCLA and are punishable criminally. First, 42 U.S.C.A. § 9603(a)13 makes it mandatory to notify the National Response Center, established under the Clean Water Act,14 whenever any “release”15 of a

13. All code sections are 42 U.S.C.A. unless stated otherwise.
toxic or hazardous substance exceeding federal standards occurs.\textsuperscript{16} The party in charge of the "vessel"\textsuperscript{17} or "facility,"\textsuperscript{18} as defined under CERCLA, is responsible for "immediately" notifying the government as soon as that person has knowledge of a release. Failure to do so is criminally punishable under section 9603(b) by fines or up to three years imprisonment for a first offense and five years for a second offense.

Second, there is a penalty for false reporting of hazardous spills or leaks. If a "person in charge"\textsuperscript{19} of a site\textsuperscript{20} where a spill has occurred knowingly reports false or misleading information to the National Response Center, that person is subject to the same penalties as if the spill was not reported or was concealed.

Third, section 9603(c) requires that any person who owned a disposal site at the time of disposal of a hazardous substance, or who now owns a disposal site, is obligated to report that site to EPA. A disposal site is one which has stored, treated, or disposed of hazardous substances as defined under the Act. Failure to report the site is punishable by a $10,000 fine or not more than one year in prison, or both.

\textsuperscript{15}The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident.

\textsuperscript{16}The National Response Center would then notify all relevant agencies depending on the facts of each situation.

\textsuperscript{17}The term 'vessel' means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 42 U.S.C.A. § 9601 (28).

\textsuperscript{18}The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

\textsuperscript{19}See text \textit{infra}.

\textsuperscript{20}We use the term "site" interchangeably with the terms "vessel" and "facility."
Finally, individuals required to report disposal sites under section 9603(c) are also required to keep specific records on those sites under section 9603(d). These records must be held for fifty years after the site is reported. A person who attempts to destroy, change, or conceal these records may be fined or imprisoned for up to three years for a first offense or five years for a second offense.

B. Exposure of Corporate Directors, Officers, and Employees to Liability Under Section 9603(b).

We must determine who may be found liable for carrying out the above actions. If a corporation violates the Act, are directors, officers, and employees sheltered from liability by the corporation if they are the ones who carried out the acts?

In *United States v. Carr*,\(^2\) the Second Circuit addressed who is liable as a “person in charge” under section 9603(b) for failure to report a release. In this case, the foreman of a paint disposal crew was convicted for failing to report a release to the National Response Center. The foreman argued he was not in a significant position of authority to be considered a person in charge. The court ruled that a “person in charge” could include anyone on the continuum from corporate directors to employees responsible for the operations. The court stated:

Indeed, as the Fifth Circuit has stated, “to the extent that legislative history does shed light on the meaning of ‘persons in charge,’ it suggests at the very most that Congress intended the provisions of [section 311] to extend, not to every person who might have knowledge of [a release] (mere employees, for example), but only to persons who occupy positions of responsibility and power.” [citation omitted]. . . .

The reporting requirements of the two statutes do not apply only to owners and operators [citation omitted], but instead extend to any person who is “responsible for the operation” of a facility from which there is a release [citations omitted].\(^2\)

Thus, the Second Circuit in *Carr* has found that anyone with a sufficient level of responsibility may be found liable under section 9603(b).

---

21. 880 F.2d 1550 (2d Cir. 1989).
22. Id. at 1554.
C. Exposure of Corporate Directors, Officers, and Employees to Liability Under Sections 9603(c) and (d).

The phrase defining liability in section 9603(c) and (d) states that an "owner or operator" who fails to report or keep records on a site can be criminally liable. Courts have not interpreted "owner or operator" in the criminal context, but the phrase has been interpreted by several courts construing civil liability under the Act.

A major factor in determining whether the owner is liable is the amount of control that the owner has over the disposal of hazardous waste on the property. In State of Idaho v. Bunker Hill Co.,23 the court held that the parent corporation of a subsidiary, which owned a hazardous substance site, was an owner under CERCLA. The court felt that the parent corporation had substantial knowledge of hazardous waste disposal and releases at the subsidiary.24 The criteria upon which the court relied in reaching its decision was the parent corporation's decision-making authority and ability to undertake actions to prevent the resulting damage caused by the disposal and releases of hazardous wastes.25

In State of New York v. Shore Realty Corp.,26 the court addressed the issue of whether an officer would be liable as an operator. The corporation was formed solely to purchase property which contained a hazardous waste disposal site. The corporation was controlled by the defendant. He was the sole director and stockholder. Not only was he fully aware of violations on the property, but he permitted them to continue. Because of the defendant's exclusive authority over the corporation and the egregious facts, the court held the defendant to be personally liable as an "operator."27

An example of the court's readiness to extend liability to corporate employees is apparent in United States v. Northeastern Pharmaceutical.28 In this case, the Eighth Circuit imposed civil liability against a plant supervisor of a corporation which was found to be a generator of toxic wastes. The defendant argued he could not be held personally liable because he did not own or possess the substances which were improperly disposed of. The court disagreed by focusing on the language of the statute which states "any person" who arranged for disposal or transportation of hazardous sub-

24. Id. at 672.
25. Id.
26. 759 F.2d 1032 (2d Cir. 1985).
27. Id. at 1052.
stances is liable. The court believed that if Congress wanted directors, officers, and employees to be sheltered from liability, Congress would have used the phrase “person” and defined it narrowly.

The court felt the congressional use of “any person” closed the loophole that would have been created if directors, officers, and employees were not held liable.

The phrase “owner or operator” defined by the above courts may be applied to sections 9603(c) and (d) which state that “any person who owns or operates” a facility is criminally liable for failure to comply with these sections. As with civil liability, the statutory focus is once again on “any person.” Under the Northeastern Pharmaceutical analysis, if a plant supervisor is held liable, then directors and corporate officers will also be liable. Thus, according to the above interpretations, corporate directors, officers, and employees in positions of responsibility have been held to be civilly liable under CERCLA. Given the foregoing construction of civil liability under CERCLA, and in the absence of any judicial decisions regarding criminal liability under section 9603, it is logical to conclude that the same individuals held civilly liable will also be criminally liable.

D. The Judicial Approach to the Mens Rea Requirements

The remainder of this article will address the issue of what mens rea is required by the Act. Because there is little case law interpreting CERCLA’s criminal sanctions, we analyze how similar federal environmental statutes have been interpreted by the courts and how the courts will interpret the criminal sanctions of CERCLA. Finally, we will make suggestions for the future to strengthen the criminal enforcement of these provisions. Our suggestions are intended to increase the deterrence value of the criminal sanctions and make the application of these penalties against corporate directors, officers and employees comply with traditional notions of fairness.

---

29. Id. at 743.

30. Id.

31. Id. For further analysis of civil liability under CERCLA, see G. O'Hara, Minimizing Exposure To Environmental Liabilities for Corporate Officers, Directors, Shareholders, and Successors, 6 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 5 (1990).

32. "Moreover, construction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme." Northeastern Pharmaceutical, 810 F.2d at 743.
1. The Public Welfare Statute Theory

CERCLA creates criminal sanctions which were not developed by the common law. It is unclear from the language of the Act whether these sanctions require a "guilty mind" to punish a violator. The Supreme Court has developed an analytic framework which will allow the enforcement of criminal penalties on a strict liability basis when law regulates activities which harm the public health and welfare. Since CERCLA regulates activity which can be extremely injurious to the public health, it must be determined if CERCLA is a public welfare statute and if so, what effect that status has on the common law requirement of a guilty mind before punishment.

The Judiciary has long been faced with interpreting the application of statutes passed by Congress which create "new" crimes, ones not developed at common law, such as the CERCLA's criminal sanctions. The common law approach to any crime includes both the prohibited action and the requirement that the perpetrator have a guilty mind. The prohibited action is known as the actus reus and the guilty mind as the mens rea requirement. A difficulty arises when Congress creates crimes which, on their face, do not require a guilty mind. The courts traditionally have tried to interpret these new crimes to fit within with the more familiar common law analysis and approach to crime. But this can create problems. Courts may be left attempting to read mens rea requirements into statutes which cannot reasonably be read to have such requirements.

Faced with this reality, but desiring to reconcile common law requirements with the new congressional statutes, the courts have developed a theory in an attempt to explain this discrepancy. Courts have recognized the new statutes as a class of laws which Congress has created to address behavior which can seriously harm the public health, safety, and welfare. These statutes are known

33. For an extensive analysis of the history and development of the public welfare statute theory, see R. Webber, Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?, 16 B.C. ENVTL. L. REV. 53 (1988).

34. The "guilty mind" requirement is a standard which generally requires more than negligence and at its most stringent level requires that the actor specifically intend to commit the crime. See United States v. Freed, 401 U.S. 601, 613 (1971) (Brennan, J., concurring).


"Mens Rea: A guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and willfulness." BLACK'S LAW DICTIONARY 889 (5th ed. 1979).


as public welfare statutes. Because violations of these statutes have the potential to seriously harm large segments of the population, courts have concluded that Congress intended to enforce these penalties on a strict liability basis.

a. The Dotterweich Case: Strict Liability for Public Welfare Statutes

In 1943, the Supreme Court developed this strict liability theory more completely in United States v. Dotterweich. In this case, an individual was convicted by a lower court under a public welfare statute for shipping adulterated and misbranded drugs. The statute as interpreted by the Supreme Court required the defendant to know what actions he was taking, but not that those actions were wrongful. The Supreme Court was willing to convict despite the lack of the guilty mind requirement based on the following analysis. First, the statute was a public welfare statute, violation of which has the potential to seriously harm the public. Second, the criminal enforcement was implemented to increase the effectiveness of the statute. Finally, the individual was in a special position of responsibility with the power to create or prevent a public harm.

There were other important justifications for applying strict liability to individuals in public welfare statute cases. First, the individual charged could have exercised reasonable care and avoided the resulting harm. Second, shipping adulterated and misbranded drugs was a misdemeanor. In misdemeanor convictions, the penalty is small and the social stigma of being convicted of a felony does not attach. These factors justified a stricter application of the laws in light of the great harm that violation of these laws could cause. However, the importance of the misdemeanor versus felony distinction has been somewhat vitiated in the subsequent development of the public welfare law line of cases.

b. The Freed Case: Strict Liability for Felonies

In United States v. Freed, the Supreme Court was willing to

38. Id.
40. 320 U.S. 277 (1943).
41. "Such legislation dispenses with the conventional requirement for criminal conduct - awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." Dotterweich, 320 U.S. at 281.
apply strict liability to a felony violation of a criminal statute under a public welfare law. In this case, the defendant was convicted of possessing hand grenades without a permit. The case turned on the issue of whether the defendant needed to be aware that possession of an unregistered dangerous weapon was illegal.

The Court believed that the dangerousness of possession of hand grenades by private individuals was as serious as the transgressions in Dotterweich.\textsuperscript{44} Consequently, this statute was a candidate for strict liability. Additionally, the Court made it clear that imposition of strict liability in this case was "premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act."\textsuperscript{45} The Court imputed the knowledge that the action was illegal to the defendant.

It was important for the Court to justify this imputation of knowledge because a general rule exists against convicting an individual of a felony without requiring a showing of a guilty mind.\textsuperscript{46} The Court overcame this hurdle by ruling that if any reasonable person would know that the action is illegal, then any individual may be held strictly liable for the offense.\textsuperscript{47} This reasoning would be repeated again in later cases.

In the 1970's, Congress became more active in passing regulations to protect the environment. A series of acts were passed to control and eliminate the pollution crisis the United States suddenly discovered it was facing. These acts all had criminal sanctions incorporated into them for the purpose of enhancing the effectiveness of the acts. However, the statutes contained knowledge requirements which mandated that at a minimum, some level of guilty mind must be proven by the prosecution. The Supreme Court and lower courts, with an ironic turn of logic, now applied the public welfare law approach to restrict the \textit{mens rea} requirements of the new statutes. What had been created to justify the absence of \textit{mens rea} requirements in earlier statutes would now be used to affirmatively curtail \textit{mens rea} requirements which Congress included in its environmental statutes.

\textsuperscript{44} Id. at 609 (in Dotterweich, 320 U.S. 277, the violation was shipping misbranded and adulterated drugs).

\textsuperscript{45} Id.

\textsuperscript{46} United States v. O'Brien, 686 F.2d 850, 853 (1982).

\textsuperscript{47} 401 U.S. 601, 609 (1971).
c. The International Minerals Case: Strict Liability Applied Where Knowledge is Required

In *United States v. International Minerals & Chemical Corp.*, the Supreme Court first addressed the issue of what level of knowledge was required for violation of a public welfare statute which specifically contained a knowledge requirement. The statute being interpreted was part of the Transportation and Explosives Act. This statute required, on its face, a knowing violation of an Interstate Commerce Commission regulation promulgated pursuant to its power with regard to the transportation of corrosive liquids. Despite explicit language that the violator "know" a regulation was being violated, the Court concluded that there was no such knowledge requirement.

In addressing the statute's explicit language, the Court took the position that the language could not be read to allow ignorance of the law as a defense. If the violator was required to know that there was a regulation which prohibited his action, a claim of no knowledge of the regulation or law would be an absolute defense. The Court ruled that Congress would not overrule such a well-established doctrine of law without an express declaration. Under this analysis, there is no requirement that the violator be aware of a specific regulation. It is sufficient that a person be aware of the facts which constituted the violation of the regulation. In *International Minerals*, the defendant was liable because he knew he was transporting corrosive liquids and that he had no transportation permit.

Having determined this, the Court interpreted "knowingly violates" to mean knowingly engaging in an act which violates the statute. There are three elements of the crime involved: (1) the shipment of the material; (2) the dangerous nature of the material; and (3) non-compliance with the regulation requiring papers listing the dangerous substance. Having decided ignorance of the law could not be a defense, the knowing requirement of the statute could only apply to the first two elements because knowledge of the third element would require knowledge of the existence of the

49. *Id.* at 567.
50. The statute stated that whoever "knowingly violates any such regulation" shall be fined or imprisoned. *Id.* at 559.
51. *Id.* at 563.
52. *Id.* at 562 - 563.
53. *Id.* at 563.
54. Webber, *supra* note 33, at 64.
regulation.\textsuperscript{55}

The Court repeated part of the public welfare rationale, stating that because of the nature of the substances being dealt with, a responsible person could be presumed to know that a regulation exists.\textsuperscript{56} This presumption was palatable because the actor was in a position of responsibility to the public and this interpretation effectuates the purpose of the statute. Both of these concerns are determinative elements of the public welfare exception for \textit{mens rea} requirements.

d. The Johnson & Towers Case: A Presumption of Knowledge Creating Strict Liability

An alternative interpretation of the \textit{mens rea} required in a public welfare statute is found in \textit{United States v. Johnson & Towers, Inc.}\textsuperscript{57} In this case, the Third Circuit had to deal with a violation of the Resource Conservation and Recovery Act (hereinafter "RCRA").\textsuperscript{58} Two employees of a chemical plant were indicted for knowingly disposing hazardous substances without a permit in violation of RCRA.\textsuperscript{59} One of the issues the court had to decide was whether a knowing violation meant knowledge of RCRA.

In analyzing RCRA,\textsuperscript{60} the court separated the violation into four elements: (1) disposing of materials; (2) that the materials were hazardous; (3) that the facility did not have a permit; and (4) that the facility was required to have a permit.\textsuperscript{61} The remaining question was whether knowledge was required for each element, or as in \textit{International Minerals}, for only the first two.

The court recognized that the statute was explicit in its requirement of knowledge, and therefore, it was necessary to find knowledge in order to convict. The court then balanced the now

\textsuperscript{55} \textit{International Minerals}, 402 U.S. at 563. \textit{See also Webber, supra} note 33, at 63.
\textsuperscript{56} \textit{Id.} at 565.
\textsuperscript{57} 741 F.2d 662 (3d Cir. 1984), \textit{cert. denied}, 469 U.S. 1208 (1985).
\textsuperscript{58} 42 U.S.C.A. § 6901 \textit{et seq.}
\textsuperscript{59} \textit{Johnson & Towers}, 741 F.2d at 664.
\textsuperscript{60} 42 U.S.C.A. § 6928(d) states in pertinent part:
\begin{enumerate}
\item[(d)] "\textit{Criminal Penalties}
\begin{itemize}
\item [(A)] without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 \textit{et seq.}]; or
\item [(B)] in knowing violation of any material condition or requirement of such permit; \ldots ."
\end{itemize}
\end{enumerate}
\textsuperscript{61} \textit{Johnson & Towers}, 741 F.2d at 668.
well-established public policy of not requiring *mens rea* in a public welfare statute against Congress' specific statutory language and intent. This balancing focused on Congress' concern about hazardous wastes and the fairness of a consistent reading of the statute. The result was a determination that "knowing" modified all four elements of the crime.

Well-established public policies, however, are not easily defeated. At the same time it granted an ignorance of the law defense in apparent contradiction to *International Minerals*, the court gutted the defense by creating a presumption of knowledge on which prosecutors can rely. The court said that individuals may be prosecuted if they "knew or should have known that there had been no compliance with the permit requirement of § 6925." It appears that prosecutors may borrow the Supreme Court analysis on the issue of whether an individual should have known of the existence of regulations under public welfare laws. Under the line of public welfare cases decided by the Supreme Court, the very nature of the action being regulated was a reason to find that strict liability was appropriate. Anyone dealing with an extremely dangerous product was presumed to understand that it was regulated. The *Johnson & Towers* court applied the exact same standard, but in an altered form. Anyone working in the disposal industry will be presumed to understand, by the very nature of its business and the substances with which it deals, that regulations are in existence.

Not only does this analysis water down the requirement of knowledge of the regulation, but the second element, knowledge of the lack of a permit, is similarly affected. Who better should have known of the existence of a permit than the individual in charge of the disposal? Thus, the *Johnson & Towers* court technically imposes a knowledge requirement with respect to the existence of the regulation and the permit in order to find a violation. The court then allows the prosecution to rely on the public welfare law theory to impute knowledge of the other elements of the crime on anyone who knows the substance with which he deals is dangerous to the

---

62. *Id.*

63. *But see* United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989). In *Hoflin*, the Ninth Circuit came to the opposite conclusion from the *Johnson & Towers* court, finding no knowledge of the permit process was required of violators of RCRA who dispose of hazardous wastes without a permit in order for the violators to be convicted. The court did this based on a plain meaning analysis, and also cited both *Dotterweich* and *International Minerals* in applying the public welfare statute considerations to restrict the *mens rea* requirements. *Id.* at 1038. *See also* United States v. Hayes International Corporation, 786 F.2d 1499 (11th Cir. 1986).

64. *Johnson & Towers*, 741 F.2d at 664-65.
public. Strict liability returns through the back door.\textsuperscript{65}

e. The Liparota Case: Public Welfare Statute Defined

In 1985, the Supreme Court defined what type of regulations may be regarded as public welfare statutes and what \textit{mens rea} requirements were appropriate for those statutes. In \textit{Liparota v. United States},\textsuperscript{66} the defendant illegally possessed food stamps in violation of the Food Stamp Act. The question at issue was whether a person had to be aware that his possession of food stamps was a violation of a statute, or did he merely need to know he possessed the food stamps.\textsuperscript{67}

The Court approached this issue by creating a two part test to determine if the statute qualified as a public welfare statute. To do so, the statute must render criminal an activity which "a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."\textsuperscript{68} If the conduct did not meet these two requirements, the Court found that there was no sufficient rationale to restrict the common law requirement of a guilty mind.\textsuperscript{69}

However, conduct which does have both of these characteristics falls squarely within the exception to the \textit{mens rea} requirements under the public welfare statutes. Because of the serious threat to society, this conduct may be punished merely for commission of the prohibited activity without requiring a guilty mind.\textsuperscript{70}

E. Interpreting the Criminal Penalties of CERCLA

The analysis of CERCLA's criminal sanctions begins with a determination of whether it is a public welfare statute as defined in \textit{Liparota}. If it is, then a traditional statutory analysis is conducted, interpreting the language of the statute and ascertaining the intent of Congress. The statutory interpretation is balanced, however, by the special public policy considerations incumbent in a public welfare statute. This balancing will determine what level of \textit{mens rea} is

\textsuperscript{65} For further analysis of this point see R. Milne, \textit{The Mens Rea Requirements of the Federal Environmental Statutes; Strict Criminal Liability in Substance But Not Form}, 37 \textit{BUFFALO L. R.} 307 (1989).

\textsuperscript{66} 471 U.S. 419 (1985).

\textsuperscript{67} \textit{Id.} at 423.

\textsuperscript{68} \textit{Id.} at 433.

\textsuperscript{69} \textit{Id.}, construed in Webber, \textit{supra} note 33, at 72-74.

\textsuperscript{70} \textit{Liparota}, 471 U.S. at 433.
required in order to violate the crimes created by Congress in this statute.

The criminal sanctions of CERCLA are located in section 9603. We approach section 9603 by analyzing the three subsections which penalize non-compliance with reporting procedures.

1. **Analysis of Section 9603(b)**

   a. **The Liparota Test**

      We must analyze whether each subsection of CERCLA is a public welfare statute. There are two questions under *Liparota* which both need to be answered in the affirmative in order for these subsections to be considered public welfare statutes:

      1. Is the conduct regulated such that a reasonable person should know that it is subject to stringent regulation? (hereinafter the "regulation" prong).

      2. Should a reasonable person know that the conduct regulated may seriously threaten the public health or safety? (hereinafter "public safety" prong).

   1) **The Regulation Prong**

      Under the analysis of *International Minerals*, a reasonable person should have known that the transportation of corrosive liquids was regulated. Under section 9603(b), it is required that any substantial spill or leak of a hazardous substance should be reported to the Federal authorities. Both statutes deal with dangerous substances. But under CERCLA, the inherent danger of the situation regulated is substantially greater. In *International Minerals*, the conduct was the mere transportation of a hazardous substance without a permit. A violation of section 9603(b) requires an actual leak of a hazardous substance. This is an inherently more dangerous situation. Thus, there is a stronger inference that an individual should know that a regulation would apply. Consequently, it must be concluded that the answer to *Liparota*'s first question is yes.

   2) **The Public Safety Prong**

      There is no rational argument to be made that a reasonable person would not know that failing to report a spill or leak of a hazardous substance would seriously threaten the public health or safety. If no report is made, then no action by responsible authori-

---

71. *Id.*

72. *Id.*
ties can be taken, and the hazard will remain. Thus, because both prongs under the Liparota analysis have been met, this subsection constitutes a public welfare regulation.

Both of the questions posed by Liparota to determine whether a statute is a public welfare statute may also be framed in a more general fashion. The issue is whether the "conduct regulated" means the specific act prohibited, or the general activity of which the specific act is a part. For example, is the disposal of hazardous waste a dangerous activity which a reasonable person would understand may seriously threaten the public health or safety? The answer to this easier question is, obviously, yes. If this is the correct framing of the "conduct regulated," then clearly all of the subsections of section 9603 will be public welfare statutes. This should be kept in mind as an alternate approach to that which is dealt with in detail both above and below.

b. Statutory Analysis

At the statutory analysis phase, the public policy of restricting the mens rea requirement of the crime in order to effectuate the goals of the statute will be balanced by interpreting congressional intent. Section 9603(a) states in pertinent part:

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

Section 9603(b) states in pertinent part:

Any person [defined in (a)] . . . who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both . . . .

73. The Supreme Court has perhaps already answered this question when it stated: "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." International Minerals, 402 U.S. at 565 (1971).

74. 42 U.S.C.A. § 9603.
It is clear from this language that Congress intended some knowledge requirement. Thus, the statute is similar to the statutes in *International Minerals* and *Johnson & Towers*. The elements of the crime are: (1) the existence of a release; (2) the substance released is hazardous; (3) the substance is defined as hazardous by CERCLA; and (4) (a) failure to notify the appropriate authorities of the spill; or (b) notification with false information about the spill.

The question is how many of these elements are modified by the knowing requirement?

At a minimum, since Congress has required knowledge, then the first two elements must be modified by that requirement. Since Congress has required culpability, no one could be found guilty if they were unaware that a spill existed or that it was hazardous. Congress requires that an individual make a report as soon as that person has "knowledge of such release." Thus, the defendant must know about the release. Additionally, the word "such" in this phrase modifies "release" and indicates that the defendant must know that the release was hazardous. The first two elements, therefore, must be read to require knowledge under a plain meaning approach. However, this leaves unanswered whether knowledge will be required of the second two elements.

This knowledge requirement is also consistent with the *International Minerals* analysis. If the person neither knew of the spill nor knew that the spill contained hazardous substances, that person would have no culpability at all. However, if knowledge is also required for the third element, it would violate the concern in *International Minerals* that ignorance of the law has been made a defense. Knowledge of the fact that CERCLA defines the substance as hazardous requires knowledge of the regulation itself, and

---

75. We assume for the purposes of this analysis that the accused is a "person in charge" within the definition of subsection (a). See supra notes 21 and 22 and accompanying text.

76. See definition supra note 15.

77. See definition supra note 3.

78. See United States v. Greer, 850 F.2d 1447 (11th Cir. 1988). In *Greer*, the Eleventh Circuit reviewed a case in which the elements were defined as follows:

(1) That the defendant was "in charge of" the facility as required by § 9603(a);

(2) That a release of a hazardous substance occurred;

(3) That the defendant "knew of such release;" and

(4) That the defendant "failed to immediately notify the National Response Center."

Note that the instructions given by the trial court were not challenged on appeal. *Id.* at 1453.

79. The traditional approach to statutory interpretation is to first look to the "plain meaning" of the language of the statute. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982). "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' " [citation omitted].
this should not be required in the absence of clear statutory intent to overrule the common law rule. This intent cannot be found in the legislative history of CERCLA. Thus, knowledge is probably not required to satisfy this element.

The fourth element (failure to notify the appropriate authorities) probably would require knowledge, but in a limited manner. The courts have consistently shown concern for the ability of the prosecution to effectuate the statute. Less stringent mens rea requirements mean easier convictions. The fourth element could be read to implicitly require knowledge that there was no notification as well as knowledge that such notification was required. A court would most likely restrict the knowledge requirement here to the fact that no notice was given to the government. For the same reason that knowledge would not modify the third element, it would not modify the second half of the fourth element. Requiring knowledge that the authorities must be notified under the statute is tantamount to requiring knowledge of the statute. The court would not want to make knowledge of the law a requirement.

In the alternative, the court might use the Johnson & Towers approach and determine that there is no sensible construction which would limit knowledge to the first two elements of the crime. However, the public policy requirements for a public welfare law would allow the court to set a standard of proof of knowledge for the final two elements which presumes that the individual in charge of the vessel or facility in question should have known that the substance was regulated and the spill should have been reported. This presumption leaves the defendant in essentially the same position as if strict liability was applied. This presumption may be rebuttable.

There is still the issue of whether the felony punishment of this section would require that knowledge be proven for all elements of the crime. There are two reasons why a court would probably find that it is unnecessary to require knowledge of all elements of the crime even though it is a felony. The Superfund Amendments and Reauthorization Act (hereinafter “SARA”) was signed into law in

80. But see Justice Brennan’s concurrence in Freed, 401 U.S. 601, 614 - 16 (1971). Justice Brennan argues that these interpretations should turn solely on congressional intent without considering the common law rule.

81. The concern is that if the court requires knowledge in every element, the prosecution will have a more difficult time proving a violation of the law. But, if no knowledge is required, proof of violation is reduced to proving the physical acts which violate the law were performed by the defendant.

82. No court has yet reached the issue of whether this presumption is rebuttable.

1986 by President Reagan in order to significantly strengthen CERCLA.\(^4\) Before CERCLA was amended by SARA, the offenses were punished as misdemeanors.\(^5\) SARA elevated the penalties to felonies without changing the knowledge requirements. Since Congress is assumed to be aware of how the Courts interpret laws, knowledge of the public welfare statute line of cases must be imputed to Congress.\(^6\) This section, under the public welfare analysis, would be interpreted to be a strict liability crime if punished as a misdemeanor.\(^7\) Since Congress did not change the wording of the knowledge requirement of the statute, it could not have intended that the knowledge requirement be increased when it increased the penalties.\(^8\)

Secondly, the viability of this restriction on imposing strict liability in felony crimes is questionable in light of *Freed*. Recall that the *Freed* court imposed strict liability for the felony of possession of a dangerous weapon without a permit. The imposition of strict liability was based on the court’s belief that any reasonable person would believe that possession of dangerous weapons was illegal. This formulation is very similar to the first question of the *Liparota* test, and consequently any statute which meets that test would probably be punishable as a strict liability statute under the *Freed* reasoning.

2. Analysis of Section 9603(c)
   
a. The Liparota Test

The *Liparota* test to determine whether the section is a public welfare statute appears to be met in the affirmative. Subsection (c) requires a notification to the EPA of any toxic disposal site by an individual who owned or operated that site when it was in operation.

1) The Regulation Prong

The question to be asked is, is the conduct regulated such that a reasonable person should know that it is subject to stringent regulation?

---

87. See supra note 40 and accompanying text.
88. The crime was originally a misdemeanor. In increasing the penalties to a felony as a result of SARA’s enactment, the knowledge requirement was not changed. This statute can therefore be interpreted without reference to the severity of its penalties.
The case here is directly analogous to *International Minerals*. In *International Minerals*, the transportation of toxic substances without a permit was found to be an activity that a reasonable person should know was subject to stringent regulation. Not seeking a permit is in essence, failure to notify the government of an activity and failure to comply with any regulations the government might have with regard to that activity. Thus, both statutes deal with notification of the government about activities involving extremely hazardous substances.

The major difference is that the violator under section 9603(c) may no longer be involved in disposing of hazardous substances. Should a reasonable person be aware that there is ongoing stringent regulation of activities that that person carried on in the past? This is a close question to decide. But, the court would probably focus on the fact that the danger from this past action does not end with the closing of the site. In fact, the danger heightens as time passes. Additionally, a site operator would be aware of this, and the general public's awareness of this fact is acute. Consequently, a court would find that a reasonable person should be aware that stringent regulations exist.

2) The Public Safety Prong

The second *Liparota* question is, should a reasonable person know that the conduct regulated may seriously threaten the public health or safety? This question may be directed specifically at the action regulated against; non-notification to EPA about a hazardous disposal site's operation. This could seriously threaten the public if there was a hazard of which no responsible agency was aware. If there is no knowledge of the problem, there will be no response, possibly until the serious danger to the public has already been realized in the form of death and disease among the affected population.89 Any reasonable person would understand this threat.

b. Statutory Analysis

We now turn to the statutory analysis and balancing of the result with the public welfare statute policy considerations. Section 9603 (c) states in pertinent part:

[By early April 1981]. . . any person who owns or operates or who at the time of disposal owned or operated, or who . . . [trans-ported hazardous substances to such a site] . . . shall . . . notify

89. See *supra* note 6 and accompanying text.
the Administrator of the Environmental Protection Agency of the existence of such facility. [specifying substances stored there and any possible releases]. Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. [emphasis added]

Congress has included a knowing requirement. The question once again will be does this requirement of knowledge extend to all of the elements of the crime?

The elements of the crime in section 9603(c) are:91 (1) the existence of a waste disposal site; (2) the fact that hazardous substances were disposed of there; (3) the hazardous substances are regulated by the act; and (4) failure to notify EPA of the existence of the site. As in International Minerals and as discussed above, the first two elements must be modified by the knowing requirement. Having no knowledge of the existence of the waste disposal site, or the fact that hazardous substances were disposed of there would make an individual innocent. However, it is hard to imagine an owner, operator, or transporter who would not be aware of what was being stored at the site.

This leaves analysis of the third and fourth elements. The arguments are essentially identical to the arguments made above for the third and fourth elements of section 9603(b). There will be no knowledge requirement as to the third element since that would amount to an ignorance of the law defense and would violate the underlying policy of public welfare statutes.

The fourth element will have a knowledge requirement as to the notification of EPA's administrator. But, the defendant need not be aware that there is a requirement to notify EPA, only that the defendant did not notify EPA. This allows for a balance between Congress' clear intent that there be a knowledge requirement

---

90. 42 U.S.C.A. § 9603(c).
91. In making this analysis we assume that the hypothetical individual charged with the crime was an owner, operator, or transporter under the statute. 42 U.S.C.A § 9601(20)(A) defines “owner or operator”:

The term “owner or operator” means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.
in the statute, the public welfare law theory which requires that the purpose of the statute be effectuated, and the common law theory that ignorance of the law is no excuse.

Once again, the court might use the alternative Johnson & Towers approach and find that knowledge modifies all four elements. But the court would then create a presumption of knowledge in the actor which in effect makes the statute a strict liability statute in its application. There is no issue regarding due process since this is a misdemeanor which the Dotterweich Court recognized may be enforced on a strict liability basis.

3. Analysis of Section 9603(d)

a. The Liparota test

Section 9603(d) will also be found to be a public welfare statute under the Liparota test. This subsection requires that individuals identified by subsection 9603(c), in addition to reporting to EPA about a site, must keep records regarding the site in accordance with EPA standards. These records would identify specifically the substances that are stored at the sites and in what amounts. The records must be maintained for fifty years after notifying EPA of the site. We apply the Liparota test to this subsection.

1) The Regulation Prong

Is the conduct regulated such that a reasonable person should know that it is subject to stringent regulation? Again the analysis starts with a comparison to International Minerals. Here, the action is maintenance of records about a site. This is similar to obtaining permits for transportation of corrosive liquids. The transportation of hazardous substances and their storage are related activities. It is not unreasonable to expect that because of the longevity of the hazard of storing toxic substances, as discussed above under subsection (c), there might be ongoing regulations regarding the maintenance of records so that a government agency is aware of what substances are stored where. This makes this activity one which a reasonable person would expect is subject to stringent regulation.

2) The Public Safety Prong

The second question is should a reasonable person know that the conduct regulated may seriously threaten the public health or

safety? The failure to maintain records which identify the chemicals stored at a location can have far reaching health ramifications. It can result in the government not being aware of the existence of an actual or potential problem. It might create a misallocation of resources or result in insufficient cleanups which can seriously threaten the public health. Consequently, a reasonable person would know that this conduct would seriously threaten the public health or safety. Under the Liparota test, section 9603(d) is a public welfare statute.

b. Statutory Analysis

Section 9603 (d)(2) states in pertinent part:

[Any person in (c) shall be required to maintain records describing substances stored at the site and their amounts] ... it shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified ... [by the EPA]. Any person who violates this paragraph shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both...[emphasis added].

The emphasized clause shows that Congress has included a knowledge requirement. Thus, we must determine if the knowledge requirement modifies all of the elements of the statute.

The elements of the crime defined by section 9603(d)(2) are:

1. The existence of a disposal site;
2. The disposal of hazardous substances at that site;
3. The fact that those substances are regulated under CERCLA; and
4. (a) the failure to maintain the records; or
   (b) the falsification of those records. For the same reasons given in the above analyses, the first two elements here will require a showing of knowledge in order to find criminality. If the individual does not know the site existed or that hazardous substances were deposited there, then there is no criminality. The fact that the substances are regulated under CERCLA will not have a knowledge requirement because of common law concerns about ignorance of the law as a defense and because of the public welfare statute policy considerations.

The fourth element will require knowledge of the fact that

---

94. In making this analysis we assume that the hypothetical individual charged with the crime was an owner, operator, or transporter under the statute.
there are no records or that the records are false. There will be no requirement that the defendant be aware that the records must be maintained by statute. This allows the court to effectuate the statute. It also answers the concerns about ignorance of the law as an excuse. It is based upon the premise that no reasonable person would believe either that destruction of the records is legal, or that falsification of the records is legal.95

Determining whether element 4(a) will meet this test is a close call. The court must determine that failure to maintain the records or the destruction of the records would be considered an illegal act by a reasonable person. Taken by themselves, these actions might not appear to be illegal without some knowledge that there is a requirement to maintain or possess the records in the first instance. The records chronicle the type and amount of substances which are hazardous to human health and might be the only records of such substances. When these actions are put in their proper context, the assumption that a reasonable person would consider these actions illegal is valid.

The alternative element 4(b) does not have a knowledge requirement. As long as the individual is aware that the records are false, any reasonable person would understand that their maintenance of the records was illegal. It is difficult to posit a scenario in which the maintenance of false records would be valid. The only reason to maintain such records would be to mislead someone. Couple this with the importance of the information and the action is clearly one which a reasonable person would know to be illegal.

The Johnson & Towers approach could also be used in this case. This entails a finding of a knowledge requirement for all of the elements and then allowing a presumption of knowledge because of the responsibility of the actor. In either case the result is essentially a strict liability statute. Finally, while this section is punishable as a felony, this will not restrict the application of strict liability for the same reasons as are detailed above in the analysis of section 9603(b).

Based upon this structured analysis of the subsections of section 9603, all of the crimes defined by Congress have limited mens rea requirements and some strict liability aspects to them. In each, the defendant must be shown to be aware of the basic facts which constitute the crime, but the defendant need not be aware that his

95. See discussion supra of Freed at 306.
actions constitute a crime. As discussed below, this may potentially convict innocent people.

F. Implications and Suggestions

The implication of the strict liability of the criminal sanctions of CERCLA is far-reaching. Congress implemented SARA to invigorate the effectiveness of CERCLA. In passing SARA, the criminal sanctions under CERCLA were increased from misdemeanors to felonies. Congress clearly intended to increase the deterrence value of CERCLA. The felony sanctions, combined with the application of a strict liability standard, create a strong tool for enforcement and deterrence.

Strict liability creates a tension between the needs of society to be protected from hazardous spills and the tradition of common law fairness. This tension may be illustrated by a hypothetical situation involving a corporate director or officer who should have known, but did not know, that a spill occurred. Is this person criminally liable? If he is, does he deserve to suffer the stigma of a felony conviction, the resultant loss of his job, the financial hardship of a personal fine and the humiliation of incarceration? If he is not criminally liable, what is to prevent other directors or officers from shielding themselves from the knowledge which may incriminate them? With no explicit statement from Congress on its intention, the courts are left to struggle with this issue.

The courts, in determining whether strict liability was appropriate for other public welfare statutes, analyzed the prohibited actions and decided that a reasonable person would not believe that the actions taken were legal. But, this legal imputation of knowledge does not mean that a reasonable person in every case will subjectively understand that his actions were in fact illegal.

For example, the director or officer of a large corporation which is involved in a toxic spill or release may be punished under CERCLA as an operator. This individual may be aware that a spill has occurred and that the chemicals are potentially hazardous. However, this director or officer may be insulated from actual knowledge regarding the extent of the danger or any technical details. Yet, this individual may be punished as a felon for failing to

97. This can be inferred from the increase in penalties from a misdemeanor offense to a felony offense in the criminal sanctions enacted by SARA.
98. See supra notes 21-32 and accompanying text.
report the spill to EPA. Knowledge of the reporting requirement is irrelevant, and the director or officer may see no need to make a report if he only has a vague understanding of what harm may be caused by the spill. Under the analysis of CERCLA above, strict liability is a proper result in this case.

There must be some way to reconcile the basic fairness of requiring a guilty mind for a conviction with the necessity of preventing toxic disasters. We propose that a device be developed to provide actual notice of CERCLA’s requirements to those who are in responsible positions and are subject to conviction.

A basic requirement that officers and directors be informed of the law should be implemented. For example, a corporation’s board of directors could be required to read and acknowledge documents which set forth their reporting obligations under CERCLA, and clearly delineate the punishment they face for failure to comply. Compliance would be a prerequisite for incorporation or for continuation of corporate status. By this method, actual notice, would be given to those directors. Additionally, the directors might be required to implement internal programs which inform their officers and employees of the same facts. This acknowledgement requirement invalidates the criticism that directors, officers, and employees are not aware of the regulations. It also increases the deterrence value of the criminal sanctions by broadly disseminating the requirements of CERCLA. This method effectuates the dual goals of increasing the fairness of the criminal sanctions and helping to attain a greater deterrence value at the same time.

This proposed solution has difficulties. We do not attempt to address what exact mechanism might be used since much of corporate law is state, not federal, law. Perhaps the federal government could create an incentive for the states to implement such policies. Such incentive might be accomplished through an amendment to CERCLA itself, using the power which enabled Congress to legislate on hazardous substances. Regardless of the mechanism used, as long as the officials involved are informed of the regulations which bind them when carrying on these disposal activities, the deterrence value of the statute will be increased and punishment of the violating officials will be just.

This increase in deterrence will help to ensure the integrity of the entire statutory scheme of CERCLA. By punishing responsible individuals who fail to inform the EPA of environmental hazards that they have created, the EPA increases the likelihood of future polluters notifying the EPA of dangerous sites. Additionally, if this
proposal is implemented, polluters will already be aware of the potential sanctions and will realize that the EPA intends to prosecute these cases. Without the notification to the EPA of potential hazards, the entire purpose of CERCLA is frustrated. However, if notification is guaranteed, CERCLA will operate as it was originally intended to protect the public health and welfare and the environment.

III. Conclusion

American industry has created an environmental tragedy. CERCLA is one of many responses to address the harms America faces today. CERCLA's criminal penalties for failure to report releases were established to ensure the reporting of hazardous substance spills upon which the operation of CERCLA depends. Reporting is essential to make the EPA aware of hazards to the public. Without reporting, the entire operation of the statute is frustrated because the EPA will not be made aware of dangerous sites. Since cleanup of hazardous sites will not occur, the public will remain at risk.

Because reporting is integral to CERCLA, the criminal penalties have been promulgated on a quasi-strict liability basis in order to deter non-compliance with the reporting procedures. This strict liability application raises a problem of fairness in that individuals usually must be aware they are committing a crime before they are punished, thereby establishing the necessary mens rea requirement. The criminal penalty sanctions may be enforced against corporate directors, officers, and employees. Liability for these individuals is predicated on their level of responsibility and knowledge of hazardous spills. This knowledge prerequisite does not require that the individual know that a crime has been committed, but only needs knowledge of the fact that a spill has occurred.

A court must balance the need of remedying hazardous substance spills with the basic fairness of requiring a criminal defendant to be aware he is committing a crime. The public welfare statute theory that the Supreme Court has developed, coupled with the common law rejection of ignorance of the law as an excuse, have become decisive in this balancing process. It is our contention that courts interpreting CERCLA will use a strict liability standard to find a violation of the Act. We have proposed a solution which would enhance the criminal deterrence of the statute, and at the same time, make application of the criminal sanctions fair.

We note that this solution does not begin to address all of
CERCLA’s shortcomings. However, by focusing on the criminal sanctions of CERCLA, we do not attempt to solve all of the current problems. We suggested an enhancement to the Act which will allow the EPA to better effectuate CERCLA’s goals.

Inappropriate disposal of hazardous waste poses a global problem. It is necessary for the United States to have mechanisms such as CERCLA’s criminal sanctions to meet this problem. It is time to take a hard stance against polluters and this requires criminal sanctions which are enforced on a strict liability basis.