

ENVIRONMENTAL LAW REVIEW

NOTE

LESSENING THE MENS REA REQUIREMENT FOR HAZARDOUS WASTE VIOLATIONS

INTRODUCTION

Amid increasing environmental concern and awareness, the use of criminal sanctions to enforce environmental regulations is becoming more common. Between October 1982 and October 1990, the United States Department of Justice Environmental Crimes Section indicted 761 corporate and individual defendants. Fines were imposed totalling \$57,358,404,¹ and defendants were sentenced to more than 348 years of jail time.² The jail sentences resulted in over 154 years of actual confinement.³

The Resource Conservation and Recovery Act of 1976 (RCRA)⁴ authorizes the imposition of criminal sanctions.⁵ RCRA explicitly authorizes individual states to implement their own waste management programs provided their standards are not less stringent than those offered under RCRA.⁶ Because a state may prescribe enforcement standards which are more stringent than those in RCRA, a state can provide for a lesser standard of culpability to convict a criminal defendant for environmental violations

1. Memorandum to Joseph G. Block, Chief Environmental Crimes Section (Dec. 13, 1990) (available from United States Department of Justice, Environmental Crimes Section). During this period, the number of indictments increased from 40 in fiscal year 1983 to a high of 134 in fiscal year 1990. The fiscal year begins October 1 and ends September 30.

2. *Id.*

3. *Id.*

4. 42 U.S.C. §§ 6901-6987 (1988).

5. *Id.*

6. *Id.*

than the "knowing" standard contained in the federal statute.⁷

In 1984 Congress amended the substantive provisions of RCRA and strengthened its enforcement provisions. Realizing that further restrictions on the disposal and handling of hazardous wastes could lead to "a significantly greater incentive to dispose of toxic waste illegally,"⁸ Congress expanded liability under RCRA. By doing so, Congress intended to facilitate the prosecution of hazardous waste law violators.⁹

This note proposes that states which have not already done so adopt a lesser mens rea than RCRA's "knowing" standard for criminal culpability. This change would be consistent with the policies underlying RCRA and the interest of individual states in protecting their citizens and environment from illegal disposal and handling of hazardous wastes.

Section I of this note outlines the history of RCRA as a public welfare statute. Section II discusses case law interpreting RCRA's mens rea requirement. Section III discusses provisions adopted by states to enforce hazardous waste regulations, notably the "reckless" standard which has been adopted by the State of Ohio¹⁰ and implemented in *Ohio v. Stirnkorb*.¹¹ Finally, Section IV suggests that the adoption of the reckless standard by states fairly balances the notion of RCRA as a public welfare statute¹² and the belief that criminal sanctions are appropriate only when accompanied by

7. RCRA requires a mental state (mens rea) of "knowing" before criminal penalties are imposed: 42 U.S.C. § 6928(d) (1988).

8. H.R. REP. No. 198, 98th Cong., 2d Sess., pt. 1, at 55 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5614.

9. *Id.*

10. OHIO REV. CODE ANN. § 3734.99 (Anderson Supp. 1989). Under this section, criminal sanctions may be imposed for reckless violation of the statute, with fines ranging from \$10,000 to \$25,000 and jail terms from two to four years. There are increased penalties for subsequent convictions.

11. *Ohio v. Stirnkorb*, No. 85-CR-5240B (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

12. Public welfare offenses have been defined to "depend on no mental element but consist only of forbidden acts or omissions." *Morisette v. United States*, 342 U.S. 246, 252-53 (1952).

There is, however, commentary suggesting RCRA is not a public welfare statute. This is despite the fact that the Department of Justice asserts that RCRA is such a statute, that it concerns the environment, and is codified within the Public Health and Welfare title (Title 42 of the United States Code). See Fike, *A Mens Rea Analysis for the Criminal Provisions of the Resource Conservation and Recovery Act*, 8 STAN. ENVTL. L.J. 174 (1986).

a requisite criminal intent.¹³

I. THE RESOURCE CONSERVATION AND RECOVERY ACT

A. Overview

RCRA regulates the generation, treatment, storage, disposal, and transportation of hazardous wastes.¹⁴ The objective of RCRA is to "promote the protection of health and the environment and to conserve valuable mineral and energy resources . . ." ¹⁵ RCRA protects the public from the dangers of hazardous wastes by imposing a control system upon the handling of such substances. Generators of hazardous wastes must comply with a system of record-keeping to identify types and quantities of wastes generated.¹⁶ A manifest system is employed to ensure that each regulated waste reaches a properly permitted facility for management.¹⁷ Transporters must comply with comparable rules,¹⁸ as must those who treat, store, or dispose of hazardous wastes.¹⁹ Noncompliance with the permit system can subject violators to criminal as well as civil sanctions.²⁰ While the RCRA provisions for the imposition of criminal penalties contain a mens rea requirement,²¹ those relating to civil penalties are governed by notions of strict liability.²²

RCRA has been characterized as a public welfare statute.²³ This is a fair characterization because RCRA, like most public welfare statutes, regulates activities inherently dangerous to the public health and safety.²⁴ Additionally, in RCRA, as in most public welfare statutes, "Congress has rendered criminal a type of con-

13. See Comment, *Criminal Sanctions for Environmental Crimes and the Knowledge Requirement*: U.S. v. Hayes International, 25 AM. CRIM. L. REV. 535, 542 (1988).

14. 42 U.S.C. §§ 6901 - 6987 (1988).

15. *Id.* § 6902.

16. *Id.* § 6922(a)(1).

17. *Id.* § 6922(a)(5).

18. 42 U.S.C. § 6923 (1988).

19. *Id.* § 6824.

20. *Id.* § 6928.

21. *Id.* § 6928(d).

22. 42 U.S.C. § 6928(g) (1988). This section provides that "[any] person who violates any requirement of this subchapter shall be liable . . ." *Id.* No mens rea requirement is indicated.

23. See Fike, *supra* note 12, at 176-79. The author defines three possible categories within which RCRA can be included: 1) specific intent crimes, 2) general intent crimes, and 3) public welfare offenses.

24. Comment, *supra* note 13, at 542.

duct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."²⁵ The scope of public welfare statutes includes those regulatory offenses which contain felony penalties.²⁶ Ordinarily, when pursuing convictions under a public welfare statute, public protection outweighs the need to require criminal intent on the part of individual defendants.²⁷ Under RCRA Congress has determined that a knowing mens rea is appropriate before felony penalties may be imposed.

B. RCRA's "Knowledge" Requirements

Proof of a particular mens rea²⁸ is presently required in federal environmental statutes that provide for criminal penalties.²⁹ Due to the seriousness of noncompliance with laws regulating dangerous substances, however, the element of intent has not always been required for their prosecution.³⁰ Persons who work with regulated substances are presumed to be able to avoid harmful occurrences because of their enhanced knowledge of and compliance with statutory rules.³¹ Due to the highly regulated nature of hazardous wastes, there should be an affirmative duty on those within the field to know and comply with regulations.³² Those convicted under such statutes could not then be characterized as "innocent."

In 1980, four years after the enactment of RCRA, Congress amended the Act to include criminal sanctions for knowing viola-

25. *Liparota v. United States*, 471 U.S. 419, 433 (1985).

26. See *United States v. Freed*, 401 U.S. 601, 607-10 (1971) (strict liability imposed for a violation of the National Firearms Act due to seriousness of the violation).

27. See *Morisette v. United States*, 342 U.S. 246, 253-56 (1952).

28. "Mens rea" is defined as "[a] guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness." BLACK'S LAW DICTIONARY 889 (5th ed. 1979).

29. The requisite mental states for the following environmental statutes are:

1. Clean Air Act, 42 U.S.C. § 7413(c)(1),(2) (1988) (knowingly).
2. Clean Water Act, 33 U.S.C. § 1319(c)(2),(3) (1988) (knowingly).
3. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9603(b), (c), & (d)(2) (1988) (knowingly).
4. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136(l)(b) (1988) (knowingly).
5. Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(b), 300i-1(a), (d)(1) (1988) (willfully, intention of harm).
6. Toxic Substances Control Act, 15 U.S.C. § 2615(b) (1988) (knowingly or willfully).

30. See *supra* text accompanying notes 23-27.

31. See Comment, *supra* note 13.

32. *Id.* at 548.

tions of RCRA.³³ In 1984 Congress further strengthened these criminal provisions by providing for the conviction of "[a]ny person who- (1) knowingly transports . . . any hazardous waste . . . to a facility which does not have a permit . . . ;" (2) who "knowingly treats, stores, or disposes of any hazardous waste . . . without a permit . . . or . . . in knowing violation of any material condition or requirement of such permit;" (3) who "knowingly . . . makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed . . ." or (4) who "knowingly generates, stores, treats, transports, disposes of, or otherwise handles any hazardous waste . . . and who knowingly destroys, alters, conceals or fails to file any record . . . required to be maintained . . ."³⁴ A person convicted of one of these offenses may be fined up to \$50,000 for each day of violation or imprisoned for two to five years.³⁵ These penalties may be doubled for a second offense.³⁶ While these are strong penalties, the legislative history demonstrates that Congress did not intend that criminal provisions be invoked for minor technical violations of the statute. The tougher criminal provisions were:

intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them. It is not aimed at punishing minor or technical variations from permit regulations or conditions if the facility operator is acting responsibility [sic]. The Department of Justice has exercised its prosecutorial discretion responsibly under similar provisions in other statutes and the conferees assume that, in light of the upgrading of the penalties from misdemeanor to felony, similar care will be used in deciding when a particular permit violation may warrant criminal prosecution under this Act.³⁷

In 1984 Congress added the offense of "knowing endangerment" as an additional criminal provision.³⁸ This offense provides penalties of up to fifteen years imprisonment and/or a one million dollar fine for knowing violations of RCRA which threaten others with "death or serious bodily injury."³⁹ As originally proposed, the

33. 42 U.S.C. § 6928(d) (1988).

34. *Id.* § 6928(d)(1-4) (1988).

35. *Id.* § 6928(d).

36. *Id.*

37. H.R. CONF. REP. NO. 1444, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5028, 5036.

38. 42 U.S.C. § 6928(e) (1988).

39. *Id.* This section states in full:

amendment was strongly worded; it would have criminalized "reckless" endangerment of human life or health.⁴⁰ That language, however, was replaced by the present "knowing endangerment" standard. This change was the result of a compromise between business interests, concerned with the dangers of expanding liability, and the Department of Justice.⁴¹ Business interests accepted a dramatic increase in maximum penalties, and the Department of Justice agreed to increase the prosecution's burden of proof by changing the "reckless" standard to "knowing."⁴²

In the amendment Congress attempted to define clearly the amount of knowledge necessary to sustain a conviction under the "knowing endangerment" provision.⁴³ As explained in the legislative history:

the new offense is drafted in a way intended to assure to the

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.

Id.

40. Cavanaugh, Harris, & Zisk, *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203, 208-10 (1988).

41. *Id.* at 210.

42. *Id.*

43. 42 U.S.C. § 6928(f) (1988). This section states:

For the purposes of subsection (e) of this section-

- (1) A person's state of mind is knowing with respect to-
 - (A) his conduct, if he is aware of the nature of his conduct;
 - (B) an existing circumstance, if he is aware or believes that the circumstance exists; or
 - (C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.
- (2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury-
 - (A) the person is responsible only for actual awareness or actual belief that he possessed; and
 - (B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, 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.

Id.

extent possible that persons are not prosecuted or convicted unjustly for making difficult business judgments where such judgments are made without the necessary scienter

[T]he endangerment offense depends upon a showing that a natural person actually knew that his conduct at that time placed another person in imminent danger of death or serious bodily injury

The Department of Justice has expressed its belief that this provision is necessary to protect the public from knowing and unjustified conduct which threatens life or serious bodily harm. Because no concrete harm need actually result for a person to be prosecuted under this section, however, the conferees as well as responsible members of the business community believe that it is necessary to make the offense as precise and carefully drawn as possible.⁴⁴

As first passed, the "knowing endangerment" provision was highly restrictive. It imposed a heavy burden of proof upon the government.⁴⁵ Conviction required proof that a defendant's conduct exhibited either "unjustified and inexcusable disregard for human life" or "an extreme indifference to human life."⁴⁶ These elements of the provision were repealed in 1984 because Congress found that such requirements "render[] the 'Knowing Endangerment' provision unnecessarily restrictive and may well have contributed to the fact that since its enactment in 1980, there has not been a single indictment"⁴⁷ To date there have been only three successful prosecutions under the knowing endangerment provision.⁴⁸

Although the degree of scienter in the "knowing endangerment" provision is explicitly defined, Congress did not include a

44. H.R. CONF. REP. NO. 1444, 96th Cong., 2nd Sess. 37-38, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5028, 5036-38.

45. See Cavanaugh, Harris & Zisk, *supra* note 40, at 212-13.

46. The Resource Conservation and Recovery Act, Pub. L. No. 96-482, §13(5), 94 Stat. 2338, 2340-41 (1980) (amended 1984).

47. H.R. REP. NO. 198, 98th Cong., 2nd Sess., pt. 1, at 55 (1983), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5614.

48. *United States v. Protex Industries, Inc.*, 874 F.2d 740 (10th Cir. 1989) (corporation guilty of exposing employees to toxic chemicals without proper safety precautions); *United States v. Tumin*, No. 87-CR-488 (E.D.N.Y., April 13, 1988) (individual defendant guilty of disposing of three 55 gallon drums of ethyl ether in a vacant lot); *United States v. Carlos Gomez*, 89 Cr. 92 (N.D.N.Y., July 14, 1989) (illegal disposal of ether and other explosive chemicals used in the manufacture of cocaine).

definition of the "knowing" requirement of section 6928(d). A clear definition of the necessary mens rea is a prerequisite to effective enforcement of the statute. In developing that definition, the burden of proof on the government should not be so restrictive that the provision fails to protect the public from the dangers of hazardous waste. Criminal sanctions can effectively deter polluters by imposing stringent penalties for serious, harmful violations, and can "affirm the status of certain environmental transgressions as serious crimes."⁴⁹ These sanctions not only impose penalties of imprisonment and large monetary fines, but also subject the defendants to the social stigma attached to a criminal proceeding, which can in itself be an effective deterrent.⁵⁰ An overly restrictive burden on the prosecutor, making conviction difficult, would frustrate the deterrent effect of the statute.

II. INTERPRETATIONS OF THE RCRA "KNOWING" STANDARD

In the absence of a statutory definition of the "knowing" standard, courts have looked to precedent as an important tool in interpreting RCRA's criminal provisions.⁵¹ While the definition of knowledge necessary for criminal culpability requires awareness⁵² or "knowledge of high probability,"⁵³ commentators have argued that the criminal provisions of RCRA actually encompass a broader liability than a "knowing" standard and are, in effect, closer to strict liability.⁵⁴ Although the case law demonstrates a

49. Comment, *supra* note 13, at 538.

50. Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93 (1985) [hereinafter *Putting Polluters in Jail*].

51. See Fike, *supra* note 12, at 184-88.

52. The Model Penal Code defines "knowingly" as follows:

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

MODEL PENAL CODE § 2.02(1)(b) at 225-26 (1985).

53. *Id.* at § 2.02(7).

54. See Milne, *The Mens Rea Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not Form*, 37 BUFFALO L. REV. 307 (1989). The author argues that the courts have relaxed standards of proof for conviction and "essentially paid lip-service to the mens rea requirements of the statute." *Id.* at 333.

willingness to give a broad interpretation of the knowing standard, the courts have not totally relieved the government of the burden of proving mens rea.

A. Johnson & Towers

The leading case interpreting the level of knowledge necessary to sustain a conviction under section 6928(d) is *United States v. Johnson & Towers, Inc.*⁵⁵ The issue in the case was whether managerial employees, in addition to owners and operators, could be held criminally liable for RCRA violations. The court also addressed in dicta the issue of the quantum of proof required to prove the alleged violations.⁵⁶

Johnson & Towers and two of its employees, a foreman and a service manager, were indicted on charges of illegally disposing of hazardous wastes at the company plant in Mount Laurel, New Jersey.⁵⁷ Waste chemicals from the plant were drained into a holding tank. When the tank was full, the chemicals were pumped into a trench.⁵⁸ The trench drained into Parker's Creek, a tributary of the Delaware River.⁵⁹ Although the chemicals were classified as "hazardous," Johnson & Towers had neither applied for nor received a disposal permit as required by RCRA.⁶⁰

Johnson & Towers pled guilty to the RCRA charges, but the two employees argued that RCRA's permit provision was inapplicable to employees because it applied only to "owners and operators" of hazardous waste generating facilities.⁶¹ The trial court accepted the employees' contention and dismissed the RCRA charges against them.⁶² The Third Circuit Court of Appeals, however, reversed the trial court decision and held that the permit provision should not be read restrictively. Responsible parties include individual agents as well as owners and operators.⁶³

55. 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

56. *Id.* at 668-69.

57. *Id.* at 663-64.

58. *Id.* at 664.

59. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 664 (3d Cir. 1984) cert. denied, 469 U.S. 1208 (1985).

60. *Id.*

61. *Id.*

62. *Id.*

63. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

The Court of Appeals then proceeded to interpret the "knowing" requirement of section 6928(d).⁶⁴ The court based its interpretation on its reading of the statutory language.⁶⁵ In order to satisfy the "knowing" requirement, defendant employees must know, at a minimum, that they were disposing of a material and that the material was hazardous.⁶⁶ Moreover, the court determined that the defendants must be aware of their permit status.⁶⁷ Although the word "knowing" was omitted from the statute criminalizing disposal without a permit,⁶⁸ the court found the word "knowing" did apply, and a contrary reading would be "arbitrary and nonsensical."⁶⁹ The court noted that since RCRA was a public welfare statute, "there would be a reasonable basis for reading the statute without any *mens rea* requirement"⁷⁰ The court, however, declined to adopt this reading and instead found that "knowingly" applied to all the necessary elements of the offense, including the knowledge of permit status.⁷¹ The court, therefore, sustained the high level of culpability that is required by the "knowing" standard.

Although the court did not relieve the government of the burden of proving the defendants' knowledge of permit status, the court assured the government, as prosecutor, that this burden was not "as difficult a burden as it fears."⁷² The court stated that the fact that one works with hazardous substances is a sufficient basis

64. *Id.* at 667.

65. Section 6928(d)(2) provides that:

any person who -

....

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

(A) without a permit under this subchapter . . . or

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

....

shall upon conviction, be subject to a fine . . . or imprisonment

Id.

66. *Johnson & Towers*, 741 F.2d at 668.

67. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

68. 42 U.S.C. § 6928(d)(2)(A) (1988). The word "knowing" was included in subsections (B) and (C).

69. *Johnson & Towers*, 741 F.2d at 668.

70. *Id.*

71. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 668 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

72. *Id.* at 669.

from which to infer knowledge of the relevant regulations. In support of its view, the court cited *United States v. International Minerals & Chemical Corp.*,⁷³ which held "where . . . obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them . . . must be presumed to be aware of the regulation."⁷⁴ Thus, the government need not prove the defendant actually knew of the permit status; such knowledge could be inferred.

The *Johnson & Towers* decision furthered the government's interest in prosecuting and punishing those accused of hazardous waste violations. By allowing the inference of knowledge, the court facilitated the prosecution of RCRA violators. Supervisory employees claiming ignorance of the regulatory scheme cannot escape liability because no direct proof of actual knowledge is available.

Some courts have gone farther than the *Johnson & Towers* court. For example, in *United States v. Hoffin*,⁷⁵ the Ninth Circuit Court of Appeals rejected the argument that the government must prove, either by inference or by proof of actual knowledge, that the defendant was aware that a permit was required and had not been obtained.⁷⁶ Douglas Hoffin was convicted of burying drums of surplus road paint. The court refused to read a knowledge requirement into section 6928(d)(2)(A)⁷⁷ because Congress had explicitly included a knowledge requirement in an adjacent section of the statute.⁷⁸ The court held that the defendant did not have to know

73. 402 U.S. 558, 565 (1971).

74. *Johnson & Towers*, 741 F.2d at 669.

75. 880 F.2d 1033 (1989), *cert. denied*, 110 S.Ct. 1143 (1990).

76. *Id.* at 1038.

77. 42 U.S.C. § 6928(d)(2)(A) (1988) states, in part:

Any person who-

(2) knowingly treats, stores, or disposes of any hazardous waste . . .

(A) without a permit . . .

shall, upon conviction, be subject to a [fine and/or imprisonment]. . . .

Id.

78. *United States v. Hoffin*, 880 F.2d 1033, 1038 (9th Cir. 1989). 42 U.S.C. § 6928(d)(2)(B) states, in part:

Any person who-

.....

(2) knowingly treats, stores, or disposes of any hazardous waste . . .

.....

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

.....

shall, upon conviction, be subject to a [fine and/or imprisonment].

Id.

that the disposal permit had not been obtained to be found guilty under the statute because the plain language and the purposes of RCRA warranted the application of a lower standard of culpability.⁷⁹

B. United States v. Hayes

In *United States v. Hayes International Corp.*,⁸⁰ the Eleventh Circuit Court of Appeals considered the degree of knowledge necessary for conviction under the knowing standard of RCRA. This case involved the illegal transportation of hazardous waste.⁸¹ Hayes International Corporation, operators of an airplane refurbishing plant, contracted with Performance Advantage, Inc., to remove waste products at no cost. In addition to removing the hazardous waste, Performance Advantage agreed to pay Hayes twenty cents per gallon for valuable jet fuel drained from plane engines.⁸² L.H. Beasley, the Hayes employee responsible for disposal of wastes, was also named as defendant in the case.⁸³ First, Hayes and Beasley contended that they misunderstood the regulations, and therefore did not knowingly violate them.⁸⁴ Second, they contended "that they did not 'know' that Performance Advantage did not have a permit."⁸⁵ Finally, the defendants claimed that they did not knowingly violate the statute because they believed that Performance Advantage was recycling, not disposing of, the wastes.⁸⁶ Under the regulations then in force, wastes not expressly listed by the Environmental Protection Agency, but possessing certain characteristics which made them hazardous, were "not regulated if they were 'beneficially used or re-used [sic] or legitimately recycled or reclaimed.'" ⁸⁷ The Eleventh Circuit Court of Appeals held that de-

79. *U.S. v. Hobin*, 880 F.2d 1033 (1989).

80. 786 F.2d 1499 (11th Cir. 1986).

81. 42 U.S.C. § 6923(d)(1) (1988), the pertinent section, states in part:

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 . . . [is subject to criminal penalties].

Id.

82. *United States v. Hayes International Corp.*, 786 F.2d 1499, 1500 (11th Cir. 1986).

83. *Id.* at 1501.

84. *Id.*

85. *Id.*

86. *United States v. Hayes International Corp.*, 786 F.2d 1499, 1501 (11th Cir. 1986).

87. *Id.* (citing 40 C.F.R. § 261.6(a)(1)).

defendants could be convicted in spite of their claim that they misunderstood the hazardous waste regulations.

At trial, the jury had found the defendants guilty.⁸⁸ Notwithstanding the jury verdict, the district court acquitted the defendants.⁸⁹ The Court of Appeals reversed finding sufficient evidence in the record to support a conviction. They cited *United States v. International Minerals & Chemical Corp.*⁹⁰ for the proposition that those dealing with hazardous wastes may be presumed to have knowledge of the governing regulations.⁹¹ The court distinguished between regulatory laws which, if violated, pose serious threats to community health and safety, and those laws which do not involve serious threats to the public welfare.⁹² The court noted that RCRA is "undeniably a public welfare statute"⁹³ and has such impact on the health and safety of the public that it is "reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions."⁹⁴ Thus, there was sufficient evidence to convict the defendants in spite of their claim of ignorance of the government regulations.

The *Hayes* court then considered whether section 6928(d)(1) of RCRA, criminalizing transportation of waste to a facility which does not have a permit, required proof of actual knowledge of whether a permit had been obtained.⁹⁵ The court found that in order to be convicted defendants must have had knowledge of the permit status of the hazardous waste processing facility. The court based this conclusion on the Congressional purpose in enacting RCRA, which was to prevent transportation of hazardous wastes to unlicensed facilities.⁹⁶ Under this interpretation one who incorrectly believed that the processing facility had a permit would not be subject to prosecution. The court, however, held that jurors could infer knowledge based on the highly regulated nature of the hazardous waste industry.⁹⁷ The court concluded that transporters

88. *Id.* at 1500.

89. *Id.*

90. 402 U.S. 558 (1971).

91. *United States v. Hayes International Corp.*, 786 F.2d 1499, 1502 (11th Cir. 1986).

92. *Id.* at 1503 (comparing hazardous waste and firearm violations to food stamp violations).

93. *Id.*

94. *Id.*

95. *United States v. Hayes International Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986).

96. *Id.* at 1504.

97. *Id.*

of hazardous wastes "presumably are aware of the relevant procedures."⁹⁸ While the court did not abandon the knowledge requirement, it substantially relaxed the government's burden of proof.

Finally, the court considered Hayes' defense that the wastes were being recycled, not disposed of. The court found evidence that the defendants did not have a "good faith belief" that the wastes were to be recycled.⁹⁹ From testimony concerning the deal struck between Hayes and Performance Advantage the jury could infer that the defendants knew that Performance Advantage did not intend to recycle the waste.¹⁰⁰ The evidence supported a conclusion that the waste, to the knowledge of the defendants, was valueless for the purposes of recycling.¹⁰¹ The jury could have reasonably concluded, therefore, that Hayes knew that the waste was to be disposed of and a permit was required.¹⁰²

The *Hayes* court allowed the jury to infer defendants' knowledge. They did not, however, dismiss the requirement of actual knowledge, or impose an affirmative duty upon the defendants to determine the final disposal of hazardous wastes. In a different case, therefore, a claim of ignorance of law could be a successful defense, if accepted by the jury. An affirmative duty would be a more effective deterrent to illegal disposal of hazardous wastes because it would preclude such a defense. Given the "knowing" standard contained in the statute, however, it was beyond the power of the *Hayes* court to impose such a duty.

C. United States v. Protex

Unlike the provisions criminalizing "knowing" violations of RCRA,¹⁰³ the knowledge requirement for a conviction under the "knowing endangerment" provision¹⁰⁴ is explicitly defined within the statute.¹⁰⁵ Congress drafted the "knowing endangerment" provision to encompass only the most serious statutory violations: those which place another person in imminent danger of death or

98. *Id.*

99. *United States v. Hayes International Corp.*, 786 F.2d 1499, 1506 (11th Cir. 1986).

100. *Id.* at 1506.

101. *Id.* at 1507.

102. *Id.*

103. 42 U.S.C. § 6928(d) (1988).

104. *Id.* § 6928(e).

105. *Id.* § 6928(f). See *supra* note 43.

serious bodily harm.¹⁰⁶ There have been only three successful convictions under this section.¹⁰⁷

The first successful prosecution under the "knowing endangerment" provision was *United States v. Protex Industries, Inc.*¹⁰⁸ The defendant, Protex Industries, was the operator of a drum recycling facility.¹⁰⁹ Protex was convicted for exposing employees to toxic chemicals without proper safety precautions.¹¹⁰ Protex argued on appeal that the trial court's instructions directing the jury that there need only be a "reasonable expectation"¹¹¹ of serious bodily injury, rather than "substantial certainty"¹¹² of such harm, "rendered the statute unconstitutionally vague."¹¹³ The court held that "the 'substantially certain' standard appears to define the mens rea necessary for commission of the crime, rather than the degree to which defendant's conduct must be likely to cause death or serious bodily injury."¹¹⁴ The prosecutor must prove, therefore, that the defendant placed "others in danger of great harm and it [had] knowledge of that danger."¹¹⁵

Protex argued for a narrow interpretation of the knowledge requirement of the "knowing endangerment" provision based on the legislative history of RCRA.¹¹⁶ The court, however, refused to address the issue of Congressional intent because the statutory language itself was adequate to put the defendant on notice that certain conduct was forbidden.¹¹⁷ Protex also argued that the trial court erred by not instructing the jury that the government had failed to provide results of tests made on samples taken from Protex' drum recycling facility.¹¹⁸ The court stated that the government's failure to notify Protex of the test results did not constitute a defense to a RCRA criminal violation.¹¹⁹ Additionally, the

106. See *supra* note 44 and accompanying text.

107. See *supra* note 48 and accompanying text.

108. 874 F.2d 740 (10th Cir. 1989).

109. *Id.* at 741.

110. *Id.* at 742.

111. *Id.* at 744.

112. *United States v. Protex Industries, Inc.*, 874 F.2d 740, 744 (10th Cir. 1989).

113. *Id.*

114. *Id.*

115. *Id.*

116. *United States v. Protex Industries, Inc.*, 874 F.2d 740, 743 (10th Cir. 1989).

117. *Id.*

118. *Id.* at 745 (the government was required to provide these results under 42 U.S.C. § 6927(a)).

119. *Id.* at 745-46.

court held that Protex had an "independent duty"¹²⁰ to ensure compliance with RCRA and that ignorance of the law is not a defense.¹²¹

Protex demonstrates the increased willingness of courts to impose criminal sanctions for environmental violations. The *Protex* court followed the "knowing" mens rea standard in section 6928(f). What is necessary to prove actual knowledge, however, remains unclear. Furthermore, the *Protex* decision does not answer the question of what mens rea requirement would best serve the purposes of RCRA.

D. Problems with Application of the "Knowledge" Requirement

Although courts have paid lip service to the requirement of actual knowledge, the case law shows an increased willingness to punish those who have harmed the public health and environment. Under RCRA section 6928(d) the *Hoflin, Johnson & Towers*, and *Hayes* courts have facilitated prosecutions by not requiring the prosecutor to prove knowledge or by allowing the jury to infer the defendant's knowledge of hazardous waste regulations.¹²² Under the "knowing endangerment" provision the *Protex* court charged defendants who should have known the dangers of exposure to toxic chemicals with knowledge of relevant regulations.¹²³ These cases are characterized by an increased willingness to charge persons working with hazardous materials with actual knowledge of RCRA regulations. By reducing the burden of proof necessary to prove knowledge, these courts have made it easier to obtain a conviction under RCRA.

III. COUNTERING HAZARDOUS WASTE VIOLATIONS AT THE STATE LEVEL

RCRA creates a national program for regulating hazardous wastes. It was enacted for the purpose of closing the "last remaining loophole in environmental law."¹²⁴ Congress sought to address

120. *United States v. Protex Industries, Inc.*, 874 F.2d 740, 745-46 (10th Cir. 1989).

121. *Id.*

122. See *supra* notes 55-102 and accompanying text.

123. See *supra* notes 103-121 and accompanying text.

124. H.R. REP. No. 1491, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6241. The report states that "unregulated land disposal of discarded

the lack of uniform and adequate state regulation¹²⁵ while also allowing states to protect the public welfare.¹²⁶ RCRA authorizes states to enact their own regulations governing hazardous wastes and specifically allows states to impose regulations more stringent than those of the federal statute.¹²⁷ No state, however, "may impose any requirements less stringent than those authorized under [RCRA]"¹²⁸

RCRA does not, however, grant states unfettered discretion. While a state may impose more stringent regulations than those required by the federal statute, the Administrator of the EPA may deny or withdraw authorization from a program which is not "equivalent to" and "consistent with" the federal regulations.¹²⁹ Moreover, the program must "provide adequate enforcement of compliance."¹³⁰ Thus, while the statute contemplates some interstate variation, the requirement that state programs be "equivalent to" and "consistent with" the federal program is intended to prevent inconsistencies.

There is some question as to how much variation the EPA will allow between the federal program and individual state programs.¹³¹ The EPA retains the power to withdraw authorization from a state program which fails to comply with federal requirements.¹³² The EPA has used this power in an attempt to withdraw approval from a state hazardous waste program containing regulations which were more restrictive than those of RCRA.¹³³ It is not clear, therefore, how much more restrictive than the federal standards the EPA will allow state regulations to be.

materials and hazardous wastes" is the last loophole in environmental law. *Id.*

125. See 1976 U.S. CODE CONG. & ADMIN. NEWS at 6268.

126. *Id.*

127. 42 U.S.C. § 6929 (1988).

128. *Id.*

129. *Id.* § 6926(b) & (e).

130. 42 U.S.C. § 6926(b) (1988).

131. The problems of federalism and RCRA enforcement are discussed at length in Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307 (1982).

132. 42 U.S.C. § 6926(e).

133. *North Carolina v. EPA*, 881 F.2d 1250 (4th Cir. 1989) (An appeal from an administrative law case involving the EPA's attempted withdrawal of approval from North Carolina's hazardous waste program based on the stringency of North Carolina's effluent requirements).

A. *The Mens Rea Requirement*

RCRA preempts any state requirements that are not as stringent as those of the federal statute.¹³⁴ The majority of state statutes which regulate compliance with RCRA standards contain mens rea requirements that are essentially equivalent to RCRA's "knowing" standard. Among states which have provisions that require a culpable mental state,¹³⁵ only Ohio has used a "reckless"¹³⁶

134. 42 U.S.C. § 6929 (1988).

135. ALA. CODE § 22-30-19(e) (1990) (includes intentional, knowing, reckless, or criminally negligent behavior); ALASKA STAT. § 46.03.790(a)-(e) (Supp. 1990) (criminal negligence or knowing); ARIZ. REV. STAT. ANN. § 49-925.A (Supp. 1990) (knowing or reckless); ARK. STAT. ANN. § 8-7-204 (Supp. 1989) (either no mens rea prescribed or knowing); CAL. HEALTH & SAFETY CODE §§ 25189.5-7 (West Supp. 1991) (knowing); CAL. HEALTH & SAFETY CODE §§ 25191(a),(b) (West Supp. 1991) (knowing); COLO. REV. STAT. § 18-13-112 (1986) (intentional); COLO. REV. STAT. §§ 25-15-310(1),(4)(b) (1986) (either no specified mens rea or enhanced punishment with knowing violations); COLO. REV. STAT. §§ 29-22-108(1),(2) (1986) (intentional, willful, reckless, or with criminal negligence); CONN. GEN. STAT. ANN. § 22a-131(a) (West Supp. 1990) (knowing or willful); DEL. CODE ANN. tit. 7, § 6309(f) (Supp. 1990) (intentional or knowing); D.C. CODE ANN. § 6-711(c) (1981) (knowing); FLA. STAT. ANN. § 403.727 (West Supp. 1990) (knowing); GA. CODE ANN. § 12-8-82 (1988) (knowing); HAW. REV. STAT. § 342J-9 (Supp. 1989) (knowing); IDAHO CODE §§ 39-4415, 39-6212 (1985 & Supp. 1990) (knows or with reason to know); ILL. ANN. STAT. ch. 111 ½, ¶ 1044 (Smith-Hurd 1990) (knowing or gross deviation from the standard of care a reasonable person would exercise); IND. CODE ANN. §§ 13-7-13-3, 13-7-13-4 (Burns 1990) (intentional, knowing, reckless or negligent); IOWA CODE ANN. § 455B.417 (1990) (knowing); KAN. STAT. ANN. § 65-3441 (1985) (enhanced punishment for knowing violations); KY. REV. STAT. ANN. § 224.994(6) (Michie/Bobbs-Merrill Supp. 1990) (knowing); LA. REV. STAT. ANN. §§ 30:2025(F), 30:2183(G) (West 1989 & Supp. 1991) (willful, intentional, or knowing); ME. REV. STAT. ANN. tit. 38, §§ 349(3), 1319-T (1989 & Supp. 1990) (knowing); MD. ENVTL. CODE ANN. §§ 7-265, 7-267 (1987) (none specified or knowing); MASS. GEN. LAWS ANN. ch. 21C, § 10 (West 1988) (knowing); MICH. COMP. LAWS ANN. § 18.1235(5) (West 1984) (willfully or with intent to defraud or mislead); MINN. STAT. ANN. § 609.671(3)-(7) (West Supp. 1991) (knowing or with reason to know); MISS. CODE ANN. § 17-17-29(5) (Supp. 1990) (knowing); MO. ANN. STAT. § 260.425 (Vernon 1990) (knowing); MONT. CODE ANN. § 75-10-418(1) (1987) (knowing); NEB. REV. STAT. § 81-1508(1) (1987) (clear criminal intent or knowing violation); NEV. REV. STAT. ANN. §§ 459.595, 459.600 (Michie 1986) (intentional, knowing, or with criminal negligence); N.H. REV. STAT. ANN. § 147-A:16 (1990) (knowing); N.J. STAT. ANN. § 2C:17-2 (West Supp. 1990) (knowing, purposeful, or reckless with enhanced punishment for knowing or purposeful violations); N.M. STAT. ANN. § 74-4-11 (1990) (knowing); N.Y. ENVTL. CONSERV. LAW §§ 71-2703, 2705, 2709, 2710, 2712, 2713, 2714 (McKinney Supp. 1991) (knowing, reckless, intentional, or with criminal negligence); N.C. GEN. STAT. § 14-284.2(a) (1986) (willful); N.C. GEN. STAT. § 130A-25 (1989) (none specified); N.C. GEN. STAT. § 143-215.88B (1990) (knowing or willful); N.D. CENT. CODE § 23-20.3-09(3) (Supp. 1989) (knowing); OHIO REV. CODE ANN. § 3734.99 (Anderson Supp. 1989); (reckless or knowing); OKLA. STAT. ANN. tit. 63, § 1-1604(a) (West 1984) (none specified); OR. REV. STAT. ANN. § 761.994(1) (1987) (knowing); PA. STAT. ANN. tit. 35, § 6018.606 (Purdon Supp. 1990) (intentional, knowing, or reckless); R.I. GEN. LAWS § 23-19.1-18 (1989) (knowing or reasonably should know); S.C. CODE ANN. § 44-56-140.C (Law. Co-op. 1976) (willful); S.D. CODIFIED LAWS ANN. § 34A-11-21 (1986) (knowing); TENN. CODE ANN. §§ 68-46-114(a)(2), 68-46-213 (1987 & Supp. 1990) (knowing); UTAH CODE ANN. §§ 26-14-13(3), (4) (1990) (knowing); VT. STAT. ANN. tit. 10, § 6612(a) (1984) (none specified); VA. CODE ANN.

standard for all criminal violations of its hazardous waste statute.¹³⁷ A number of states use a progressively higher level of punishment depending on the mens rea for the crime. In these states a hazardous waste violation committed "recklessly" carries a lesser penalty than one committed "purposely" or "knowingly."¹³⁸

Generally, the difference between "reckless" and "knowing" is the nature of the risk involved. Recklessness requires a conscious disregard for a "substantial and unjustifiable risk."¹³⁹ When a person acts "knowingly," however, she "is practically certain that [her] conduct will cause" the particular result.¹⁴⁰ Thus, a person acting recklessly differs from one acting knowingly in that while she is aware of the risk, the probability of harm is "less than substantial certainty."¹⁴¹

Given the difference between the two standards, holding a hazardous waste regulation violator to a "reckless" standard has substantial practical effect. This effect was illustrated in *Ohio v.*

§ 10.1-1455(B),(D) (Supp. 1990) (willful or knowing); WASH. REV. CODE ANN. § 70.105.085 (Supp. 1991) (knowing, which refers to an awareness of fact, not an awareness of law); W. VA. CODE § 20-5E-15 (1989) (knowing); WIS. STAT. ANN. § 144.74(2) (1989) (willful); Wyo. STAT. § 35-11-901(j),(k) (1988) (willful or knowing).

For a complete listing of mens rea requirements for hazardous waste statutes, see Bonanno & DeCicco, *A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: the Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and proposed Laws*, 5 J. LAND USE & ENVTL. L. 1, 35-210 (1989).

136. The Model Penal Code describes "recklessly" as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02 (1985).

137. Except for violations of fee, labeling, explosive gas monitoring plans, and polychlorinated biphenyl regulations, the Ohio statute stated that "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 (1988).

138. See, e.g., N.J. STAT. ANN. §§ 2C:17-2(a)(2), 2C:43-3(a), 2C:43-6(a) (West Supp. 1990). A person who acts knowingly or purposely in releasing hazardous waste is guilty of a second degree crime, and may be fined up to \$100,000 or receive a jail sentence of five to ten years, or both. A person who acts recklessly in regard to the same offense may be fined up to \$7,500 or sentenced to three to five years in jail, or both. *Id.*

139. MODEL PENAL CODE § 2.02 comment 3 (1985).

140. *Id.* § 2.02(b)(ii).

141. *Id.* § 2.02 comment 3.

Stirnkorb,¹⁴² which was decided under the pre-1989 version of the Ohio statute.¹⁴³ In *Stirnkorb* an operations manager was found criminally liable for "recklessly" violating Ohio's hazardous waste laws.¹⁴⁴ This case has been hailed as "expanding liability" for hazardous waste violators.¹⁴⁵

B. Ohio v. Stirnkorb

CECOS International employed defendant John Stirnkorb as operations manager of its Aber Road Facility. This facility was used to store hazardous wastes.¹⁴⁶ CECOS was required to dispose of wastes according to a process which involved the storage and sealing of wastes in excavations, or cells, with dimensions of approximately 500 by 500 feet and approximate depth of 50 feet.¹⁴⁷ CECOS was required to submit monthly reports to the Ohio Environmental Protection Agency (Ohio EPA) containing information describing the wastes, volumes of waste received, and the locations of disposed waste.¹⁴⁸ Under continuous monitoring by the Ohio EPA, CECOS was responsible for proper disposal of these wastes.¹⁴⁹

CECOS had prepared a "storm water management plan" which required all rainwater which came into contact with the hazardous waste at the site to be treated as "hazardous waste leachate."¹⁵⁰ As mandated by Ohio law, CECOS developed a hazardous waste leachate "contingency plan" which required all hazardous waste leachate to be pumped into a certain fire pond.¹⁵¹ Rainwater which had not been contaminated was pumped into different fire ponds.

CECOS had previously been informed by the U.S. EPA that

142. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio Library, Courts file).

143. *See supra* note 137.

144. *See infra* notes 146-95 and accompanying text.

145. *Court Decisions: RCRA Litigation*, 4 *Toxics L. Rep.* (BNA) 129 (July 5, 1989).

146. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 10.

147. *Id.* at 6.

148. *Id.* at 9.

149. *Id.*

150. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 10 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

151. *Id.*

rainwater that remained in contact with hazardous waste for certain periods of time would be presumed hazardous.¹⁵² CECOS was also informed, moreover, that the determination of whether rainwater was hazardous was dependent upon individual circumstances and this determination was to be made by Ohio EPA officials.¹⁵³ The *Stirnkorb* court noted that it should have been inferred from this statement that the determination was not to be made by persons at the CECOS facility.¹⁵⁴ In addition, the Ohio EPA had also informed CECOS that only rainwater which had never come into contact with waste could be considered nonhazardous.¹⁵⁵

John Stirnkorb was the emergency coordinator for the plant and responsible for implementation of the contingency plan.¹⁵⁶ He retained that authority when he was promoted to operations manager in 1984.¹⁵⁷ Because of his managerial status and his background in working with waste materials, Stirnkorb was held accountable for "knowledge of the environmental field in general as well as the rules, laws and regulations needed to run the Aber Road facility."¹⁵⁸ Moreover, his managerial capacity at CECOS authorized him to make policy decisions concerning the operational management of the facility.¹⁵⁹

Beginning on November 1, 1984, heavy rainfall required not only that rainwater be pumped from the Aber Road facility, but also that the contingency plan for disposal of the contaminated water be implemented.¹⁶⁰ Stirnkorb was found at trial to have had personal knowledge that the on-site Ohio EPA inspector was on vacation at this time.¹⁶¹ Normally, the Ohio EPA inspector met with Stirnkorb at least weekly to advise him concerning CECOS'

152. *Id.* at 13. Rainwater was to be considered hazardous after it had been in contact with wastes for "periods long enough to solubilize waste constituents." *Id.*

153. *Id.*

154. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 13 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio Library, Courts file).

155. *Id.*

156. *Id.* at 10-11.

157. *Id.* at 11.

158. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 12-13 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

159. *Id.* at 12.

160. *Id.* at 14-15.

161. *Id.* at 15.

compliance with EPA rules.¹⁶² Without notifying Ohio EPA officials, however, Stirnkorb ordered the pumping of discolored water into one of the fire ponds designated to contain uncontaminated rainwater, and "normal" clear water into an adjacent drainage ditch.¹⁶³

When the Ohio EPA on-site inspector returned from his vacation, a CECOS employee voiced concerns about the pumping of contaminated rainwater.¹⁶⁴ As a result, an investigation was begun by the Ohio EPA and the Ohio Bureau of Criminal Investigation.¹⁶⁵ CECOS also began its own investigation.¹⁶⁶ The court concluded that although Stirnkorb was aware of the procedures required by the storm water management plan and the contingency plan, he had ordered the water crew to pump the contaminated rainwater without knowing whether the Ohio EPA or the U.S. EPA had been consulted.¹⁶⁷ Samples taken from the site indicated the presence of hazardous materials in the rainwater which had been pumped into the drainage ditch.¹⁶⁸

John Stirnkorb was indicted on six separate counts of violating Ohio's hazardous waste laws. Count One alleged unlawful and reckless disposal of hazardous waste at an unauthorized disposal site.¹⁶⁹ Count Two charged the defendant with unlawfully and recklessly failing to evaluate the waste.¹⁷⁰ Count Three alleged disposal of hazardous waste without obtaining the required chemical analysis of the waste.¹⁷¹ Count Four alleged that Stirnkorb unlawfully polluted the "waters of the state" with waste materials without having obtained a permit authorizing such disposal.¹⁷² Count

162. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 15 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

163. *Id.* at 14-15.

164. *Id.* at 15.

165. *Id.* at 16.

166. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 16 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

167. *Id.* at 17.

168. *Id.* at 18-20. These chemicals included phenol, para-tert-butylphenol, toluene, orthodichlorobenzene, and cyanide. *Id.*

169. *Id.* at 1-2.

170. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 2 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

171. *Id.*

172. *Id.* at 3.

Five alleged unlawful and reckless violations of the waste facility installation and operation permit.¹⁷³ Finally, Count Six alleged unlawful and reckless violations of "the terms and conditions requiring compliance with performance standards" of the facility.¹⁷⁴ Also indicted was Allan Orth, environmental control manager of the landfill, CECOS International, and CECOS' parent holding corporation, Browning Ferris Industries.¹⁷⁵ Defendants moved for dismissal on all counts; the court granted dismissal of both Count Two (failure to evaluate waste) and Count Six (violating performance standards).¹⁷⁶ Thereafter, John Stirnkorb presented no defense evidence.¹⁷⁷ The remaining defendants were granted a mistrial.¹⁷⁸

In an extensive 108 page decision, Judge Robert R. Ringland cited the deterrent effect of criminal sanctions¹⁷⁹ and the legislative intent of preserving and protecting the environment.¹⁸⁰ He then found that Stirnkorb's conduct was reckless because he failed to obtain state approval before ordering disposal of the wastes.¹⁸¹ Under Ohio law,¹⁸² the burden of proof for establishing Stirnkorb's "criminal conduct" required that guilt be established beyond a reasonable doubt for each material element of each count.¹⁸³ Judge Ringland stated that:

based upon [Stirnkorb's] experience, training, and duties in the placement of waste, his knowledge of the contingency plan and storm water management plan, as well as his knowl-

173. *Id.*

174. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 3-4 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

175. *Id.* at 4.

176. *Id.* at 4-5. The trial court dismissed both counts because the regulations setting forth culpability referred to generators, and therefore were inapplicable to the landfill and to the defendants. *Id.*

177. *Id.* at 5.

178. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 6 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file). The defendants' motion for mistrial was based on the failure of the state to provide discovery of previous statements of co-defendant Orth. Stirnkorb did not join in the motion. *Id.*

179. *Id.* at 25-26.

180. *Id.* at 25.

181. *Id.*

182. OHIO REV. CODE ANN. § 2901.24(A) (Anderson 1987).

183. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 21 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

edge of the advisory opinions and "caveats" sent down from Ohio and U.S. EPA on issues where he had responsibility, i.e. pumping of water and placement of waste, . . . [Stirnkorb's] order to pump liquid over the cell into the drainage ditch, based only [sic] the criteria of the color of the water without chemically testing the water, and without permission of the Ohio or U.S. EPA authorities, was reckless.¹⁸⁴

Judge Ringland then discussed the scienter requirement in detail. "Reckless" is defined under Ohio law as follows:

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.¹⁸⁵

The *Stirnkorb* court determined that recklessness requires "some element of scienter . . . since it involves a known risk."¹⁸⁶ While the standard is less stringent than "knowingly,"¹⁸⁷ it "still involves subjective determination."¹⁸⁸ The legislative history of the Ohio Criminal Code indicates that the reckless standard was not intended to allow the defense of ignorance of the law.¹⁸⁹ Rather, the legislative history indicates that there should be liability for the failure to become aware of strict regulatory provisions.¹⁹⁰ Thus, persons working in the hazardous waste industry who violate Ohio waste regulations may be presumed to be acting recklessly.

The *Stirnkorb* decision created a legal duty to inquire into the safety of disposal techniques. Although Stirnkorb's behavior did not rise to the level of "knowing" and there was no finding of crim-

184. *Id.* at 40.

185. OHIO REV. CODE ANN. § 2901.22(C) (Anderson 1987).

186. Ohio v. Stirnkorb, No. 85-CR-5240B, slip op. at 34.

187. OHIO REV. CODE ANN. § 2901.22(B) (Anderson 1987) states:

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

188. Ohio v. Stirnkorb, No. 85-CR-5240B, slip op. at 34 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

189. *Id.* at 39-41.

190. *Id.*

inal intent, Judge Ringland stated that "the failure to apprise one's self of all necessary regulations, correspondence, and communications is itself reckless based upon the highly regulated nature of this industry and the chance of great harm for any commission or omission made in failing to follow these regulations, opinions and caveats."¹⁹¹ Judge Ringland also stated that because of the legislature's intent to regulate hazardous waste facilities strictly, "acting without educating oneself would be in and of itself conduct which would be construed as reckless under the legislative definition of reckless."¹⁹² Consequently, those who handle hazardous wastes have a duty to learn about relevant regulations.

The *Stirnkorb* decision suggests that in addition to knowing the relevant regulations, hazardous waste handlers must make correct decisions. Judge Ringland cited *State v. Freeman*,¹⁹³ a case where a county commissioner was held to have acted recklessly when, faced with a possible lapse in insurance coverage, he bypassed the required bidding process.¹⁹⁴ Judge Ringland stated that the defendant in *Freeman* was found to be reckless even though he "had to make a tough choice between two alternatives"¹⁹⁵ Thus, the reckless standard may allow conviction of hazardous waste regulation violators who make the wrong decision. This stringent standard is consistent with the purpose of RCRA, which is to protect public health and safety.

IV. LESSENING THE MENS REA REQUIREMENT FROM "KNOWING" TO "RECKLESS" IN STATE LAW

State adoption of stricter mens rea standards could help dispel the belief that crimes against the environment are a lesser evil than traditional criminal offenses. In part, this belief stems from the fact that environmental crimes are regulatory violations. In the past, regulatory violations were not viewed as violent or morally delinquent.¹⁹⁶ Instead, regulatory crimes were viewed as economic

191. *Id.* at 41.

192. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 34 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file).

193. 20 Ohio St. 3d 55, 485 N.E.2d 1043 (1985).

194. *Id.*

195. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip. op. at 35.

196. *Putting Polluters in Jail*, *supra* note 50 at 95.

crimes,¹⁹⁷ and violators were not punished as criminals.¹⁹⁸ Like other regulatory violations, environmental crimes have not been treated as "serious" offenses.¹⁹⁹

Many regulatory crimes are subject to strict liability because they are perceived as threatening public welfare.²⁰⁰ Environmental crimes, however, constitute a "new class of regulatory crimes"²⁰¹ which greatly threaten the public welfare. They therefore warrant the imposition of stricter criminal penalties.

The adoption of a lesser mens rea standard for environmental violations does, however, pose some problems. The profile of the hazardous waste violator has evolved beyond the "midnight dumper."²⁰² While it may seem logical to impose more severe criminal sanctions on corporate polluters, the courts may be disinclined to impose harsh penalties on those violators who do not fit the "midnight dumper" profile. The broad definition of "hazardous waste" contained in RCRA encompasses more than toxic waste discarded by industry.²⁰³ For example, a recent conviction obtained under RCRA's "knowing endangerment" provision was in connection with the manufacture of cocaine.²⁰⁴ As a result, more people could be considered hazardous waste violators. What of the "ma and pa" businesses that disposes of paint or cleaner in such a way as to violate the hazardous waste statutes? Should they have known that the substance they were dealing with had been classified as hazardous waste? Given these questions and the need to protect citizens, the state must carefully choose and precisely define the scope of criminal liability provisions for hazardous waste violations.

197. *Id.*

198. *Id.* at 94-95.

199. *Id.* at 95.

200. *Putting Polluters in Jail, supra* note 50, at 95-96.

201. *Id.* at 96.

202. Bonanno & DeCicco, *supra* note 135, at 2.

203. 42 U.S.C. § 6903 (5) states:

(5) 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.

204. *United States v. Gomez*, 89 Cr. 92 (N.D.N.Y., July 14, 1989).

The imposition of a workable mens rea requirement is critical to the prosecution of environmental crimes. Under the "knowing" standard of RCRA, the merely reckless or negligent handler of hazardous waste may avoid criminal prosecution. Although state adoption of a "reckless" standard does not guarantee that environmental violations will not occur, it does impose an affirmative duty to inquire into regulations governing the hazardous waste industry. While a "knowing" standard requires that a specified conduct is "practically certain" to cause a particular result,²⁰⁵ a "reckless" standard requires only awareness of and conscious disregard for the risk.²⁰⁶ As Judge Ringland pointed out in *Stirnkorb*, a defendant may be reckless even though he "had to make a tough choice between two alternatives."²⁰⁷ The implication is that any doubts that one may have concerning the handling, disposing, transporting, storing, or generating of hazardous waste must be resolved before action is taken. The "reckless" standard would impose this affirmative duty to inquire and to resolve doubts.

Implementing a state-by-state approach can, however, present problems. While Ohio has expanded liability by imposing criminal sanctions on reckless violators, there is a wide variation in mens rea requirements and criminal penalties among the fifty states and the District of Columbia.²⁰⁸ Polluters may, therefore, find it advantageous to locate in those states which punish environmental criminals less harshly.

In spite of these dangers, there are still good reasons for states to adopt lesser mens rea standards. Legislative action which aggressively protects the environment and public health has significant long term benefits. These benefits outweigh the short term economic gains of more lax environmental regulations.

Other options have been suggested to revise hazardous waste laws. Establishing a Model Penal Code for environmental crimes has been proposed to deal with the lack of uniformity in state enforcement.²⁰⁹ While this is an attractive option states may be slow

205. MODEL PENAL CODE § 2.02(2)(b)(ii) (1985).

206. *Id.* at § 2.02(2)(c).

207. *Ohio v. Stirnkorb*, No. 85-CR-5240B, slip op. at 35 (Ohio Ct. Com. Pls., Clermont Cty., May 15, 1989), *aff'd*, Nos. CA89-08-076, CA89-11-098 (Ohio Ct. App., Sep. 4, 1990), *appeal dismissed*, No. 90-2135 (Ohio, Feb. 13, 1991) (LEXIS, Ohio library, Courts file). See notes 193-95 and accompanying text.

208. See Bonanno & DeCicco, *supra* note 135, at 35.

209. *Id.* at 34.

in adopting a "Model Environmental Code."²¹⁰ It has also been suggested that Congress amend RCRA to lower the threshold for liability and to impose stricter penalties.²¹¹ While some may find this second option desirable, given the lobbying power of the waste industry and the past willingness of Congress to compromise with business interests, it may be a hard-fought battle for change.²¹²

Adopting a lesser mens rea requirement may prove to be the most effective way to enforce environmental regulations. Adoption of such a standard at the state level is advantageous because state legislatures are more accessible to input from citizens and environmental groups. By following Ohio's lead other states could take an important step towards protecting the environment and the welfare of their citizens.

CONCLUSION

Protection of the public welfare is paramount. The hazardous waste industry is highly regulated because failure to follow regulations creates the risk of great harm. In order to protect the public, those who work in this regulated field must be fully knowledgeable about regulations and take responsibility for their actions. The harm that may result from improper handling of wastes by uninformed industry decision-makers demands criminal punishments to serve as a deterrence.

States may further the notion that environmental crimes are serious transgressions by actively pursuing prosecutions under a burden of proof that is not exceedingly difficult to meet. The "reckless" standard, which requires neither actual knowledge nor a high probability of harmful results, is preferable to the "knowing" standard. While a guilty mind has traditionally been required before the imposition of criminal sanctions, the status of RCRA as a public welfare statute requires strict enforcement of regulations of the hazardous waste industry.

The "reckless" standard strikes an appropriate balance between the notions of protection of the public and the protection of innocent persons from criminal prosecution. By requiring a lesser level of culpability than RCRA's "knowing" state of mind, the

210. *Id.*

211. *Id.*

212. See Cavanaugh, Harris, & Zisk, *supra* note 40 and accompanying text.

“reckless” standard invokes an affirmative duty to inquire if a practice is at all questionable or suspect. In the life and death realm of unlawful handling of hazardous wastes, such a standard is needed.

Judith Ianelli '91

