933 F.2d 35
59 USLW 2743, 33 ERC 1411, 21 Envtl. L. Rep. 21,449
(Cite as: 933 F.2d 35)

UNITED STATES of America, Appellee,
v.
MacDONALD & WATSON WASTE OIL COMPANY, Defendant, Appellant.
UNITED STATES of America, Appellee,
v.
NARRAGANSETT IMPROVEMENT COMPANY, Defendant, Appellant.
UNITED STATES of America, Appellee,
v.
Eugene K. D'ALLESANDRO, Defendant, Appellant.
UNITED STATES of America, Appellee,
v.
Faust RITAROSSI, Defendant, Appellant.
UNITED STATES of America, Appellee,
v.
Frances SLADE, Defendant, Appellant.

Nos. 90-1051 to 90-1054 and 90-1212.

United States Court of Appeals,
First Circuit.

Heard Oct. 2, 1990.
Decided May 10, 1991.

Defendants were convicted in the United States District Court for the District of Rhode Island, Ernest C. Torres, J., of violation of criminal provisions of Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and they appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that: (1) evidence supported jury finding that soil was contaminated with toluene and was hazardous waste within meaning of RCRA; (2) defendants violated hazardous waste disposal laws by permitting disposal at facility which lacked permit for specific type of hazardous waste even if facility had some type of permit; and (3) proof that defendant was responsible corporate officer was insufficient to show required knowledge for conviction under RCRA.

Affirmed in part; vacated and remanded in part.

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Before CAMPBELL, Circuit Judge, TIMBERS, [FN*] Senior Circuit Judge, and CYR, Circuit Judge.

FN* Of the Second Circuit, sitting by designation.

***39** LEVIN H. CAMPBELL, Circuit Judge.

This appeal concerns the criminal liability of individuals and corporations under hazardous waste disposal laws.

Following a jury trial in the district court, appellants were convicted, inter alia, of having violated criminal provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq. (1982 & Supp. V 1987) and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9603(b) (1982 & Supp. V

1987).

The indictment originally contained 53 counts. By September 11, 1989, when the trial began, 16 counts had been dismissed and eight severed; and, during trial 12 more counts were dismissed on the government's motion, leaving 17 for submission to the jury. The submitted counts all related to the transportation and disposal of toluene waste from the Master Chemical Company. Appellants were convicted on all 17 counts, as follows:

MacDonald & Watson Waste Oil Co. ("MacDonald & Watson"), Faust Ritarossi, Frances Slade and Eugene K. D'Allesandro were convicted, on two counts each, of knowingly transporting and causing the transportation of hazardous waste, namely toluene and soil contaminated with toluene, to a facility which did not have a permit, in violation of RCRA, § 3008(d)(1), 42 U.S.C. § 6928(d)(1).

MacDonald & Watson and Narragansett Improvement Co. ("NIC") were convicted of knowingly treating, storing and disposing of hazardous waste, namely toluene and soil contaminated with toluene, without a permit, in violation of RCRA, § 3008(d)(2)(A), 42 U.S.C. § 6928(d)(2)(A).

MacDonald & Watson and NIC were convicted of failing to report the release of a hazardous substance into the environment in violation of CERCLA, § 103(b)(3), 42 U.S.C. § 9603(b)(3).

MacDonald & Watson was convicted of making false statements in violation of 18 U.S.C. § 1001 and of mail fraud in violation of 18 U.S.C. § 1341.

I. FACTS

Located in Boston, Massachusetts, Master Chemical Company manufactured chemicals primarily for use in the shoe industry. Master Chemical had been owned by the Estate of Moses Weinman (hereinafter "the Estate"), which was the principal in transactions with appellants. Among the chemicals Master Chemical used was toluene, which it stored in a two thousand gallon underground storage tank. When Master Chemical personnel discovered in the late fall or early winter of 1982 that water was entering the tank and contaminating the toluene, the tank was emptied and its use discontinued. In 1984, Master Chemical Company was sold, and the toluene tank was excavated and removed. A Master Chemical employee testified that he found a small hole in the tank, and that the soil surrounding the tank appeared black and wet and smelled of toluene.

An environmental consulting firm, Goldberg-Zoino & Associates, Inc. ("GZA"), was retained to assist in the cleanup. GZA prepared a study of the site and solicited a bid from MacDonald & Watson for the excavation, transportation, and disposal of the toluene-contaminated soil. MacDonald & Watson, a company with offices in Johnstown, Rhode Island, was in the business of transporting and disposing of waste oils and contaminated soil. MacDonald & Watson operated a disposal facility on land in Providence, Rhode Island, known as the "Poe Street Lot," leased from appellant NIC. [FN1] MacDonald & Watson operated the Poe Street Lot under NIC's Rhode Island RCRA permit, which authorized the disposal at the lot of liquid hazardous wastes and soils contaminated with non-hazardous wastes such as petroleum products. Neither NIC nor MacDonald & Watson held a RCRA permit authorizing them to dispose of solid hazardous wastes such as toluene-contaminated soil at the lot. At the Rhode Island administrative hearing held when NIC sought its permit, appellant D'Allesandro, president of MacDonald & ***40** Watson, testified that hazardous waste operations at the Poe Street Lot would be managed by MacDonald & Watson and that he would be the manager of the facility there. According to the terms of NIC's lease of the Poe Street Lot to MacDonald & Watson, NIC retained responsibility for compliance with state and federal law with respect to permitting and operating the hazardous waste treatment and storage facilities.

> FN1. NIC operates an asphalt production plant on property of which the Poe Street Lot is a part.

The Estate accepted MacDonald & Watson's bid to remove and clean up the contaminated soil. The Estate's attorney, Deborah Shadd, discussed the proposed arrangement with appellant Slade, MacDonald & Watson's employee, and sent Slade a contract under which MacDonald & Watson would remove "contaminated soil and toluene." Shadd asked Slade to review the contract. Shadd also asked Slade to have it signed for MacDonald & Watson, which she did. Thereafter, appellant Ritarossi, another employee of MacDonald & Watson, supervised the transportation of the toluene-contaminated soil from Master Chemical to the Poe Street Lot in nine 25-yard dump truck loads

and one 20-yard load. A Massachusetts hazardous waste manifest accompanied each truckload, bearing the Massachusetts hazardous waste code M-001. [FN2] Four of the manifests bore Ritarossi's signature. Prior to acceptance of the waste at the Poe Street Lot, MacDonald & Watson employees received an "Authorization to Accept Shipment of Spill Cleanup Material" form bearing Slade's typed name, describing the spilled material as "toluene," and describing the "petroleum product and the material spilled into" as "toluene and gravel." At this point, a MacDonald & Watson employee stamped the manifests "Non-hazardous in Rhode Island, Accepted for Processing at Asphalt Production Plant." Neither NIC nor MacDonald & Watson reported the disposal of the Master Chemical wastes as a release of a hazardous substance into the environment pursuant to CERCLA § 103(b)(3).

> FN2. "M-001" is a Massachusetts code designating waste oil, which is considered hazardous under Massachusetts law but not under RCRA or Rhode Island law. Mass.Regs.Code tit. 310, § 30.131 (1986) (Hazardous Waste from Non-Specific Sources). No RCRA hazardous waste identification number was assigned to the waste.

A. Sufficiency of the Evidence

[1][2] Appellants argue that the evidence was insufficient to support their convictions. In United States v. Gomez Pabon, 911 F.2d 847, 852 (1st Cir.1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 801, 112 L.Ed.2d 862 (1991), we stated the applicable standard of review:

> [W]e must view the evidence "in the light most favorable to the government, drawing all legitimate inferences and resolving all credibility determinations in favor of the verdict." United States v. Angiulo, 897 F.2d 1169, 1197 (1st Cir.1990) [cert. denied, [--- U.S. ----] 111 S.Ct. 130 [112 L.Ed.2d 98] (1990)]. The verdict must be upheld if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See, e.g., United States v. Aponte-Suarez, 905 F.2d 483, 489 (1st Cir.1990) [cert. denied, [--- U.S. ----] 111 S.Ct. 531 [112 L.Ed.2d 541] (1990) and [--- U.S. ----] 111 S.Ct. 975 [112 L.Ed.2d 1061] (1991)]; United States v. Bernal, 884 F.2d 1518, 1523 (1st Cir.1989).

With respect to the convictions under RCRA, appellants contend that the evidence was insufficient to establish that the Master Chemical contaminated soil was a "hazardous waste" for purposes of RCRA. [FN3] They argue that petroleum constituents ***41** other than toluene were detected in the soil, (including benzene and methyl tert-butyl ether), and that another tank containing non-hazardous petroleum derivatives toluene and benzene was located near the site of the toluene tank. They also argue that testimony regarding water entering the toluene tank and the hole discovered when the tank was removed did not establish that the toluene tank leaked, because the water could have entered through a pipe and the hole could have resulted during tank removal. These arguments are not persuasive. Contamination with other non- hazardous chemicals would not render soil that was also contaminated with toluene a non-hazardous waste. Groundwater in the toluene tank excavation pit showed toluene at 360,000 parts per million, vastly greater than levels of any other chemical. This sample data, along with testimony regarding the soil's toluene smell, and other testimony, was plainly sufficient to enable the jury to find that the soil was contaminated with toluene and was a hazardous waste as defined in the relevant regulations implementing RCRA. See 42 U.S.C. §§ 6921, 6903(5) and (27).

> FN3. Under the relevant regulation, 40 C.F.R. § 261.33(d), the following are hazardous wastes when they are discarded or intended to be discarded:
>
> Any ... contaminated soil ... resulting from the cleanup of a spill into or on any land or water of any commercial chemical product ... having the generic name listed in paragraph ... (f) of this section.
>
> Commercial toluene is one such listed chemical product. Rhode Island's regulations, by incorporation of 40 C.F.R. § 261.33(d) and (f), similarly list commercial chemical product toluene and soil contaminated therewith as hazardous wastes.

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D'Allesandro and NIC contend that the evidence was insufficient to support their convictions. D'Allesandro was the manager and principal of MacDonald & Watson. There was evidence that he participated actively in the firm's day-to-day

management, and that he had been warned on other occasions that his company had disposed of toluene-contaminated soil and that this was illegal. There was no direct evidence, however, of his knowledge of the particular shipments at issue. Since we vacate his conviction because of fundamental defects in the court's jury instructions, see infra, we do not reach the question of evidentiary sufficiency in his case.

[5][6] NIC contends that the evidence was insufficient to support its conviction for the crimes of its purported agents. "A corporation may be convicted for the criminal acts of its agents, under a theory of respondeat superior ... where the agent is acting within the scope of employment." United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir.), cert. denied, 459 U.S. 991, 103 S.Ct. 347, 74 L.Ed.2d 387 (1982); United States v. Gold, 743 F.2d 800, 822-23 (11th Cir.1984), cert. denied, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985). [FN5] ***43** NIC denies that either D'Allesandro or two other MacDonald & Watson clerical employees, Giagio Cefala and Brenda Santaniello, were NIC's agents for purposes of imposing criminal liability. We do not reach this question, however, since even assuming all or some of these three MacDonald & Watson employees were agents of NIC, NIC's convictions cannot stand given our determination that D'Allesandro, one of the three, was improperly convicted. We are unable to tell what part the finding of D'Allesandro's guilt played in the jury's determination of NIC's guilt. It is at least conceivable that, without finding D'Allesandro guilty, the jury would have acquitted NIC. Further, while the government proffered evidence that Santaniello signed the name of NIC's president to the waste manifests for the Master Chemical project and received the Authorization to Accept Shipment, the government's evidence of Santaniello's involvement in all elements of the crimes charged to NIC under RCRA, 42 U.S.C. § 6928(d)(2)(A) and CERCLA, 42 U.S.C. § 9603(b)(3) was slight. Indeed, the government did not contend that Santaniello, a clerical employee, was "in charge" of the facility within the meaning of the CERCLA provision. See United States v. Carr, 880 F.2d 1550, 1554 (2d Cir.1989) (term "person in charge" does not extend to every person who might have knowledge of release, but only to supervisory personnel who occupy positions of responsibility and power); United States v. Greer, 850 F.2d 1447, 1453 (11th Cir.1988). In any case, given our uncertainty as to D'Allesandro's role in NIC's convictions, they must be vacated.

FN5. The district court's instructions on corporate liability were as follows:

> Two of the Defendants as you know, are corporations. A corporation is a separate entity and it may be guilty of a criminal offense. A corporation, of course, cannot act for itself. It functions through officers, employees and agents. Accordingly, a corporation is chargeable with knowledge of any facts known to its officers, employees and agents and it's responsible for the actions or inactions of those officers, employees and agents at least to the extent that such knowledge, actions or inactions relate to the conduct of the corporation's business. A person need not be an employee of a corporation to be its agent. Anyone authorized to act for the corporation is its agent with respect to matters of the type for which such authority is given. Consequently, a corporation is liable for the acts of its agents as long as those acts are within the scope of the authority given to that agent.

B. Federal Criminal Jurisdiction

Appellants contend that the district court lacked jurisdiction over Counts One and Two, which charged violations of criminal provisions within RCRA, § 3008(d), 42 U.S.C. § 6928(d)(1) and (2). [FN6] Appellants rely on the RCRA provision which allows the United States Environmental Protection Agency ("EPA") Administrator to authorize a state to administer and enforce a hazardous waste program under RCRA Subtitle C, § 3006, 42 U.S.C. § 6926. [FN7] They argue that Rhode Island's authorized state program [FN8] displaced the federal program, leaving no federal crime and ousting the federal court of jurisdiction. Appellants emphasize the statutory language which authorizes the state to carry out its program in lieu of the federal program, and to issue and enforce permits. Appellants ***44** argue that, after state program approval, permits issued by the state are to be criminally as well as civilly enforced by the state alone, under EPA-scrutinized state law. They note that pursuant to 42 U.S.C. § 6926(e), whenever the state fails to administer and enforce a state program in accordance with federal standards, the state authorization may be withdrawn and a federal program reinstated.

FN6. Section 3008(d) of RCRA, 42 U.S.C. §

6928(d), provides that:

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 under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052)

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

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052); or

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

. . . . .

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both [with penalty to be doubled after a first conviction].

FN7. 42 U.S.C. § 6926(b) provides, in pertinent part: Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program.... Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste ... unless, ... (1) such State program is not equivalent to the Federal program ..., (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter.

FN8. Rhode Island's hazardous waste program has received final EPA approval, 51 Fed.Reg. 3780 (Jan. 30, 1986).

The linchpin of appellants' argument is that the term "program" in § 6926 incorporates the exclusive responsibility to enforce criminal provisions penalizing the disposal of hazardous wastes. See Wyckoff Co. v. Environmental Protection Agency, 796 F.2d 1197, 1199-1200 (9th Cir.1986) (rejecting argument that Congress intended to revoke EPA's power to issue orders under 42 U.S.C. § 3013 when state program is in effect). Appellants urge that criminal enforcement logically falls within the meaning of "program" just as do the regulatory and permitting provisions which are, with certain explicit reservations, generally part of the federal program that is displaced (not merely supplemented) by authorized state programs. See 40 C.F.R. § 264.1(f) (1990) (exempting persons who treat, store or dispose of a hazardous waste in a state with an approved RCRA hazardous waste program from the scope of Part 264 federal regulations); 42 U.S.C. §§ 6925, 6927 (providing alternatively for EPA issuance of permits and inspections where state programs have not been authorized, or state issuance of permits and inspections where state programs have been authorized).

[7] We find no merit in the above contention. The language of the challenged federal criminal provision, 42 U.S.C. § 6928(d), does not limit prosecutions thereunder to those who deal with facilities lacking a federal permit. The statute criminalizes "Any person" who acts without, or in respect to facilities lacking, "a permit under this subchapter." A permit under this subchapter is one issued by the Administrator of the EPA or by an authorized state. 42 U.S.C. § 6925.

That § 6928(d), and companion federal criminal provisions, are meant to apply within states having authorized programs is amply supported by the legislative history. Prior to the 1984 RCRA Amendments--when, as today, RCRA provided for state programs which, when federally approved, would be carried out "in lieu" of the federal program, and which authorized the state to issue and enforce permits--the federal penal statute preceding § 6928(d) was worded so as to apply in so many words to violations both of federal and state permitting programs. Thus, the earlier version provided:

> Any person who knowingly—
>
> (1) transports any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under section 3005 of this title (or section 3006 of this title in case of a State program), ...
>
> shall, upon conviction, be subject to a fine of not more than $25,000 for each day of violation, or to imprisonment not to exceed one year, or both.

Resource Conservation and Recovery Act of 1976, Pub.L. No. 94-580, § 3008(d)(1), 90 Stat. 2795, 2812; 42 U.S.C. § 6928(d)(1). The 1984 amendments increased the applicable criminal penalties and simply substituted "under this subchapter" for the references to the specific subsections under which permits, federal and state, may be granted. [FN9] The new language, "without a ***45** permit under this subchapter," subsumed both state and federal permits, as both types are provided for within "this subchapter." The latter did not, therefore, in any way narrow the scope of federal criminal jurisdiction. Nor did the legislative record hint at any intention by Congress to narrow the scope of federal criminal jurisdiction. To the contrary, Congress manifested its desire to retain a strong federal presence. H.R.Conf.Rep. No. 98-1133, 98th Cong., 2d Sess., October 3, 1984 at 110, reprinted in 1984 U.S.Code Cong. & Admin.News 5681; S.Rep. No. 98-284, 98th Cong., 1st Sess., October 28, 1983 at 45 ("The Federal government's ability to obtain criminal penalties against generators and other persons who knowingly cause the transportation of hazardous waste to an unpermitted facility is essential to the regulatory scheme.") Had Congress intended to impose a hitherto unknown limitation upon the scope of its laws criminalizing permit violations, its intentions would surely have been manifested; for example, § 6928(d) would have been reworded to indicate that it applied only to persons in states lacking an authorized state program.

> FN9. Changes made in 1984 to the other criminal provisions of the current RCRA, § 3008(d), 42 U.S.C. § 6928(d), are also relevant. Subsections (d)(3) and (d)(4) relate to fraud and concealment activities under federal and state RCRA regulations. The legislative history states, "the amendments also clarify the fact that paragraph (d)(4) applies to records or other documents required by state regulation in a State with an authorized RCRA program." H.R.Rep. No. 98-198, 98th Cong., 2d Sess., May 17, 1983 at 55, reprinted in 1984 U.S.Code Cong. & Admin.News 5576, 5614. Prior to the 1984 amendments, subsection (d)(4)'s terms applied to "regulations promulgated by the Administrator under this subchapter." The 1984 amendments changed this language to: "regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle." The same change was made in the criminal provision relating to omission of information in subsection (d)(3) and the same language is used in the new subsection (d)(5), which prohibits knowing transportation of RCRA hazardous wastes without a manifest where state or federal regulations require such a manifest.
>
> Consistent with § 6928(d)(1), the criminal prohibitions of subsection (d)(2) and the new subsection (d)(7) relating to permit crimes simply state violations in terms of a "permit under this subchapter." Congress simply clarified that subsection (d)(4) always has applied in the case of state- authorized programs by adding the precise textual basis on which to conclude that Congress intended to remove federal criminal jurisdiction by simplifying the statutory language with respect to permit crimes in subsections (d)(1) and (d)(7).

Appellants' reliance upon Congressional reports discussing state takeover and enforcement of the RCRA hazardous waste program is misplaced. These reports, like the statute itself, simply do not focus upon whether "program" was intended to carry with it the exclusive right to engage in criminal enforcement. See, e.g., H.R.Rep. No. 94-1491, 94th Cong., 2d Sess. 24, pt. 1, reprinted in 1976 U.S.Code Cong. & Admin.News 6238, 6262 ("It is the Committee's intention that the States are to have primary enforcement authority and if at anytime (sic) a State wishes to take over the hazardous waste program it is permitted to do so, provided that the State laws meet the Federal minimum requirements for both administering and enforcing the law.") (Emphasis supplied).

Appellants contend there is significance in the absence from the federal criminal statute of the notice requirement found in RCRA civil enforcement § 3008(a). Section 3008(a) authorizes the Administrator of EPA to bring a civil action in United States district

court for RCRA violations, and specifically provides,

> [i]n the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

RCRA § 3008(a)(2). In § 3008(d), there is no specific reference to alternative enforcement by state or federal authorities or to notice in the case of federal enforcement in RCRA-authorized states. Appellants argue that federal criminal enforcement would warrant notice to the authorized state to a greater extent than civil enforcement, and that the absence of such a notice provision for criminal cases indicates that Congress intended no federal criminal enforcement in authorized states. It is apparent from the legislative history, however, that § 6928(a) is directed at obtaining rapid compliance, and notice prior to federal intervention is therefore significant for reasons not applicable to criminal enforcement, which is directed toward after-the-fact penalties. See S.Rep. No. 96-172, 96th Cong., 2d Sess. 4, reprinted in 1980 U.S.Code Cong. & Admin.News 5019, 5022 ("1980 Senate Report") ("This section also amends section 3008 to authorize the Administrator to act against violations before a 30-day period has elapsed. This provision is aimed at stopping so-called 'midnight ***46** dumping' which may not continue at any location for more than 30 days, and to seek penalties for single occurrences, rather than just continuing offenses."). The statutory differences, therefore, can be explained on grounds having nothing to do with a purported cancellation of federal criminal jurisdiction.

C. RCRA Violations

[8] MacDonald & Watson, D'Allesandro, Slade and Ritarossi were convicted of knowingly transporting, or causing the transportation of hazardous waste, i.e., toluene-contaminated soil, to a facility which does not have a permit, under 42 U.S.C. § 6928(d)(1). See note 6, supra. MacDonald & Watson and NIC were convicted of knowingly treating, storing and disposing of a hazardous waste without a permit, under § 6928(d)(2)(A). See note 6, supra. They now argue that their convictions were illegal because NIC did in fact have a Rhode Island RCRA permit, albeit one that did not allow disposal into its facility of toluene-contaminated soil. NIC's permit, instead, authorized acceptance of liquid RCRA hazardous wastes and non-hazardous solids, such as petroleum-contaminated solid materials. While NIC's permit, therefore, provided no authority to dispose of the hazardous waste in question, appellants contend they did not violate either prong of § 6928(d) because the statute only penalizes transportation "to a facility which does not have a permit under this subchapter," and disposal "without a permit under this subchapter."

We find this argument entirely unpersuasive

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[11] Finally, appellants urge that they could not have reasonably anticipated the charged interpretation of the statute, and that the ambiguity should be resolved in favor of lenity. Public welfare statutes, however, are not to be construed narrowly but rather to effectuate the regulatory purpose. ***50** United States v. Johnson & Towers, Inc., 741 F.2d at 666, and cases cited. We hold that appellants were properly indicted under subsection (d)(1) and subsection (d)(2)(A) for the conduct charged.

D. The Responsible Corporate Officer Doctrine

D'Allesandro, the President and owner of MacDonald & Watson, contends that his conviction under RCRA, § 3008(d)(1), 42 U.S.C. § 6928(d)(1), must be vacated because the district court incorrectly charged the jury regarding the element of knowledge in the case of a corporate officer. [FN12] Section 3008(d)(1) penalizes "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....". (Emphasis supplied.) In his closing, the prosecutor conceded that the government had "no direct evidence that Eugene D'Allesandro actually knew that the Master Chemical shipments were coming in," i.e., were being transported to the Poe Street Lot under contract with his company. The prosecution did present evidence, however, that D'Allesandro was not only the President and owner of MacDonald & Watson but was a "hands-on" manager of that relatively small firm. There was also proof that that firm leased the Poe Street Lot from NIC, and managed it, and that D'Allesandro's subordinates had contracted for and transported the Master Chemical waste for disposal at that site. The government argued that D'Allesandro was guilty of violating § 3008(d)(1) because, as the responsible corporate officer, he was in a position to

ensure compliance with RCRA and had failed to do so even after being warned by a consultant on two earlier occasions that other shipments of toluene-contaminated soil had been received from other customers, and that such material violated NIC's permit. In the government's view, any failure to prove D'Allesandro's actual knowledge of the Master Chemical contract and shipments was irrelevant to his criminal responsibility under § 3008(d)(1) for those shipments.

> FN12. After the court's charge, D'Allesandro objected to the corporate responsibility instruction but not on the ground now raised, namely, the court's failure to require proof of actual knowledge. D'Allesandro thus failed to comply with Fed.R.Crim.P. 30 requiring both an objection and statement of "the matter to which he objects and the grounds of his objection." However, D'Allesandro raised the relevant point at the hearing on his motion for judgment of acquittal at the close of the government's case in chief. He there urged that in the absence of proof of knowledge, the government's attempt to proceed against him under the responsible corporate officer doctrine was improper. In these circumstances, and given the fact that the instruction as given failed to require proof of an essential element, we conclude the question is now properly before us. See Leary v. United States, 395 U.S. 6, 32, 89 S.Ct. 1532, 1546, 23 L.Ed.2d 57 (1969) (a failure to object to unconstitutional jury instructions was sufficiently preserved by objection to same issue in moving for a directed verdict and, later, for a new trial); Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945) (failure to instruct properly on intent so egregious as to excuse failure to object). See also Francis v. Franklin, 471 U.S. 307, 313-18, 105 S.Ct. 1965, 1970-73, 85 L.Ed.2d 344 (1985); Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 2457, 61 L.Ed.2d 39 (1979); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

The court apparently accepted the government's theory. It instructed the jury as follows:

> When an individual Defendant is also a corporate officer, the Government may prove that individual's knowledge in either of two ways. The first way is to demonstrate that the Defendant had actual knowledge of the act in question. The second way is to establish that the defendant was what is called a responsible officer of the corporation committing the act. In order to prove that a person is a responsible corporate officer three things must be shown.
> First, it must be shown that the person is an officer of the corporation, not merely an employee.
>
> Second, it must be shown that the officer had direct responsibility for the activities that are alleged to be illegal. Simply being an officer or even the president of a corporation is not enough. The Government must prove that the person ***51** had a responsibility to supervise the activities in question.
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> And the third requirement is that the officer must have known or believed that the illegal activity of the type alleged occurred.

The court's phrasing of the third element at first glance seems ambiguous: it could be read to require actual knowledge of the Master Chemical shipments themselves. We are satisfied, however, that the court meant only what it literally said: D'Allesandro must have known or believed that illegal shipments of the type alleged had previously occurred. This tied into evidence that D'Allesandro had been advised of two earlier shipments of toluene- contaminated waste, and was told that such waste could not legally be received. For the court to require a finding that D'Allesandro knew of the alleged shipments themselves (i.e., the Master Chemical shipments), would have duplicated the court's earlier instruction on actual knowledge, and was not in accord with the government's theory. [FN13]

> FN13. Thus the prosecutor said, in his closing, "We can concede, Ladies and Gentlemen, that we have no direct evidence Eugene D'Allesandro ... actually knew that the Master Chemical shipments were coming in. But there is another way the Government can show that Eugene D'Allesandro was responsible for these shipments. The court will tell you what the law is but listen for the court's instruction that a corporate officer who is in a position in a company to insure that these types of actions don't occur and who knew that the company was engaged in such types of activities and did

nothing to stop it can be held responsible for these actions."

[12] D'Allesandro challenges this instruction, contending that the use of the "responsible corporate officer" doctrine is improper under § 3008(d)(1) which expressly calls for proof of knowledge, i.e., requires scienter. The government responds that the district court properly adapted the responsible corporate officer doctrine traditionally applied to strict liability offenses to this case, instructing the jury to find knowledge "that the illegal activity of the type alleged occurred,"--a finding that, together with the first two, made it reasonable to infer knowledge of the particular violation. We agree with D'Allesandro that the jury instructions improperly allowed the jury to find him guilty without finding he had actual knowledge of the alleged transportation of hazardous waste on July 30 and 31, 1986, from Master Chemical Company, Boston, Massachusetts, to NIC's site, knowledge being an element the statute requires. [FN14] We must, therefore, vacate his conviction.

FN14. The actual words of D'Allesandro's Count One indictment read as follows: "On or about July 30, 1986, in the District of Rhode Island ... Eugene K. D'Allesandro ... did knowingly transport and cause to be transported hazardous waste, namely toluene and soil contaminated with toluene, from Master Chemical Company, Boston, Massachusetts, to Narragansett Improvement Company, a facility which had neither interim status nor a permit ... to treat, store or dispose of such waste." D'Allesandro's indictment under Count Two is the same, except it alleges that the knowing transportation occurred on or about July 31, 1986.

[13] The seminal cases regarding the responsible corporate officer doctrine are United States v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943), and United States v. Park, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975). These cases concerned misdemeanor charges under the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. §§ 301-392, as amended, relating to the handling or shipping of adulterated or misbranded drugs or food. The offenses alleged in the informations failed to state a knowledge element, and the Court found that they, in fact, dispensed with a scienter requirement, placing "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." Dotterweich, 320 U.S. at 277, 64 S.Ct. at 135. The Court in Park clarified that corporate officer liability in that situation requires only a finding that the officer had "authority with respect to the conditions that formed the basis of the alleged violations." But while Dotterweich and Park thus reflect what is now clear and well-established law in respect to public welfare statutes and regulations lacking an express knowledge or other scienter requirement, ***52** we know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute. Park, 421 U.S. at 674, 95 S.Ct. at 1912. Especially is that so where, as here, the crime is a felony carrying possible imprisonment of five years and, for a second offense, ten.

[14] The district court, nonetheless, applied here a form of the responsible corporate officer doctrine established in Dotterweich and Park for strict liability misdemeanors, as a substitute means for proving the explicit knowledge element of this RCRA felony, 42 U.S.C. § 6928(d)(1). As an alternative to finding actual knowledge, the district court permitted the prosecution to constructively establish defendant's knowledge if the jury found the following: (1) that the defendant was a corporate officer; (2) with responsibility to supervise the allegedly illegal activities; and (3) knew or believed "that the illegal activity of the type alleged occurred." As previously stated, the third element did not necessitate proof of knowledge of the Master Chemical shipments charged in the indictment, but simply proof of earlier occasions when D'Allesandro was told his firm had improperly accepted toluene-contaminated soil.

Contrary to the government's assertions, this instruction did more than simply permit the jury, if it wished, to infer knowledge of the Master Chemical shipments from relevant circumstantial evidence including D'Allesandro's responsibilities and activities as a corporate executive. With respect to circumstantial evidence, the district court properly instructed elsewhere that knowledge did not have to be proven by direct evidence but could be inferred from the defendant's conduct and other facts and circumstances. The court also instructed that the element of knowledge could be satisfied by proof of willful blindness. [FN15] These instructions allowed the jury to consider whether relevant circumstantial evidence established that D'Allesandro actually knew of the charged Master Chemical shipments. These would have sufficed had it merely been the court's purpose to point out that knowledge could be

established by circumstantial evidence, although the court could, had it wished, have elaborated on the extent to which D'Allesandro's responsibilities and duties might lead to a reasonable inference that he knew of the Master Chemical transaction.

> FN15. The court instructed the jury generally regarding the element of knowledge as follows:
> An act is said to be done knowingly if it is done voluntarily and intentionally and not because of ignorance, mistake, accident or some other reason. The requirement that an act be done knowingly is designed to
> insure that a Defendant will not be convicted for an act that he did not intend to commit or the nature of which he did not understand.
> Proof that a Defendant acted knowingly or with knowledge of a particular fact does not require direct evidence of what was in that Defendant's mind. Whether a Defendant acted knowingly or with knowledge of a particular fact may be inferred from that Defendant's conduct, from that Defendant's familiarity with the subject matter in question or from all of the other facts and circumstances connected with the case.
> In determining whether a Defendant acted knowingly, you also may consider whether the Defendant deliberately closed his eyes to what otherwise would have been obvious. If so, the element of knowledge may be satisfied because a Defendant cannot avoid responsibility by purposefully avoiding learning the truth. However, mere negligence or mistake in not learning the facts is not sufficient to satisfy the element of knowledge.
> See generally United States v. Cincotta, 689 F.2d 238, 243 n. 2 (1st Cir.), cert. denied, 459 U.S. 991, 103 S.Ct. 347, 74 L.Ed.2d 387 (1982) ("The conscious avoidance principle means only that specific knowledge may be inferred when a person knows other facts that would induce most people to acquire the specific knowledge in question.... Evidence of conscious avoidance is merely circumstantial evidence of knowledge...."); United States v. Jewell, 532 F.2d 697, 700 (9th Cir.), cert. denied, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976); United States v. Rivera, 926 F.2d 1564, 1571 (11th Cir.1991) ("deliberate ignorance and positive knowledge are equally culpable"). See also United States v. Sanchez-Robles, 927 F.2d 1070, 1073-75 (9th Cir.1991).

[15] Instead, the district court charged, in effect, that proof that D'Allesandro was a responsible corporate officer would conclusively prove the element of his knowledge of the Master Chemical shipments. The jury was told that knowledge could be ***53** proven "in either of two ways." Besides demonstrating actual knowledge, the government could simply establish the defendant was a responsible corporate officer--the latter by showing three things, none of which, individually or collectively, necessarily established his actual knowledge of the illegal transportation charged. Under the district court's instruction, the jury's belief that the responsible corporate officer lacked actual knowledge of, and had not willfully blinded himself to, the criminal transportation alleged would be insufficient for acquittal so long as the officer knew or even erroneously believed that illegal activity of the same type had occurred on another occasion.

We have found no case, and the government cites none, where a jury was instructed that the defendant could be convicted of a federal crime expressly requiring knowledge as an element, solely by reason of a conclusive, or "mandatory" presumption of knowledge of the facts constituting the offense. See Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (per curiam); Francis v. Franklin, 471 U.S. 307, 314 & n. 2, 105 S.Ct. 1965, 1971 & n. 2, 85 L.Ed.2d 344 (1985); Hill v. Maloney, 927 F.2d 646, 648 & n. 3 (1st Cir.1990); see also Contract Courier Services, Inc. v. Research and Special Programs Admin., U.S. Dept. of Transportation, 924 F.2d 112, 114 (7th Cir.1991); cf. Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). The government's primary reliance on the Third Circuit's more limited decision in Johnson & Towers, 741 F.2d 662, 670, is misplaced. There, the court of appeals concluded that "knowingly" applies to all elements of the offense, including permit status, in RCRA § 3008(d)(2)(A). The court of appeals advised that proof of knowledge of the permit requirement and the nonexistence of the permit did not impose a great burden because such knowledge might, in a proper case, be inferred. Relying on the Supreme Court's decision in United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563, 91 S.Ct. 1697, 1700, 29 L.Ed.2d 178 (1971), [FN16] the court of appeals emphasized "that under certain regulatory statutes requiring 'knowing' conduct, the government need prove only knowledge of the actions taken and not of

the statute forbidding them." Johnson & Towers, 741 F.2d at 669; [FN17] see also United States v. Dee, 912 F.2d 741, 745-46 (4th Cir.1990), cert. denied, 499 U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2d 242 (1991) (knowledge of RCRA's prohibitions may be presumed; instruction that defendants had to know substances involved were chemicals, without requiring knowledge they were hazardous, was harmless error); United States v. Sellers, 926 F.2d 410, 416 (5th Cir.1991) (assuming arguendo that district court erred in failing to instruct that government must prove defendant knew waste was hazardous under 42 U.S.C. § 6928(d)(2)(A), error was not plain). Thus, this case supports only the position that knowledge of the law ***54** may be inferred, [FN18] and does not address knowledge of acts.

FN16. In that case, the Supreme Court held that a statute regarding failure to record shipment of chemicals, and specifically proscribing "knowing violation of regulations" did not require knowledge of the regulations. The Court clearly stated that "knowledge of the shipment of the dangerous materials is required." 402 U.S. at 560, 91 S.Ct. at 1699. Thus, the Court reasoned that handlers of dangerous materials may be subject to different standards than others; it was only knowledge of the regulations that the Court found could be presumed. 402 U.S. at 565, 91 S.Ct. at 1701.

FN17. The government also cites the Hayes and Hoflin decisions in support of its position. In Hoflin, as discussed above, the Ninth Circuit disagreed with the Johnson & Towers court and decided that knowledge of the nonexistence of a permit was not necessary for conviction under RCRA, § 3008(d)(2)(A). The Hoflin court, however, found that knowledge of the hazardous nature of the material disposed must be proven, and did not suggest that such knowledge could be irrebuttably presumed for corporate officers as the court instructed here. In Hayes, also discussed above, the Eleventh Circuit found knowledge of the nonexistence of a permit a required element under RCRA, § 3008((d)(1). There, the court of appeals simply found, "in this regulatory context a defendant acts knowingly if he willfully fails to determine the permit status of the facility." Hayes, 786 F.2d at 1504 (citing Boyce Motor Lines v. United States, 342 U.S. 337, 342, 72 S.Ct. 329, 331, 96 L.Ed. 367 (1952)).

FN18. Further, the court of appeals in Johnson & Towers did not indicate how knowledge may be inferred. To the extent the fact of permit nonexistence may be inferred, such inference may be from willful blindness or other circumstantial evidence. The court of appeals did not indicate that such facts could be irrebuttably presumed based on corporate position and facts unrelated to the specific alleged illegal activity charged.

The government's citation of three additional cases in support of its assertion that other courts have sanctioned application of instructions such as those given here is also incorrect. In the first, United States v. Frezzo Brothers, Inc., 602 F.2d 1123 (3d Cir.1979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980), the defendants were convicted of willfully or negligently discharging pollutants into a navigable water of the United States without a permit in violation of 33 U.S.C. §§ 1311(a), 1319(c). Since defendants could have been found guilty solely based on negligence, no presumption of knowledge was necessary to sustain the convictions. Likewise, in the second, United States v. Cattle King Packing Co., Inc., 793 F.2d 232 (10th Cir.), cert. denied, 479 U.S. 985, 107 S.Ct. 573, 93 L.Ed.2d 577 (1986), the responsible corporate officer instruction was sufficient only to put to the jury the issue of the defendant's responsibility for meat inspection violations, which did not require scienter. The jury was also, however, instructed that it must find defendant had intent to defraud for purposes of convicting on charges of fraudulent violations, and another instruction specifically instructed that for all counts but one "the crimes charged in this indictment require proof of specific intent before the defendants can be convicted." Cattle King, 793 F.2d at 241; see also United States v. Hiland, 909 F.2d 1114, 1128 & n. 18 (8th Cir.1990).

Finally, in the third, United States v. Andreadis, 366 F.2d 423 (2d Cir.1966), cert. denied, 385 U.S. 1001, 87 S.Ct. 703, 17 L.Ed.2d 541 (1967), the defendant president of a company was convicted of fraud in advertising and contested the sufficiency of the evidence. Regarding the element of knowledge that the advertising claims were false, the court of appeals concluded that the jury could "infer" that the

defendant had the requisite knowledge of the advertisements' falsity, 366 F.2d at 430. The court's citation to cases concerning fraudulent intent makes clear that its use of the word "infer" relates simply to an inference based on circumstantial evidence. See United States v. Lichota, 351 F.2d 81, 90 (6th Cir.1965), cert. denied, 382 U.S. 1027, 86 S.Ct. 647, 15 L.Ed.2d 540 (1966). Having held that the evidence of knowledge was sufficient, the court alternatively noted that the defendant had an affirmative duty to insure that the advertising agency's claims on behalf of his product were true, and might, "having failed totally to discharge this responsibility in even the slightest measure," therefore be charged with knowledge. Andreadis, 366 F.2d at 430. We understand the Andreadis and other courts to simply state that willful blindness may be inferred from circumstantial evidence, and do not think such cases sanction an independent instruction for jury findings concerning scienter. See Stone v. United States, 113 F.2d 70, 75 (6th Cir.1940) ("Scienter may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known."). [FN19]

> FN19. In United States v. Avant, 275 F.2d 650, 653 (D.C.Cir.1960), the court ordered a new trial due to jury instruction defects, noting as follows:
> A showing of recklessness standing alone does not, as the trial judge's charge tended to suggest, establish knowledge as a matter of law. However, the jury is permitted to impute knowledge of the falsity of the statements to the accused, not as a matter of law but as a consequence of inferences reasonably drawn from the facts shown. 'While there is no allowable inference of knowledge from the mere fact of falsity, there are many cases where from the actor's special situation and continuity of conduct an inference that he did know the untruth of what he said * * * may legitimately be drawn.' Bentel v. United States, 2 Cir., 13 F.2d 327, 329, certiorari denied Amos v. United States, 1926, 273 U.S. 713 [47 S.Ct. 109, 71 L.Ed. 854]. This is more particularly allowable when the actors or utterers are persons 'in a far better position to judge than the unsophisticated public to whom they sold * * *.' Van Riper v. United States, 2 Cir., 13 F.2d 961, 964, certiorari denied, Ackerson v. United States, 1926, 273 U.S. 702 [47 S.Ct. 102, 71 L.Ed. 848]. This concept has been consistently applied in federal courts.
> (Case name italicization added).

[16] ***55** We agree with the decisions discussed above that knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions. Further, willful blindness to the facts constituting the offense may be sufficient to establish knowledge. However, the district court erred by instructing the jury that proof that a defendant was a responsible corporate officer, as described, would suffice to conclusively establish the element of knowledge expressly required under § 3008(d)(1). Simply because a responsible corporate officer believed that on a prior occasion illegal transportation occurred, he did not necessarily possess knowledge of the violation charged. 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. [FN20]

> FN20. We also must consider whether the constitutional error in this case was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 1262, 113 L.Ed.2d 302 (1991) (opinion of Rehnquist, C.J.); Carella v. California, 491 U.S. 263, 266, 109 S.Ct. 2419, 2420, 105 L.Ed.2d 218 (1989); Rose v. Clark, 478 U.S. 570, 576- 78, 106 S.Ct. 3101, 3105-06, 92 L.Ed.2d 460 (1986); Francis v. Franklin, 471 U.S. 307, 325-26, 105 S.Ct. 1965, 1977, 85 L.Ed.2d 344 (1985); Hill, 927 F.2d at 648. We conclude that it was not. The prosecutor conceded, in closing, that the government had no direct evidence of D'Allesandro's knowledge of the Master Chemical shipments, and urged the jury to consider the responsible corporate officer doctrine as a basis for conviction. See supra, note 13. Thus, the government's theory of the case relied specifically on the erroneous instruction establishing a mandatory presumption as to the scienter element of the offense, based on the enumerated predicate facts. We cannot say that these predicate facts-- (1) status as an officer of the corporation; (2) direct responsibility for the activities that are alleged to be illegal; and (3) knowledge or belief that the illegal activity of the type alleged

occurred--conclusively establish knowledge such that no rational jury could find that D'Allesandro did not have knowledge in this case. While the district court could properly have instructed the jury that it could infer knowledge from the circumstantial evidence, in this case the inference is not so "overpowering" as to render the error harmless beyond a reasonable doubt. See Rose, 478 U.S. at 580-81, 106 S.Ct. at 3107-08.

E. CERCLA § 103(b)(3)

CERCLA imposes criminal sanctions upon any person in charge of a facility from which a "reportable quantity" of a hazardous substance is released who fails to immediately notify the appropriate federal agency. CERCLA, § 103(b)(3), 42 U.S.C. § 9603(b)(3) (1982 & Supp. V 1987). [FN21] The default reportable quantity for a hazardous substance is one pound, CERCLA, § 102(b), 42 U.S.C. § 9602(b), unless superseded by regulations promulgated pursuant to CERCLA, § 102(a), 42 U.S.C. § 9602(a). Appellants MacDonald & Watson and NIC contend that the indictment and jury instructions improperly established the reportable quantity of soil contaminated with toluene as one pound. [FN22] For this reason, ***56** they seek reversal of CERCLA convictions. The government responds that it properly charged, and the district court correctly instructed that the reportable quantity for soil contaminated with commercial chemical product toluene (hereinafter "toluene") [FN23] is one pound. Alternatively, the government argues that, since the evidence was undisputed that ten large truckloads of the hazardous waste was released, any error in the charge and jury instructions was harmless. We hold that the one pound reportable quantity set out in the indictment and charged in the court's instructions was incorrect, but constituted harmless error.

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***61** Conclusion

In sum, we affirm the convictions of Faust Ritarossi, Francis Slade and MacDonald & Watson. We vacate the convictions of Eugene D'Allesandro and of NIC and remand for a new trial or such other action as may be consistent herewith.

So ordered.

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