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# Criminal Prosecution of Responsible Corporate Officers and Negligent Conduct under Environmental Law

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The Clean Air Act (CAA), and the Clean Water Act (CWA) each contain two novel provisions that may significantly lower the bar for criminal prosecution of corporations and their employees for conduct not traditionally considered criminal. First, both statutes provide criminal penalties for negligent violations of the statutes. Under such provisions, the United States has, for example, obtained the conviction of a railroad construction manager who was off duty at the time an independent contractor punctured a pipeline, resulting in the discharge of oil into the Skagway River in Alaska. See *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999). The CAA and CWA also both define the term “person” to include “any responsible corporate officer” for purposes of criminal violations. These provisions raise the possibility that high-level corporate officers may face criminal prosecution for “knowing” violations of the CAA and CWA, regardless of actual knowledge of the violation.

This article provides an overview of the responsible corporate officer doctrine, from its early roots in cases under the Federal Food, Drug, and Cosmetic Act, (FFDCA), through its modern application in the context of criminal environmental enforcement. The article then offers a synopsis of the provisions of the CAA and CWA providing for prosecution of negligent conduct. Lastly, it provides a survey and discussion of relevant developments in case law in both areas.

The responsible corporate officer doctrine has its origins in two cases arising under the FFDCA. In *United States v. Dotterweich*, 320 U.S. 277 (1943), the U.S. Supreme Court addressed the criminal culpability of corporate officers under the FFDCA. Joseph Dotterweich, president and general manager of a pharmaceutical company, was convicted of three misdemeanor counts of violating the FFDCA by misbranding drugs and shipping adulterated drugs in interstate commerce. *Id.* at 278. The Second Circuit Court of Appeals reversed the conviction on the grounds that only the corporation, not Dotterweich individually, could be held liable for violating the statute. *Id.* at 279. The Supreme Court reversed, finding that a corporate officer could be criminally liable under the Act even absent consciousness of wrongdoing. *Id.* at 284. The Court held that in the absence of a mens rea requirement the prosecution was not required to prove knowledge on the part

of the corporate officer to sustain a conviction under a public welfare statute such as the FFDCA. Such regulatory statutes, reasoned the Court, subordinate the interests of corporate officers in favor of public protection. *Id.* at 284–85. “In the interest of the larger good [the FFDCA] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.” *Id.* at 281. Although the Court acknowledged that it would be “too treacherous” to attempt to define the class of corporate officers potentially liable under the Act, the Court did state broadly that liability may be found in “all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs.” *Id.* at 284.

The doctrine was further refined in *United States v. Park*, 421 U.S. 658 (1975). Like *Dotterweich*, *Park* arose from alleged violations of the FFDCA. In *Park*, the CEO of a retail food chain was charged with violating the FFDCA after the discovery of a rodent infestation at one of his company’s warehouses. *Id.* at 658. Park had been notified of the problem and was also aware of a similar problem at another company warehouse. In addition, there was evidence that Park had conferred with other officers to ensure that corrective action was being taken. *Id.* at 664. Although he did not participate in the acts causing the violation, Park was convicted under the FFDCA. The Supreme Court affirmed Park’s conviction. Following its reasoning in *Dotterweich*, the Court noted that “the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.” *Id.* at 672. The Court held that under the FFDCA,

the government establishes a *prima facie* case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of and that he failed to do so.

*Id.* at 673–74. The Court did note that Park could have sought, but failed to seek, an instruction requiring the government to prove he was “not without power or capacity to affect the conditions which founded the charges” against him. *Id.* at 676. In sum, as developed in *Dotterweich* and *Park*, a corpo-

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rate officer with the power and authority to prevent conduct prohibited by a health and welfare or regulatory statute, such as the FFDCA, may be held criminally liable for a violation of that statute even in the absence of affirmative participation in the conduct causing the violation.

More recently, prosecutors have attempted to use the responsible corporate officer doctrine in the context of criminal environmental enforcement actions. The doctrine as developed under the FFDCA cases is not a perfect fit with environmental cases. Like the FFDCA, environmental laws are regulatory health and welfare statutes. However, unlike the FFDCA, most criminal environmental statutes explicitly require proof of a mens rea element.

Prosecution under the responsible corporate officer doctrine may arise in two ways in the context of environmental enforcement. First, two federal environmental statutes specifically include the concept of the responsible corporate officer doctrine within their terms. The CAA and the CWA both provide that, for purposes of the criminal enforcement provisions of the respective acts, the term "person" includes "any responsible corporate officer." 42 U.S.C. § 7413(c)(6); 33 U.S. § 1319(c)(6). In addition, prosecutors in some cases have attempted to use the responsible corporate officer doctrine as developed in *Dotterweich* and *Park* to impute knowledge on corporate officials for violations of other environmental laws not containing an explicit reference to the responsible corporate officer doctrine. As the following cases demonstrate, prosecutors have not been entirely successful in applying the doctrine as a substitute for actual knowledge in criminal environmental cases. Nonetheless, the doctrine can be used to allow a jury to infer actual knowledge by a corporate officer.

In *United States v. White*, 766 F. Supp. 873 (E.D. Wash. 1991), several employees of a pesticide manufacturing facility were indicted under the Resource Conservation and Recovery Act (RCRA), and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), alleging that they unlawfully stored pesticide rinseates and illegally disposed the rinseates by applying them to a field near residential property. One of the defendants, Steed, was charged on the basis of his position as supervisor over environmental and safety measures at the facility. *Id.* at 894. The district court held that Steed could not be found liable based solely on his corporate supervisory position. *Id.* at 895. The court rejected the prosecution's reliance on *Park* and *Dotterweich* noting that, unlike the FFDCA, both FIFRA and RCRA contain a mens rea element. *Id.* According to the court, application of the responsible corporate officer doctrine in this context would impermissibly transform the knowledge requirement from "knowing" to "should have known." *Id.*

The use of the responsible corporate officer doctrine under RCRA as a substitute for actual knowledge was also rejected in *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991). In *MacDonald & Watson*, the First Circuit confronted the question of whether a defendant's role as a corporate officer was sufficient by itself to impute knowledge to the defendant for a knowing violation of RCRA. The presi-

dent of a corporation was convicted of violating RCRA by knowingly transporting hazardous waste to an unpermitted site operated by the company. *Id.* at 46. The prosecution alleged that the defendant was a "hands-on" manager. Further, although the government could not show the individual defendant knew of the specific shipment alleged in the information, it did allege that he had knowledge of two prior shipments of similar waste that violated the facility's permit. *Id.* at 50. The court held that the responsible corporate officer doctrine could not be used in these circumstances to impute knowledge on the defendant. *Id.* at 55. The court recognized that knowledge may be inferred from circumstantial evidence "indicating position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions." *Id.* The court also noted that "willful blindness" may suffice to establish knowledge. *Id.* However, the court was unwilling to allow the responsible corporate officer doctrine to substitute for the explicit knowledge requirement contained in RCRA. "In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge." *Id.*

In other cases, particularly those brought under the CWA, courts have been more receptive to use of the responsible corporate officer doctrine. In *United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991), the Tenth Circuit affirmed the conviction under the CWA of a public utilities director who had general supervisory authority over a municipal waste water treatment plant. *Id.* at 1415. Brittain was accused of directing a plant supervisor to falsify discharge monitoring reports and to discharge raw sewage in violation of an NPDES permit. *Id.* at 1415, 1418. Brittain argued that an individual may only be subject to criminal sanctions for permit violations if he is a permittee. *Id.* at 1419. In support of this argument, he pointed to Congress's addition of "responsible corporate officers" as individuals potentially subject to criminal sanctions under the CWA. *Id.* The court rejected this argument, noting that the inclusion of "responsible corporate officers" in the CWA is an expansion, rather than a limitation, on the scope of individuals subject to criminal sanctions. *Id.* The court, after reviewing *Park* and *Dotterweich*, reasoned that Congress intended to permit responsible corporate officers to be held criminally liable "in spite of their lack of 'consciousness of wrong-doing.'" *Id.* The court added that "a 'responsible corporate officer,' to be held criminally liable, would not have to 'willfully or negligently' cause a permit violation. Instead the willfulness or negligence of the act would be imputed to him by virtue of his position of responsibility." *Id.*

Likewise, the Ninth Circuit permitted use of the responsible corporate officer doctrine in *United States v. Iverson*, 162 F.3d 1015 (9th Cir. 1998). In *Iverson*, the founder and president of a chemical company was convicted of violating the CWA by discharging wastewater from a drum cleaning operation into the sewer system. *Id.* at 1018. After being denied permission to discharge the wastewater into the sewer system, Iverson ordered his employees to dispose of wastewater into sewer drains at an

apartment complex he owned, as well as at his home. *Id.* The practice was suspended for a number of years when the company hired an outside firm to clean its drums; however, it was reinstated after the defendant purchased a warehouse with sewer access. *Id.* at 1019. Prior to the resumption of the discharges to the sewer system, Iverson announced his “official” retirement from the company, although he continued to receive money from the company and to direct the activities of the company’s employees. *Id.* In 1997, Iverson was indicted for, and subsequently convicted of, discharging wastewater into the sewer system at his warehouse after his “retirement” from the company. *Id.* Iverson argued at trial that the district court misinterpreted the responsible corporate officer doctrine by instructing the jury that it must find that Iverson (1) knew that his employees were discharging pollutants into the sewer system, (2) had the authority and the capacity to prevent the discharges, and (3) failed to prevent the discharges. *Id.* at 1022. Iverson argued that he could not be held criminally liable as a responsible corporate officer because he did not in fact exercise control over the disposal of wastewater and he did not have an express corporate duty to oversee the disposal. *Id.* The Ninth Circuit rejected Iverson’s interpretation of the responsible corporate officer doctrine. The court held that under the CWA, “a person is a responsible corporate officer if the person has authority to exercise control over the corporation’s activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.” *Id.* at 1025. In reaching its conclusion, the court relied on the language of the CWA, the Supreme Court’s interpretation of the responsible corporate officer doctrine in *Dotterweich* and *Park*, and the Ninth Circuit’s previous interpretations of similar statutory requirements. *Id.* The court also found that the district court’s jury instruction was appropriate. The instruction only relieved the government of having to prove that Iverson personally discharged or caused the discharge of the pollutants. *Id.* at 1026. The government still had to prove that Iverson knew that employees were discharging pollutants and that he had the capacity and authority to prevent the discharges and failed to do so. *Id.* at 1025–26.

In *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001), the Fourth Circuit confronted the question of whether a defendant could be held criminally liable under the responsible corporate officer doctrine where he was not a formal officer of the company but had participated in some transactions on behalf of the facility and controlled the facility’s finances and payment of expenses. James Ming Hong was convicted of negligently violating the CWA. Hong helped acquire a wastewater treatment facility in 1993 and, although he was not a formal officer of the company, he controlled the company’s finances and played an important role in the company’s operations. *Id.* at 529. For example, he negotiated the lease for one of the company’s buildings, participated in the purchase of a wastewater treatment system, and controlled payment of some of the company’s expenses. *Id.* at 529–30. In 1996, company employees began discharging untreated wastewater into the publicly owned sewer system. *Id.* at 530. Based on those activities, Hong was eventually charged and convicted as a “responsible corporate officer”

for negligently violating the CWA. *Id.* On appeal, Hong argued that the government failed to prove that he was a responsible corporate officer because the government failed to show that he was a formal officer of the company or that he exerted sufficient control over company operations to be held responsible for the illegal discharges. *Id.* at 531. The Fourth Circuit rejected Hong’s view of the responsible corporate officer doctrine. *Id.* Relying on *Dotterweich* and *Park*, the court held that Hong’s official title was not relevant to the inquiry. *Id.* Instead, the court noted that “the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.” *Id.* According to the court, Hong’s involvement in company affairs was sufficient to prove that he “substantially controlled corporate operations” and, therefore, could be held liable as a responsible corporate officer. *Id.* at 532.

In *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), cert. denied, 535 U.S. 1111 (2002), three company officers were charged with multiple violations of the CWA, RCRA, the Endangered Species Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. The charges arose out of the storage and discharge of wastewater from a chemical manufacturing facility. *Id.* at 1231–32. The defendants were Christian Hansen (founder and former president, CEO, and chairman), his son, Randall Hansen (former acting CEO and COO), and Alfred Taylor (former plant manager). *Id.* at 1225. The jury convicted all three defendants on multiple counts and the court sentenced all three to prison terms ranging from four to nine years. *Id.* at 1231–32. On appeal, Christian and Randall Hansen challenged their convictions for “knowing endangerment” under RCRA on the theory that the district court’s jury instruction regarding the responsible corporate officer doctrine “permitted the jury to convict them on the basis of their corporate positions instead of their individual liability.” *Id.* at 1250. The defendants argued that during the times of the alleged RCRA violations neither of them was present at the plant and therefore neither had the requisite mens rea to support a conviction for “knowing endangerment.” The Eleventh Circuit rejected this argument. The court reasoned that the district court’s instruction required the jury to find that the defendants “acted knowingly in failing to prevent, detect or correct the violation” and, therefore, the jury could not have found the Hansens guilty under the responsible corporate officer doctrine based solely on their corporate offices. *Id.* at 1252–53. The Eleventh Circuit also concluded that the testimony of former employees and experts “was sufficient for the jury to find that the defendants placed others in danger of death or serious bodily injury” and that the defendants “knew that the conditions of the plant were dangerous and that the conditions posed a serious danger to the employees.” *Id.* at 1243–44.

An analysis of these cases shows that, although the responsible corporate officer doctrine may not generally be used as a substitute for the knowledge requirement for an environmental crime, the government may prove knowledge by circumstantial evidence, thereby imputing actual knowledge to the corporate officer. Evidence that a jury may permissibly use to infer knowledge includes

the defendant's position in the company, authority to control the conduct giving rise to the claim, and actual knowledge of prior instances of noncompliance. Courts will look beyond corporate formalities and titles. Even in the absence of holding a formal corporate title, a defendant may have liability under the responsible corporate officer doctrine based on actual control over operations or finances. Finally, courts appear most accepting of the responsible corporate officer doctrine under the CWA where the concept has been incorporated into the terms of the statute. Under other environmental statutes such as RCRA, the efforts of prosecutors to use the doctrine have met with mixed success.

In addition to incorporating the responsible corporate officer doctrine, both the CAA and the CWA lower the bar for criminal enforcement by criminalizing negligent violations of the respective statutes. The CWA broadly imposes criminal liability for negligent violations of various sections of the Act, for violations of discharge permit conditions and limitations, for violations of pretreatment requirements, and for violations of dredge and fill permit requirements. 33 U.S.C. § 1319(c)(1)(A). Criminal liability may also be imposed for "negligently introduc[ing] into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which [sic] such person knew or reasonably should have known could cause personal injury or property damage" or that causes a POTW to violate an effluent limitation or other condition imposed in its permit. 33 U.S.C. § 1319(c)(1)(B). A party convicted of a first-time negligent violation of the CWA is subject to a fine of up to \$25,000 per day of the violation and imprisonment of up to one year. 33 U.S.C. § 1319(c)(1).

Criminal liability for negligent violations of the CAA is more limited. The CAA imposes criminal sanctions on a person who negligently releases a hazardous air pollutant or extremely hazardous substance and "who at the time negligently places another person in imminent danger of death or serious bodily injury." 42 U.S.C. § 7413(c)(4). A first-time conviction of this provision subjects the violator to a criminal fine under Title 18 of the United States Code and up to one year of imprisonment. *Id.*; 18 U.S.C. § 3571. Given the more limited scope of negligent criminal liability under the CAA, most reported cases relating to negligent criminal environmental violations arise under the CWA.

One primary issue facing the courts in criminal negligence cases under the CWA is whether a showing of simple negligence is sufficient to sustain a conviction or whether a heightened criminal negligence standard applies. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000), the Ninth Circuit affirmed the use of a simple negligence instruction under the CWA. Defendant Edward Hanousek was employed by Pacific & Arctic Railway and Navigation Company as roadmaster of the White Pass & Yukon Railroad. *Id.* at 1119. On the evening of October 1, 1994, an independent contractor working for the railroad accidentally ruptured a heating oil pipeline, eventually leading to the discharge of 1,000 to 5,000 gallons of oil into the Skagway River. *Id.* Hanousek was charged and eventually convicted of negligently discharging a harmful quantity of oil into a navigable water in violation of the CWA. *Id.* On appeal to the Ninth Circuit, Hanousek argued that the

district court erred by failing to instruct the jury that the government had to prove criminal negligence, as opposed to ordinary negligence, before he could be convicted under the CWA. *Id.* at 1120. The Ninth Circuit rejected Hanousek's contention that the CWA requires a heightened showing of negligence. *Id.* at 1121. After examining the plain language of the statute and noting that "[i]f Congress intended to prescribe a heightened negligence standard, it could have done so explicitly," the court held that the government need only prove ordinary negligence for a violation of the CWA. *Id.* Hanousek also claimed that requiring only ordinary negligence for a criminal offense violated due process. The court rejected this challenge on the grounds that the CWA is "public welfare legislation" and "[i]t is well established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process." *Id.* Hanousek sought review of the Ninth Circuit's decision by the U.S. Supreme Court. Although the Court rejected Hanousek's petition, Justices Thomas and O'Connor published a strongly worded opinion dissenting from the denial of certiorari. According to Justice Thomas, the Ninth Circuit erred in relying on the notion that the CWA is a public welfare statute as justification for dismissing Hanousek's due process claim. *Id.* at 1103.

In *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005), the Tenth Circuit followed the rationale of *Hanousek* and ruled that "an individual violates the CWA by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." *Id.* at 1283. The direct question before the court was whether the CWA required proof that the defendant knew the discharge in question would enter waters of the United States. Ortiz argued, and the district court agreed, that he could not have violated the CWA unless he knew his discharge would enter waters of the United States. The Tenth Circuit disagreed. The court examined the plain language of Section 1319(c)(1) and found that the ordinary meaning of the term "negligently" did not require that Ortiz have actual knowledge. *Id.* at 1282-83. Instead, the question was whether Ortiz "failed to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance" and not whether he had knowledge that the discharge would reach waters of the United States. *Id.* at 1283.

At least one district court has followed the lead of *Hanousek*. In an unpublished opinion, the United States District Court for the District of New Jersey adopted the simple negligence standard employed by the *Hanousek* court. *United States v. Atlantic States Cast Iron Pipe Co.*, Crim. No. 03-852 (MLC), 2007 WL 2282514, at \*13-14 (D.N.J. Aug. 2, 2007). The court instructed the jury that "[a] person negligently violates the Clean Water Act by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances, and, in so doing, discharges any pollutant into United States waters without or in violation of a water permit." *Id.* at \*13. Although recognizing that the *Hanousek* formulation was the controlling appellate precedent and that neither party objected to the definition of negligence, the court suggested that this aspect of *Hanousek* should be "carefully scrutinized." *Id.* at \*14, n.17.

In their own separate ways, the responsible corporate officer doctrine and the criminalization of negligent conduct under the CWA and CAA act to ratchet down the threshold for criminal liability for regulated entities and their employees. The responsible corporate officer doctrine permits juries to infer the knowledge element of environmental crimes through an individual's corporate position, knowledge of other violations, and authority to control activity, even if that authority is not exercised. Meanwhile, under current precedent from the Ninth and Tenth Circuits, regulated entities and their employees may face criminal liability for acts of simple negligence. Although most convictions for

negligent environmental violations have occurred under the CWA, the CAA contains a similar provision that may be used by prosecutors when the violation puts others at risk of serious injury or death. Likewise, although most environmental convictions of corporate employees in their capacity as a "responsible corporate officer" have arisen under the CWA, the CAA also contains language incorporating the responsible corporate officer doctrine. Moreover, prosecutors have had some success, though mixed, in securing convictions of responsible corporate officers for violations of other environmental statutes, such as RCRA, that do not contain explicit reference to the doctrine. 🌳