

# PLI Current

## The Journal of PLI Press

---

Vol. 2, No. 4, Autumn 2018

## Hazardous Waste: You Can Know What You Don't Know

**John S. Irving IV**

*Holland & Knight LLP*

The U.S. Court of Appeals for the Ninth Circuit<sup>1</sup> has made it clear that a defendant need not actually know that it is breaking the law in order to be convicted of the federal crime of illegally storing, transporting, or disposing of hazardous waste in violation of the Resource Conservation and Recovery Act (RCRA).<sup>2</sup> Combined with legal theories that impute employees' actions to a company and its managers, this poses a substantial risk to employers.

### The Resource Conservation and Recovery Act

The primary criminal provision of RCRA states:

- (d) Criminal penalties  
Any person who—

- 
- (1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit . . .
  - (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—
    - (A) without a permit . . .
  - (5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste . . . required to be accompanied by a manifest . . .
- shall, upon conviction, be subject to a fine of [up to \$250,000 for individuals and up to \$500,000 for business organizations], or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.<sup>3</sup>

### ***United States v. Spatig* and Other Criminal RCRA Cases**

In *United States v. Spatig*,<sup>4</sup> the Ninth Circuit affirmed defendant-appellant John Spatig's conviction and forty-six-month sentence for storing over 3,400 containers of flammable and corrosive chemicals, including paint, hydrochloric acid, and degreaser, on his residential property in Idaho. The court for the first time explicitly held that RCRA's criminal provision is a "general intent" crime, as opposed to a "specific intent" one—meaning that the government need "prove only that the defendant knowingly engage[d] in conduct that results in a . . . violation—as opposed to establishing that the defendant acted with knowledge that his actions were illegal."<sup>5</sup> This extended the court's earlier similar ruling with respect to criminal offenses under the Clean Water Act.<sup>6</sup> The *Spatig* court explained that this low intent threshold was due to the fact that RCRA is a public welfare statute "whose overriding concern is the grave danger to people and the environment from hazardous wastes."<sup>7</sup> The court held that because RCRA is a general intent crime, the defendant was not able to assert a diminished mental capacity defense that would otherwise be available in a case where the government needed to prove specific intent.

The Ninth Circuit's holding in *Spatig* is consistent with its earlier holdings and with holdings from other federal judicial circuits, although some courts have

required some reason to know that the material in question was hazardous, or that the transporter or receiving facility lacked a required permit. Examples of other criminal RCRA cases include:

**United States v. Hoflin**, 880 F.2d 1033 (9th Cir. 1989). Director of Public Works ordered the burial of drums containing paint and was convicted of disposal without a permit. *Court*: Knowledge of the absence of a permit is not an element of the offense. Conviction affirmed. *But see United States v. Speech*, 968 F.2d 795 (9th Cir. 1992). With respect to transportation of hazardous waste, the government must prove that the defendant knew that the receiving facility lacked a permit, and there would not be a violation where the transporter relied in good faith on a fraudulent certificate. Conviction reversed.

**United States v. Johnson Towers, Inc.**, 741 F.2d 662 (3d Cir. 1984). Truck repair company employees emptied a tank holding degreasers and other chemicals into a trench. *Court*: RCRA requires that employees knew or should have known that their employer failed to obtain a permit. Conviction reversed.

**United States v. Goldsmith**, 978 F.2d 643, 645–46 (11th Cir. 1992). Defendant transported 150 drums, including thirty-eight that contained hazardous waste, to an unpermitted facility. Some of the drums were later dumped in the woods. *Court*: A defendant need not know the exact identity of the chemicals disposed of, but only that the chemicals have the potential to be harmful to others or to the environment—that is, that the drums did not contain an innocuous substance like water. Conviction affirmed.

**United States v. Int'l Petroleum Corp.**, 1:16-CR-00097 (D. Del. 2017). Used oil and wastewater processing facility operator falsely characterized thousands of gallons of waste oil sludge as non-hazardous and shipped them without a manifest. Company pled guilty to transporting hazardous waste without a manifest.

**United States v. UNY LLC (d/b/a Gen. Super Plating Co.)**, 5:15-CR-00287 (N.D.N.Y. 2016). Metal plating facility operator pled guilty to unlawful storage/disposal of a hazardous waste—namely, placing a water filter with excessive levels of chromium in a trash dumpster.

**United States v. SouthCo Enters.**, 3:16-CR-00148 (N.D. Tex. 2016). Waste transportation company pled guilty to unlawfully storing containers of hazardous waste in box trailers at its facility.

**United States v. Leading Edge Aviation Servs., Inc.**, 4:14-CR-00121 (N.D. Miss. 2015). Commercial aircraft painting facility operator pled guilty to unlawful storage/disposal of hazardous paint-stripping waste in an open pit.

**United States v. Integrated Plastics Sols. LLC**, 6:13-CR-10185 (D. Kan. 2015). Operator of recycling facility for plastics and electronics pled guilty to unlawful storage/disposal of hazardous paints and solvents.

## **Criminal Liability Imputed to the Company and Managers**

Two legal theories can impute criminal liability for the actions of an employee or agent to the company and to senior managers. This poses a significant risk, especially where the employee need not actually “know” that he or she is doing anything illegal in order to violate RCRA or other environmental laws.

The doctrine of respondeat superior holds a company responsible for the actions of an employee or agent where those actions are within the scope of that employee’s or agent’s duties and were intended to benefit the company. Both requirements are interpreted broadly. The company need not actually benefit from the conduct, and it suffices that the employee’s motives were mixed, so long as one of the motives was to benefit the company.<sup>8</sup>

The responsible corporate officer (RCO) doctrine applies criminal liability to individual corporate officers who had the ability to prevent or correct a violation but failed to do so—even where they had no actual knowledge of the conduct giving rise to the offense. The RCO doctrine is rooted in strict liability misdemeanor offenses under the Federal Food, Drug, and Cosmetic Act (FDCA).<sup>9</sup> The U.S. Supreme Court recently declined to consider an appeal where two farm executives were convicted under the RCO theory and were sentenced to three months in prison in connection with the distribution of salmonella-contaminated eggs.<sup>10</sup>

Environmental statutes have a “public welfare” function and character similar to that of the FDCA, so it is not much of a leap to expect the government to apply the RCO doctrine to environmental offenses, as well. The Clean Water Act

and the Clean Air Act both include “any responsible corporate officer” in their definition of the term “person.”<sup>11</sup> Not surprisingly, there have been both felony and misdemeanor Clean Water Act prosecutions of corporate executives using that theory.<sup>12</sup>

RCRA’s definition of “person”<sup>13</sup> does not specifically include a “responsible corporate officer.” The U.S. Court of Appeals for the First Circuit vacated a criminal RCRA conviction under the RCO doctrine in 1991 in a prosecution of the president of a waste disposal company that disposed of hazardous chemicals from a leaking underground tank in a shoe repair facility.<sup>14</sup> The court held that the fact that the defendant was a responsible corporate officer alone did not meet RCRA’s knowledge requirement. Still, as with any other offense, knowledge can be inferred from circumstantial evidence, including a manager’s oversight over operations that lead to a RCRA offense. So long as there is some evidence of knowledge or willful blindness, corporate managers are fair game for RCRA criminal prosecutions. Again, as the Ninth Circuit reminds, RCRA is a general intent crime that only requires knowledge of the facts giving rise to the violation, and not that the law was being violated.

## Recommendations for Companies and Managers

**1. Assess your environmental risks.** Become familiar with RCRA and other environmental statutes and consider how they might apply to your business. Periodically reassess those risks to determine whether new operations implicate environmental laws. Document those efforts.

### Helpful Resources

#### Environmental Protection Agency (EPA)

Regulatory Information by Sector

[www.epa.gov/regulatory-information-sector](http://www.epa.gov/regulatory-information-sector)

Summaries of Environmental Laws and Executive Orders

[www.epa.gov/laws-regulations/laws-and-executive-orders#majorlaws](http://www.epa.gov/laws-regulations/laws-and-executive-orders#majorlaws)

Resource Conservation and Recovery Act (RCRA)

[www.epa.gov/rcra](http://www.epa.gov/rcra)

Clean Water Act

[www.epa.gov/laws-regulations/summary-clean-water-act](http://www.epa.gov/laws-regulations/summary-clean-water-act)

Clean Air Act

[www.epa.gov/laws-regulations/summary-clean-air-act](http://www.epa.gov/laws-regulations/summary-clean-air-act)

CERCLA (Superfund)

[www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act](http://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act)

Endangered Species Act

[www.epa.gov/laws-regulations/summary-endangered-species-act](http://www.epa.gov/laws-regulations/summary-endangered-species-act)

Emergency Planning and Community Right-to-Know Act (EPCRA)

[www.epa.gov/laws-regulations/summary-emergency-planning-community-right-know-act](http://www.epa.gov/laws-regulations/summary-emergency-planning-community-right-know-act)

#### American Bar Association (ABA)

Section of Environment, Energy, and Resources

[www.americanbar.org/groups/environment\\_energy\\_resources.html](http://www.americanbar.org/groups/environment_energy_resources.html)

---

**2. Establish and maintain an “effective” corporate compliance program that includes environmental compliance and auditing.** The government evaluates the effectiveness of corporate compliance programs using the definition found in the Federal Sentencing Guidelines. The existence of an effective compliance program is one factor that the government considers when deciding whether to bring a criminal prosecution in the first place and in sentencing. Factors include conducting periodic risk assessments; designating specific personnel to oversee the compliance program; making sure that they have necessary resources; having formal policies and procedures to prevent, detect, and deter unlawful activity; training employees; and establishing anonymous tip lines for employees to report suspected violations without fear of retaliation.

## **Helpful Resources**

### **Federal Sentencing Guidelines**

§8B2.1 (Effective Compliance and Ethics Program)

[www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8#NaN](http://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8#NaN)

### **U.S. Department of Justice**

Evaluation of Corporate Compliance Programs (2017 guidance)

[www.justice.gov/criminal-fraud/page/file/937501/download](http://www.justice.gov/criminal-fraud/page/file/937501/download)

U.S. Attorney's Manual § 9-28.300, Factors to Be Considered

[www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.300](http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.300)

U.S. Attorney's Manual § 9.28.800, Corporate Compliance Programs

[www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.800](http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.800)

### **Environmental Protection Agency (EPA)**

Compliance

[www.epa.gov/compliance](http://www.epa.gov/compliance)

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (“Audit Policy”) (1991 Final Policy Statement)

[www.gpo.gov/fdsys/pkg/FR-2000-04-11/pdf/00-8954.pdf](http://www.gpo.gov/fdsys/pkg/FR-2000-04-11/pdf/00-8954.pdf)

Interim Approach to Applying the Audit Policy to New Owners (2008 Notice)

[www.gpo.gov/fdsys/pkg/FR-2008-08-01/pdf/E8-17715.pdf](http://www.gpo.gov/fdsys/pkg/FR-2008-08-01/pdf/E8-17715.pdf)

EPA Announces Renewed Emphasis on Self-Disclosed Violation Policies  
(May 15, 2018)

[www.epa.gov/sites/production/files/2018-05/documents/  
refreshannouncementfordisclosures.pdf](http://www.epa.gov/sites/production/files/2018-05/documents/refreshannouncementfordisclosures.pdf)

**3. Check your company's directors and officers (D&O) insurance** to confirm that senior managers are covered for the considerable expenses involved in a government investigation.

### Helpful Resources

**Tom Bentz (Partner, Holland & Knight)**

[www.hklaw.com/Thomas-Bentz/](http://www.hklaw.com/Thomas-Bentz/)

---

**John S. Irving IV** is a partner in the Washington, D.C. office of Holland & Knight. He is a former federal prosecutor with significant trial and investigative experience whose current practice focuses on corporate internal investigations, effective compliance and ethics programs, and white collar defense in a variety of substantive areas, including the Foreign Corrupt Practices Act, False Claims Act, environmental statutes, and congressional investigations. Mr. Irving is also co-author of the chapters "Environmental Law" and "The Affordable Care Act: Compliance and Enforcement" in PLI's [Corporate Compliance Answer Book \(2019 Edition\)](#).

---



## NOTES

1. The Ninth Circuit includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.
2. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*
3. *Id.* § 6928(d). Subsection (e) provides increased penalties for a defendant “who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury.” That provision was not at issue in the recent Ninth Circuit case. *See also* 18 U.S.C. § 3571.
4. *United States v. Spatig*, 870 F.3d 1079 (9th Cir. 2017).
5. *Id.* at 1084 (internal quotation marks omitted).
6. *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993).
7. 870 F.3d at 1083 (internal quotation marks omitted).
8. *See, e.g.*, UNITED STATES ATTORNEY’S MANUAL § 9-28.210, [www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.400](http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.400).
9. 21 U.S.C. § 301 *et seq.*
10. *United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016), *cert denied*, 137 S. Ct. 2160 (2017).
11. 33 U.S.C. § 1319(c)(6); 42 U.S.C. § 7413(c)(6).
12. *See, e.g.*, *United States v. Iverson*, 162 F.3d 1015 (9th Cir. 1998); *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001).
13. 42 U.S.C. § 6903(15).
14. *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991).

