The Criminal Provisions of RCRA: Should Strict Liability Be Applied to its Permit Requirement?

James S. Lynch
THE CRIMINAL PROVISIONS OF RCRA: SHOULD STRICT LIABILITY BE APPLIED TO ITS PERMIT REQUIREMENT?

Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA) in response to increased public concern over the devastating effect of hazardous waste on the environment. The statute was designed to provide a "cradle-to-grave" management scheme for hazardous waste by controlling it from its point of generation to final disposal. Regulations issued by the Environ-

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3 See Note, The Role of Injunctive Relief and Settlements in Superfund Enforcement, 68 COR-
mental Protection Agency (EPA) pursuant to RCRA require a documentation system through which the EPA can track hazardous waste through generation, transportation, treatment, storage and eventual disposal. RCRA is enforced by the EPA through both civil and criminal mechanisms.

During the 1980s the federal government's effort to prosecute environmental crimes increased dramatically. This heightened

**NEILL L. REV. 706, 709 n.24 (1983)** (suggesting that "commentators have deemed RCRA system a 'cradle-to-grave' statutory scheme because subtitle C of the Act traces hazardous waste from generator, to transporter, to disposal facility."); **Note, Landowner Liability Under CERCLA: Is Innocence A Defense?, 4 ST. JOHN'S J. LEGAL COMMENT. 149, 151 n.11 (1988)** (citing 1 D. STEVER, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE at § 5.01, 5-6 (1988)).

RCRA is designed for the following purposes: 1) to provide a system for tracking and preserving a record of hazardous waste movement from its inception to disposal ("cradle to grave"); 2) to ensure disposal is accomplished so as to prevent escape of hazardous waste into the environment; and 3) to provide an enforcement mechanism to ensure compliance with the regulations.

**Id.**


activity in criminal enforcement was prompted by a series of highly publicized incidents that confirmed the public’s belief that the hazardous waste problem was in urgent need of attention.\(^8\) To facilitate this effort Congress amended RCRA in 1980,\(^9\) and again in 1984.\(^10\) Although the majority of the amendments represented

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In 1979 Assistant United States Attorney General James Moorman, who was responsible for enforcing the United States' environmental laws, testified before Congress as to the seriousness of the hazardous waste problem:

Moorman’s testimony reflected the fact that during the late 1970s several highly publicized incidents galvanized public opinion into a conviction that the threat to public health was both real and immediate. In the public’s mind, places such as the Chemical Control site in Elizabeth, New Jersey, Love Canal in Niagara Falls, New York, the so-called Valley of the Drums in Shepardsville, Kentucky, and the Stringfellow Acid Pits in California had become synonymous with - and the symbols of - corporate America’s reckless disregard of public health. *Id.* See generally S. Novick, *supra* note 5, § 13.01[6], at 13-17 (Love Canal prompted EPA staff to heavily publicize similar environmental disasters in an effort to persuade Congress to adopt stricter legislation).


Section 6928(d) as amended provides:

**Criminal Penalties.** Any person who—

1. knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under
minor changes aimed at refining the hazardous waste regulatory

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; or
   (C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other documents filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after November 8, 1984) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under the subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under subchapter—
   (A) in knowing violation of any material condition or requirement of a permit under this subchapter; or
   (B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this subchapter; 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. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

42 U.S.C. § 6928(d) (1982 & Supp. 1989). See also ARBUCKLE, supra note 2, at 101 ("The 1984 Amendments significantly expand the list of these criminal violations. . . . All of this is part of a message from Congress to EPA and the Justice Department that Congress wants to see more rigorous enforcement of the nation's hazardous wastes laws."). See generally Roske & Gulley, The Hazardous and Solid Waste Amendments of 1984: A Dramatic Over-
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program, Congress adopted major changes in one area: criminal enforcement.\(^{11}\) Despite the amendments, federal prosecutors have been unable to effectively enforce RCRA’s criminal provisions due to controversy regarding the requisite mens rea necessary to sustain a conviction.\(^{12}\) Recently, in United States v. Hoflin,\(^{13}\) the Ninth Circuit Court of Appeals interpreted the provisions of RCRA section 6928(d)(2), which imposes criminal penalties upon a person who engages in certain environmentally unsafe conduct, including the disposal of hazardous waste without an authorizing permit. The principal issue in Hoflin concerned the interpretation of the word “knowingly” as it appears in that section.\(^{14}\) The word is undoubtedly a modifier,\(^{15}\) but the statute does not clearly indicate which words it modifies.\(^{16}\)

This Note discusses the requisite mental state for a criminal


\(^{13}\) 880 F.2d 1033 (9th Cir. 1989), cert. denied, 110 S. Ct. 1143 (1990).

\(^{14}\) See Hoflin, 880 F.2d at 1038 (court construed statute to determine whether defendant must “know” dump site lacked permit).

\(^{12}\) See W. LaFave & A. Scott, Criminal Law § 3.4 at 212-14 (2d ed. 1986) (effect of “knowingly” in statutes).

\(^{14}\) See Hayes Int’l, 786 F.2d at 1502 (“Congress did not provide any guidance, either in the statute or the legislative history, concerning the meaning of ‘knowing’ in section 6928(d).”); Johnson & Towers, 741 F.2d at 668 (“As a matter of syntax we find it no more awkward to read ‘knowingly’ as applying to the entire sentence than to read it as modifying only ‘treats, stores or disposes.’”); Fike, supra note 12, at 175 (discussing ambiguity of § 6928(d)). Cf. W. LaFave & A. Scott, Criminal Law § 3.4(b) at 213-14 (2d ed. 1986) (ambiguity regarding scope of “knowingly” as modifier).
conviction under RCRA section 6928(d)(2) and suggests an interpretation that imposes strict liability with respect to its permit requirement. Part I reviews the statutory language, the legislative history, and relevant case law to determine the proper elements of the crime provided for in section 6928(d)(2). Part II examines the impact of the Hoflin case as compared to the conclusions drawn from the analysis in Part I.

I. INTERPRETATION OF SECTION 6928(d)(2)

A. Statutory Construction

In order to properly construe a statute, its language must first be examined.17 RCRA section 6928(d)(2) provides:

[a]ny 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 pursuant to Title I of the Marine Protection, Research and Sanctuaries Act (86 Stat. 1052)[33 U.S.C. §§ 1411 et seq.]; or
(B) in knowing violation of any material condition or requirement of such permit; or
(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards . . .

. . . 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 . . . .18

It is evident that “knowingly” modifies the words “treats,” “stores,” “disposes of,” and “any hazardous waste,”19 but what is

17 See United States v. Turkette, 452 U.S. 576, 580 (1981) (to determine statute’s scope look to language first); Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (statutory interpretation begins with statute’s language); Caminetti v. United States, 242 U.S. 470, 490 (1917) (examine language first; if plain and not leading to absurd result, it is sole evidence of legislative intent); Morris v. United States, 156 F.2d 525, 529 (9th Cir. 1946) (court may rely on sufficiently clear language). See also R. Dickerson, The Language and Application of Statutes 229-33 (1975); 2A C. Sands, Sutherland on Statutory Construction § 46.01 (4th ed. 1975).
19 See Hoflin, 880 F.2d at 1033 (‘‘knowingly’’ modifies ‘‘hazardous waste’’ as well as
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not as clear is whether the word “knowingly” also modifies the permit requirement in subsection (A).20

It is a well-settled rule of Anglo-American jurisprudence that criminal offenses must include a mens rea component.21 Congress may depart from this underlying principle only where the statute is enacted to protect the public welfare.22 The title, subject matter, and available legislative history of RCRA strongly indicate that protection of the public welfare is the purpose behind and goal of RCRA.23 Courts have confirmed this conclusion.24

'treats, stores and disposes of’); Johnson & Towers, 741 F.2d at 669 (“knowingly” applies to all elements of offenses). Cf. Hayes Int'l, 786 F.2d at 1503 (knowledge applies to “hazardous waste” only with respect to facts not with respect to law).


21 See United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978) (“intent generally remains an indispensable element of a criminal offense”); Morissette v. United States, 342 U.S. 246, 254 n.14 (1952) (penal system must require mens rea to be accepted as constitutional); Dennis v. United States, 341 U.S. 494, 500 (1951) (“the existence of a mens rea is the rule of, rather than exception to, the principle of Anglo-American criminal jurisprudence”).

22 See United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (Congress may depart from general rule only if to protect public welfare); United States v. Freed, 401 U.S. 601, 607 (1971) (no element of scienter necessary to convict under Firearm Law); Morissette, 342 U.S. at 252-53 (public welfare offenses “consist only of forbidden acts and omissions,” and therefore require no mental state); United States v. Dotterweich, 320 U.S. 277, 280-81 (1943) (no mens rea necessary where statute touches “phases of the lives and health of people, which in the circumstances of modern industrialism, are largely beyond self-protection”). See also Fike, supra note 12, at 177-78 (mens rea analysis of public welfare offenses); Habicht, supra note 7, at 10485 (public welfare statutes require only knowledge of law or intent to violate it). But see Liparota v. United States, 471 U.S. 419, 433 (1985) (Court, wary of criminalizing innocent conduct, held knowledge of illegality necessary). The Liparota Court noted that the particular (Food Stamp Fraud Act) violation would not threaten the community's health or safety. Id.

23 See Title 42 of the United States Code (Public, Health and Welfare title). In the congressional findings section of the statute, Congress stated that the “disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment.” 42 U.S.C. § 6901(b)(2) (1982). The legislative history also indicates RCRA is a public welfare statute. See H.R. REP. No. 1491, supra note 2, at 3. The Committee on Interstate and Foreign Commerce sought to protect the environment and its population through its recognition of the detrimental effect of improperly discarded hazardous waste. Id.

The Committee also referred to other motivations, such as concern “with the consumption of [the] nation's domestic raw materials and the potential for future material shortages” as well as increasing lack of available landfill areas at which to dispose of discarded materials. Id.

24 See United States v. Hoffin, 880 F.2d 1033, 1038 (9th Cir. 1989) (RCRA is public welfare statute), cert. denied, 110 S. Ct. 1143 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986) (“section 6928(d)(1) is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and
Although it appears that Congress had the authority to create strict liability offenses in this statute,\textsuperscript{25} it is submitted that a review of section 6928(d)(2) in the broader context of RCRA's other criminal provisions supports the argument that strict liability may not have been what the legislature intended. An examination of each criminal provision in section 6928 reveals that "knowledge" is a theme that runs throughout.\textsuperscript{26} Such evidence intimates that Congress may have intended that "knowingly" modify all of section 6928(d), including the permit requirement in section 6928(d)(2).\textsuperscript{27} However, it is more likely that Congress intended to

\textsuperscript{25} See W. LaFave & A. Scott, Criminal Law, § 2.12(d) at 155-56 (2d ed. 1986) (discussing constitutionality of strict liability statutes).

The United States Constitution forbids the federal government (amendment V) and the states (amendment XIV) from depriving any person of life, liberty, or property without due process of law. U.S. Const. amends. V & XIV. Courts have held that offenses requiring no mens rea must bear some substantial relationship to some matter of legitimate public concern so as not to offend due process. See Smith v. California, 361 U.S. 147, 152 (1959) ("public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors - in fact an absolute standard . . . ."); United States v. Balint, 258 U.S. 250 (1922) (federal narcotics statute required no mens rea due to seriousness of offense); United States v. Flum, 518 F.2d 39 (8th Cir.) (stressing seriousness of crime court upheld statute prohibiting boarding or attempting to board aircraft with weapon), cert. denied, 423 U.S. 1018 (1975). Cf. Nigro v. United States, 4 F.2d 781 (8th Cir. 1925) (court found scienter necessary in statute imposing strict liability on those buying drugs with forged stamps). But see Liparota v. United States, 471 U.S. 419 (1985) (strict liability provision struck down in apparent public welfare statute).


\textsuperscript{27} See Hayes Int'l, 786 F.2d at 1503-04 (applying strict liability to section 6928(d) could criminalize innocent conduct, conflicting with congressional intent); Johnson & Towers, 741 F.2d at 668 (court held "knowingly" applies to subsection (A), stating that it was unlikely that Congress intended to strictly criminalize conduct under subsection (A) while not doing so under subsection (B)). The Johnson & Towers court concluded that either "the omission of the word 'knowing' in (A) was inadvertent or that 'knowingly' which introduces subsection (2) applies to subsection (A)." Id. See also Fike, supra note 12, at 179 (arguing for application of mens rea). See generally W. LaFave & A. Scott, Criminal Law § 3.8(a) at 243-46 nn.1-19 (2d ed. 1986) (discussing factors to consider when determining legislative intent regarding strict liability); Sutherland, Statutory Construction § 47.36 (4th ed. 1984) (discussing use of intrinsic aids in statutory interpretation).
create an offense in section 6928(d)(2) that contained a greater degree of culpability. If this were true, and Congress did intend to omit the mens rea from subsection (A), it could have purposefully formulated language to convey that intent. It is submitted that such an intent is expressed in RCRA section 6928(d)(2); the language chosen by Congress makes subsection (A) and subsection (B) critically distinct. While Congress placed a mens rea component in subsection (2), (the language preceding subsections (A) and (B)), subsection (A) conspicuously omits a knowledge requirement, while in subsection (B) knowledge is unmistakably an element.

Notwithstanding this apparent congressional intent to omit a

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[the existing subsection provides criminal penalties for knowingly treating or storing, or disposing of hazardous wastes without a permit, but existing law is unclear whether a violation of a permit condition constitutes a criminal violation. The proposed section as amended would eliminate the ambiguity by providing explicit penalties for knowingly failing to comply with a material condition of the permit.]

This section is 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 responsibly. The Department of Justice has exercised its prosecutorial discretion responsibly under similar provisions in other statutes and the conferes assume that . . . similar care will be used in deciding when a particular permit violation may warrant criminal prosecution of this Act.

Id. (emphasis added). See also Federal Hazardous Waste Law, supra note 8, at 214 n.70 (noting that different degrees of criminal intent may be required for different elements of a particular offense); Fike, supra note 12, at 186 (suggesting that Congress may have intended violations under subsection (B) to be held to different level of intent than subsection (A)).

21 Cf. Liparota v. United States, 471 U.S. 419, 426-27 (1985) (absent precision in drafting, statute must contain mens rea); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986) (if Congress had intended strict liability, it would have dropped "knowingly" requirement).


23 42 U.S.C. § 6928(d)(2) (1982 & Supp. 1989). "Any person who . . . knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter . . . (B) in knowing violation of any material condition or requirement of such permit . . ." Id. (emphasis added). See United States v. Hoflin, 880 F.2d 1033, 1037 (9th Cir. 1989) (to read statute otherwise would "eviscerate the distinction" between subsection (A) and subsection (B)). But see United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984) ("as a matter of syntax we find it no more awkward to read 'knowingly' as applying to the entire sentence than to read it as modifying only 'treats, stores and disposes' "), cert. denied, 468 U.S. 1208 (1985).
mens rea requirement from subsection (A), some have argued that subsection (2)'s "knowingly" runs through the statute and accordingly affects offenses defined in both subsections (A) and (B). While such a reading may comport with certain canons of statutory interpretation, other such canons present a contrary view. To allow the word "knowingly" in subsection (2) to run through and modify the terms of subsections (A) and (B) would render the "knowingly" modifier present in subsection (B) redundant. It is submitted that such a strained reading was not the interpretation intended by Congress.

It is arguable that RCRA's language is clear enough to support an interpretation based on its plain meaning. Nevertheless, it is prudent to examine RCRA's legislative history for congressional perspective.

See Opening Brief for Defendant-Appellant at 25-27, United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989) (No. 86-3071), cert. denied, 110 S. Ct. 1143 (1990) [hereinafter Brief for Defendant]. See also Hayes Int'l, 786 F.2d at 1504 (knowledge requirement runs throughout the statutory section); Johnson & Towers, 741 F.2d at 666 (same).

See SUTHERLAND, supra note 27, § 59.04, at 13. In general, criminal statutes are construed so as to require criminal intent, especially when the offense is a felony. Id. See also United States v. Bailey, 444 U.S. 394, 406 n.6 (1980) (congressional omission of mens rea does not mean punishment can be imposed without proof of mens rea); Morissette v. United States, 342 U.S. 246, 248 (1952) (crime construed as containing mens rea, although not contained in statutory language).

See United States v. Yermian, 468 U.S. 63 (1984). No rule of grammar requires that this term be applied to every subsequent phrase in the section. Id. at 69 n.6. See United States v. Bramblett, 348 U.S. 503, 509-10 (1955). "That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority. But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." Id. See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW § 2.2(a) at 75 (2d ed. 1986) (discussing use of canons in construing criminal statutes).

See Hofin, 880 F.2d at 1038. The Hofin court's interpretation of subsection (A) is consistent with the fundamental principle of statutory construction that "a statute should not be interpreted so as to render the legislature's language mere surplusage." In Re Bellanca Aircraft Corp., 850 F.2d 1275, 1280 (8th Cir. 1988). See also 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1984) (same).

See Hofin, 880 F.2d at 1037 (court concluded statute not ambiguous and accordingly applied plain meaning to its language). The plain meaning rule has been stated as: "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." Caminetti v. United States, 242 U.S. 470, 485 (1917). See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW § 2.2(b) at 76 (2d ed. 1986) (discussing plain meaning rule).

See STASKY, LEGISLATIVE ANALYSIS AND DRAFTING 76 (2d ed. 1984). The context of statutory language includes the purpose the legislature had in passing the statute, its legislative history, the relationship of the statute to other statutes, etc. Id. To obtain this context, one must obviously go "outside" the four corners of the statute. Id. See also Frank-
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B. Legislative History

The primary concern of Congress when enacting RCRA in 1976 was to effectively address the mounting threat to the American public and the environment created by improper waste disposal practices. Due to the gravity of this problem Congress deemed it necessary to provide criminal as well as civil sanctions. The legislative history indicates that Congress intended to impose criminal penalties on only the most serious offenses. It has been argued that "knowing" violations are the most severe and therefore are the only offenses that Congress intended to criminalize. Although this argument may be applicable to the majority of the


See H.R. Rep. No. 1491, supra note 2, at 3. The House Report states:

The overriding concern of the Committee however, is the effect on the population and the environment of the disposal of discarded hazardous wastes - those which by virtue of their composition or longevity are harmful, toxic or lethal. Unless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment.

Id. See also supra note 2 and accompanying text (discussing RCRA's purposes).

See H.R. Rep. No. 1491, supra note 2, at 30 ("Many times civil penalties are more appropriate and more effective than criminal. However, many times when there is a willful violation of a statute which seriously harms human health, criminal penalties may be appropriate."). See also Habicht, supra note 7, at 10485 (Justice Department poll revealed that Americans view environmental crime resulting in death as seventh most severe crime, ahead of skyjacking and drug smuggling); Riesel, supra note 7, at 10072 (suggesting criminal sanctions are especially necessary in corporate crime because imprisonment and social stigma serve as deterrents to corporate officers).

See H.R. Rep. No. 1491, supra note 2, at 30 (report suggests that only willful violations which seriously affect human health are to be penalized); Fike, supra note 12, at 189-90 (evidence in legislative history indicates RCRA's criminal sanctions primarily apply to "most egregious of offenders").

See Brief for Defendant at 29. Hoflin claimed that due to the broad range of enforcement provisions contained in RCRA, prosecutors should tailor the penalty to the crime. Id. Thus, only the most serious violations (those where knowledge is an element) were to be criminally prosecuted. Id. See also United States v. Hayes Int'l Corp., 786 F.2d 1499, 1504 (11th Cir. 1986) (congressional purpose indicates knowledge of permit status required; removing knowing requirement would criminalize innocent conduct); United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984) (unlikely Congress intended to prosecute persons acting without permit irrespective of their knowledge), cert. denied, 469 U.S. 1208 (1985). Cf. United States v. Billie, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987). The Endangered Species Act provided criminal penalties when a violation of the Act was done "knowingly." Id. Although the court found that Congress did "not intend to make knowledge of the law an element" of its criminal violation, defendants contended that knowledge was a necessary element of a criminal penalty. Id. (quoting H.R. Rep. No. 95-1625, 95th Cong., 2d Sess. 26, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9453, 9476).
criminal provisions contained in RCRA, the importance of the permit requirement indicates that this argument is inapplicable here.42 Since the primary purpose of the statute is to deter unpermitted dumping of hazardous waste,43 it would therefore be reasonable for Congress to deem this statute's cardinal prohibition a serious offense and accordingly criminalize such conduct under a strict liability standard.44

The legislative history also indicates a trend toward the strengthening of RCRA's penalty provisions and criminal enforcement mechanisms.45 This is evidenced by the 1980 and 1984 amendments to RCRA.46 The 1980 amendment increased en-

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42 See United States v. Hoffman, 880 F.2d 1033, 1038 (9th Cir. 1989) (discussing importance of permit requirement), cert. denied, 110 S. Ct. 1143 (1990). Those who handle certain hazardous wastes have an affirmative duty to provide information to the EPA in order to secure permits. Id. "Placing this burden on those handling hazardous waste materials makes it possible for the EPA to know who is handling hazardous waste, monitor their activities and enforce compliance with the statute." Id.

43 See 42 U.S.C. § 6902(a) (1982 & Supp. 1989). Section 6902(a) notes that the objectives of the statute "are to promote the protection of health and the environment and to conserve valuable material and energy resources . . . ." Id. It continues by listing eleven means by which to achieve this end. Id. All of the means focus on various ways to halt illegal dumping and include financing, education, research, and "prohibiting future open dumping on the land." Id. See 42 U.S.C. § 6902(b) (Supp. 1989). In 1984 Congress amended the statute to declare the national policy on hazardous waste: "wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is . . . generated should be . . . disposed of so as to minimize the present and future threat to human health . . . ." Id. See also 42 U.S.C. § 6901(b)(4) (1982) ("open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land"); 42 U.S.C. § 6925(a) (1982 & Supp. 1989) (after regulations take effect "disposal of any such hazardous waste is prohibited except in accordance with such a permit").

44 See Hoffman, 880 F.2d at 1038-39 (stressing importance of permit requirement, court held "that knowledge of the absence of a permit is not an element of the offense defined by 42 U.S.C. §§ 6928(d)(2)(A)"); Cf. Morissette v. United States, 342 U.S. 246, 256 (1952). Despite the general requirement of a mens rea in criminal law, the Supreme Court has recognized that a different standard applies to criminal statutes that are designed to protect public welfare and those that are regulatory in nature. Id. With regard to violations of these types of statutes the Court stated, "whatever the intent of the violator, the injury is the same . . . . [L]egislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element." Id. United States v. Billie, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (public welfare statute containing "knowingly" construed as requiring no requisite mental state). But see United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984) (court recognized general rule regarding public welfare statutes but refused to apply such construction to RCRA), cert. denied, 469 U.S. 1208 (1985).

45 See supra notes 9-11 and accompanying text (discussing the 1980 and 1984 amendments' broadening of enforcement devices).

46 See supra notes 9-10 (discussing the 1980 and 1984 amendments to RCRA).
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enforcement power by creating felony sanctions for first offenders, as well as increasing the maximum civil penalties available. It further increased the federal prosecutors' arsenal by creating the offense of knowing endangerment. The 1984 amendments furthered this enforcement trend by repealing the "extreme indifference" and "unjustified disregard" elements of the "knowing endangerment" provision. The accompanying Senate and House Reports indicate that the underlying purpose in enacting the 1984 amendments was to encourage federal prosecutors to initiate criminal actions under this section. RCRA's enactment and subsequent amendments evidence Congress' intent to strengthen the power of federal prosecutors in the area of hazardous waste law enforcement. Accordingly, it is submitted that an interpretation


49 See 42 U.S.C. § 6928(e) (1982 & Supp. 1989). The enactment prohibited "[a]ny person who knowingly transports, treats, stores, [or] disposes of . . . any hazardous waste" from knowingly placing another person in "imminent danger of death or serious bodily injury." Id. See Federal Hazardous Waste Law, supra note 8, at 207. The "knowing endangerment" offense became the first of its kind in federal law; its enactment reflects the legislature's objective of "providing prosecutors with enforcement authority adequate to address the more egregious instances of improper waste disposal . . . ." Id.

50 See supra note 10 (discussing 1984 amendments).

51 See 42 U.S.C. § 6928(e)(2)(A), (B) (1982 & Supp. 1989). Prior to the 1984 amendments, the "knowing endangerment" provision required the elements of either "an unjustified and inexcusable disregard for human life, or . . . an extreme indifference for human life" to be proven for conviction. Id. These provisions placed such a heavy burden of proof on the government that only one indictment was handed down before the amendments. See United States v. Greer, 655 F.2d 51, 52-54 (5th Cir. 1981) (employees directed to test deadly chemicals by sniffing them, rather than conducting appropriate tests as specified by RCRA). See also Federal Hazardous Waste Law, supra note 8, at 213 ("reluctance of federal prosecutors to initiate criminal actions" under "knowing endangerment" provision led to repeal of "extreme indifference" and "unjustified disregard" elements).


53 Cf. Fike, supra note 12, at 191. This commentator suggests that due to the extreme
that achieves this worthwhile end would be appropriate; not requiring proof of knowledge for successful prosecution of offenses connected with RCRA’s permit requirement will facilitate this desired result.

Additional evidence of the legislative intent surfaced during the 1980 amendment process. Commentary by the House Conference Committee on the “knowing endangerment” provision contained in the 1980 amendments reveals to a greater extent the sentiments of Congress. Its commentary contained the following observations concerning section 6928: “The state of mind for all criminal violations under section [6928] is ‘knowing.’ The conference have not sought to define ‘knowing’ for offenses under subsection (d); that process has been left to the courts under general principles.” Congress chose not to elaborate on the mens rea issue and did not further address these “general principles.” In construing RCRA, the courts are in agreement that the most important “general principle” is the well-established proposition that the criminal provisions of statutes that are designed to protect the public health are to be construed so as to effectuate their regulatory purpose. In order to achieve the regulatory purpose of this importance Congress placed on “stopping the illicit disposal of hazardous wastes, one may assume that Congress’s intent was to maximize, not minimize, the deterrent effect of RCRA’s criminal provisions.”

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*See supra* note 9 (discussion of 1980 amendment).

*See* H.R. CONF. REP. NO. 1444, 96th Cong., 2d Sess. 39 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5036. The Report deals specifically with subsection (f) which defines the mens rea necessary for conviction under the newly added “knowing endangerment” provision. *Id.* See also *infra* note 56 and accompanying text.

*See* H.R. CONF. REP. NO. 1444, 96th Cong., 2d Sess. 39 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5036. The Report continues “[s]ince subsection (e) creates an entirely new offense, however, the conference substitute defines specifically the nature and quality of the knowledge that must be proved.” *Id.*

*Id.*

*See* United States v. Hayes Int’l Corp., 786 F.2d 1499, 1502-03 (11th Cir. 1986) (reviewing long list of cases to determine “general principles” and construing statute to best effectuate regulatory purpose); United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984) (relying on precedents court held regulatory statutes are to be construed to effectuate regulatory purpose), *cert. denied*, 469 U.S. 1208 (1985). *Cf.* United States v. Park, 421 U.S. 658, 673 (1975) (upheld penal sanctions cast in rigorous terms when seen fit to enforce accountability of corporate agents dealing with products that may affect health of customers); United States v. Freed, 401 U.S. 601, 607 (1971) (construed firearm statute to include no mens rea because statute was “regulatory measure in the interest of public safety”); Morissette v. United States, 342 U.S. 246, 254 (1952) (construed public welfare statute to have no mens rea to maximize its deterrent effect). *But see*
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statute, a construction that maximizes its deterrent effect would be appropriate. Consequently, reading a mens rea element into subsection (d)(2)(A) would contravene legislative intent by making the offense more difficult to prosecute.

C. Precedent

When interpreting section 6928(d), courts have been plagued by the troublesome statutory language as well as the lack of statutory guidance. The Third Circuit Court of Appeals, in United States v. Johnson & Towers, Inc., was the first appellate court to address these issues.

The Johnson & Towers corporation and two of its employees were charged with dumping chemicals into a trench that flowed into a tributary of the Delaware River. The corporation pleaded guilty, but the individual defendants moved for dismissal of the RCRA counts, contending that since they were not “owners or operators” of the corporation they were not subject to the statute. The motion was granted and the government appealed.


Cf. Freed, 401 U.S. at 607 (construed firearm statute to omit mens rea, which maximized deterrent effect); United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (construed hazardous waste statute to allow prosecutor to presume defendant was aware of regulation, which maximizes deterrent effect). But cf. Liparota, 471 U.S. at 433. Liparota construed a regulatory statute in such a way so as not to maximize deterrent effect by requiring a culpable mental state. The Court distinguished the statute in Liparota from those in Freed and International Minerals & Chem. Corp. by noting that it did not involve “a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”

See Hayes Int’l, 786 F.2d at 1502 (“Congress did not provide any guidance either in the statute or the legislative history, concerning the meaning of ‘knowing’ in section 6928(d).”); Johnson & Towers, 741 F.2d at 668 (concluding language of section 6928(d)(2)(A) is ambiguous). But see United States v. Hoflin, 880 F.2d 1033, 1037 (9th Cir. 1989) (concluding statute is unambiguous).


See Brief for Appellee at 18, United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989) (No. 86-3071), cert. denied, 110 S. Ct. 1143 (1990) [herinafter Brief for Appellee].


Id. Jack Hopkins, a foreman, and Peter Angel, servicing manager in the trucking department, were the two remaining defendants employed by Johnson & Towers, Inc. Id.

Id. at 665. The single issue on appeal was whether the individual defendants were
In reversing, Judge Sloviter rejected the district court's construction of the statute as creating "an unduly narrow view of both the statutory language and the congressional intent" and held that the two defendants were "persons" within the meaning of the statute. In dicta, the Johnson & Towers court then interpreted what proof of knowledge, under section 6928(d)(2), would be necessary for conviction at trial. The Third Circuit, while noting that the regulatory purpose of the statute provides a reasonable basis for reading the statute with no mens rea requirement, nevertheless held that "such a reading would be arbitrary and nonsensical when applied to this statute." The court reasoned that it was unlikely that Congress intended to strictly criminalize conduct under subsection (A), while not doing so under subsection (B). It concluded that either Congress inadvertently omitted a mens rea element from subsection (A), or that the mens rea requirement from subsection (2) ran through and modified subsection (A). Accordingly, the Johnson & Towers court held that the statute required a showing of knowledge for every element of the offense.

Although the Johnson & Towers analysis may appear reasonable, when viewed in light of the statute's legislative history, its conclu-
sion is flawed.\(^7\)\(^8\) As previously noted, it is unlikely that Congress accidentally omitted mens rea language from section 6928(d)(2).\(^7\)\(^4\) To the contrary, strict compliance with the permit requirement is necessary to effectuate the statutory purpose.\(^7\)\(^5\) This strongly indicates that Congress intentionally omitted this knowledge modifier in order to promote enforcement, and ultimately, compliance.\(^7\)\(^6\) With this in mind, it is unlikely that the Johnson & Towers decision will be given much precedential weight.\(^7\)\(^7\)

Section 6928 was again construed in *United States v. Hayes International Corp.*\(^7\)\(^8\) In *Hayes International*, the corporation and one of its employees were convicted of charges based on their consignment of leftover jet fuel, paint, and solvents to an unpermitted recycling firm.\(^7\)\(^9\) The trial court set aside the guilty verdict on several grounds, one of which was that the defendants had no knowledge that the recycling firm to which they consigned their waste did not possess the requisite permit.\(^8\)\(^0\)

The Eleventh Circuit Court of Appeals reversed,\(^8\)\(^1\) articulating that in an industry as heavily regulated as that of hazardous waste management, ignorance of the law is no defense.\(^8\)\(^2\) The *Hayes International* court stated that it would also be no defense to claim a lack of knowledge that the substance was a “hazardous waste”

\(^7\)\(^3\) See *supra* note 52 and accompanying text (evidence that Congress intended to promote federal enforcement); notes 53-58 and accompanying text (arguing that to effectuate regulatory purpose, courts should construe regulatory statute to maximize deterrent effect).

\(^7\)\(^4\) See *supra* notes 27-32 and accompanying text (discussing apparent congressional intent to omit mens rea requirement from subsection (A)).

\(^7\)\(^5\) See *supra* notes 42-44 and accompanying text (discussing importance of permit requirement).

\(^7\)\(^6\) *Id.*

\(^7\)\(^7\) See Hoflin, 880 F.2d at 1038 (court declined to follow Johnson & Towers). See also Fike, *supra* note 12, at 185-87 (discussing weakness of Johnson & Towers analysis).

\(^7\)\(^8\) 786 F.2d 1499 (11th Cir. 1986).

\(^7\)\(^9\) *Id.* at 1500. Hayes International Corp. operated an airplane refurbishing plant. *Id.* Performance Advantage, the recycling firm, paid Hayes 20 cents per gallon for left over jet fuel, which they recycled, and at no extra cost removed the paint and solvents. *Id.*

\(^8\)\(^0\) *Hayes Int'l*, 786 F.2d at 1501. The other grounds were: (1) the defendants did not commit any “knowing” violation because they misunderstood the regulations, and (2) the defendants did not commit a “knowing” violation because they believed Performance Advantage was recycling wastes. *Id.*

\(^8\)\(^1\) *Id.* at 1507.

\(^8\)\(^2\) *Id.* at 1503. The *Hayes Int'l* court construed the statute as a public welfare statute. *Id.* See also *supra* note 57 and accompanying text (discussing public welfare statutes).
within the meaning of the regulations, nor would it be a defense to argue ignorance of the permit requirement. Although the Eleventh Circuit held that a party may be convicted without awareness of the regulation, it concurrently determined that in order to convict a defendant, the prosecutor must prove that the defendant knew the facility with which it was dealing had no permit. The court recognized this paradox, but reasoned that to hold otherwise might criminalize innocent conduct. Judge Kravitch, writing for the court, concluded that such a standard does not place an excessive burden on federal prosecutors who could readily prove this knowledge circumstantially.

The *Hayes International* court chose not to impose a strict liability standard on subsection (A) due to a fear that a contrary rule might punish the innocent. Such apprehension is unwarranted because this is a risk Congress chose to take. Congress imposed this high standard of liability in an effort to induce those handling hazardous waste to ascertain the truth. Accordingly, it is suggested that an interpretation imposing this affirmative duty on those handling toxic waste would more effectively realize the intent of Congress.

In sum, *Johnson & Towers* and *Hayes International* both recog-

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83 *Hayes Int'l*, 786 F.2d at 1503. Distinguishing *Liparota*, the court concluded that knowledge of the illegality is not an element of the crime. *Id.*

84 *Id.*

85 *Id.* at 1505. The *Hayes Int'l* court asserted that the government does not face an unacceptable burden of proof in showing that the defendant acted with knowledge of permit status because the court allowed the prosecutor to prove this knowledge circumstantially. *Id.* In addition, the court also recognized the doctrine of "willful disregard." *Id.*

86 *Id.* at 1504 n.6. The court stated that "it might seem anomalous to hold that the defendant had actual knowledge that the law requires a permit, but that it must show knowledge of the permit status of the disposal site at issue." *Id.* The court feared someone might be tricked into believing a facility had a permit, deliver material to them, and be punished for this mistake of fact. See *id.* But see *Hoflin*, 880 F.2d at 1038 (placing burden on handlers of waste would better effectuate legislative purpose); *supra* notes 42-44 and accompanying text (discussing importance of permit requirement).

87 *Hayes Int'l*, 786 F.2d at 1505. See *supra* note 84.

88 *See supra* note 86.

89 Cf. *Hoflin*, 880 F.2d at 1038 (construing language according to legislative intent, despite warnings expressed in *Hayes Int'l* concerning mistake of fact).

90 *See Hoflin*, 880 F.2d at 1038 ("those who handle wastes are affirmatively required to provide information to the EPA in order to secure permits."); 42 U.S.C. § 6925(b) (1982) (requirements of permit application).
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ized the need for strict compliance with RCRA provisions, yet each, in construing the permit requirement to include a mens rea element, fell short of giving the prosecutor the necessary enforcement power. Nevertheless, both decisions have increased the power of the federal prosecutor by adding to his arsenal the doctrines of "inferred knowledge," "conscious avoidance," and "presumed knowledge." Such an enforcement trend, if continued, would lead to a construction of this public welfare statute in a way that fulfills its legislative objective.

II. **The Hoflin Case**

Recently, in *United States v. Hoflin*, the Ninth Circuit Court of Appeals construed RCRA section 6928(d)(2). Douglas Hoflin, as Director of Public Works for the city of Ocean Shores, Washington, instructed one of his employees to haul old drums that held surplus flammable traffic paint to the city sewage treatment plant and bury them. Following these instructions, Hoflin's employee buried fourteen drums at the plant. Testimony revealed that during the burial process, several drums were leaking and at least one broke open. Almost two years later, the incident was re-

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91 See *Hayes Int'l*, 786 F.2d at 1503 ("statute is undeniably . . . public welfare statute involving . . . heavily regulated area with great ramifications for . . . public health and safety."); *Johnson & Towers*, 741 F.2d at 666 (noting that although result is harsh, this public welfare statute must be construed to effectuate its regulatory purpose).

92 See *Hayes Int'l*, 786 F.2d at 1504 ("inferred knowledge" and "conscious avoidance"); *Johnson & Towers*, 741 F.2d at 669 ("presumed knowledge"); *Federal Hazardous Waste Law*, supra note 8, at 236 (discussing these doctrines as applied to *Johnson & Towers* and *Hayes Int'l*).

93 See *Federal Hazardous Waste Law*, supra note 8, at 236 (suggesting that *Hayes Int'l* and *Johnson & Towers* have created a trend toward enhanced enforcement power and should their progeny continue this trend, legislative intent will be realized); Fike, *supra* note 12, at 197. The author states that "the criminal provisions of RCRA have been correctly interpreted by the Eleventh Circuit in *Hayes Int'l* and should be interpreted by other courts as establishing a general intent offense" as is indicated by the legislative history of the Act. *Id.*

94 880 F.2d 1033 (9th Cir. 1989), cert. denied, 110 S. Ct. 1143 (1990).

95 *Id.* at 1035. The director of the sewage treatment plant, Fred Carey, urged Hoflin not to bury the paint there because he felt it would jeopardize the plant's National Pollutant Discharge Elimination System (NPDES) certification, but Hoflin proceeded anyway. See Brief for Appellee at 9.

96 *Hoflin*, 880 F.2d at 1035.

97 *Id.* The hole was not deep enough, so the employees crushed the barrels with a front-end loader to make them fit. See Brief for Appellee at 9-10.
ported to authorities. The EPA recovered the drums, which were discovered to have contained material deemed hazardous under 'RCRA,' thereby requiring disposal only at facilities holding EPA permits. No such permit had been obtained by the city sewage treatment plant. Consequently, Hoflin was indicted and convicted of disposing of hazardous waste without a permit, in violation of RCRA section 6928(d)(2)(A).

On appeal, the defendant contended that he did not know the city lacked the required permit. This argument compelled the Ninth Circuit to construe section 6928(d)(2)(A) to determine whether knowledge of the lack of a permit is an essential element of the crime.

The Hoflin court began its analysis by interpreting the language of the statute. It concluded, contrary to the Johnson & Towers court, that the language is unambiguous, and accordingly construed its plain meaning. As a result, the Ninth Circuit held that knowledge of the absence of a permit is not an element under section 6928(d)(2)(A). Judge Thompson, writing for the court, reasoned that such a result is consistent with the purpose of RCRA, which is to protect the public and the environment from the grave dangers associated with unregulated hazardous waste disposal. Moreover, the court maintained that this decision was

98 Hoflin, 880 F.2d at 1035. The director of the sewage treatment plant finally reported the incident. Id.
100 Hoflin, 880 F.2d at 1035.
101 Id.
102 Id. at 1036. Hoflin was also indicted for conspiracy to dispose of a hazardous waste without a permit, in violation of 18 U.S.C. § 371 and 18 U.S.C. § 2, from which he was acquitted, and on an unrelated offense of disposing of kitchen sludge in violation of 18 U.S.C. § 2 and 33 U.S.C. § 1319(c)(1), under which he was convicted. Id.
103 Hoflin, 880 F.2d at 1036. Hoflin unsuccessfully argued that knowledge of the permit was an element of the offense and that the failure to so instruct the jury was reversible error. Id.
104 Id. at 1037.
105 Id. See supra note 17 and accompanying text (discussing proper method of statutory interpretation).
106 See Hoflin, 880 F.2d at 1037 (statute unambiguous so no need to look beyond plain meaning of language); but see Johnson & Towers, 741 F.2d at 668 (statute ambiguous so must look beyond words to determine meaning).
107 Hofin, 880 F.2d at 1037.
108 See id. at 1038. "Millions of tons of hazardous substances are literally dumped on the
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in accord with other decisions that have construed similar public welfare statutes. Finally, the Hoflin court concluded that the placement of this burden on those who handle hazardous waste will allow the EPA to better enforce compliance, thus effectuating RCRA's legislative purpose.

In accord with Part I's analysis, the Hoflin court adopted a strict liability standard with respect to RCRA's permit requirement under section 6928(d)(2)(A). It is suggested that this approach correctly interprets the statute's language and fulfills the legislature's intent.

CONCLUSION

Despite the inherent difficulty in construing inexact statutory language coupled with insufficient legislative history, this Note has suggested that RCRA section 6928(d)(2)(A) has been correctly interpreted by the Ninth Circuit in Hoflin. The language of the statute, when viewed after an examination of its legislative history, strongly indicates that strict liability with respect to its permit requirement was intended. Historically, courts have attempted to construe public welfare statutes so as to comport with congressional objectives of strict enforcement. The determination in Hoflin that RCRA section 6928(d)(2)(A) requires no mens rea will maximize the desired deterrent effect of this statute, thereby conforming with congressional intent and society's concern.

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ground each year; a good deal of these can blind, cripple or kill.” Id. (citing 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6241, 6249). See also supra note 2 and accompanying text (discussing purpose of RCRA).

Hoflin, 880 F.2d at 1038. See supra notes 22-26 and accompanying text (discussing RCRA as public welfare statute).

Hoflin, 880 F.2d at 1038. “Finally, our conclusion is consistent with RCRA's goals and the treatment Congress gave 'knowledge' in 42 U.S.C. § 6928(d)(2)(A) and (B) to achieve these goals.” Id.

Id.