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Illegal Drug Laboratories: A Growing Health and Toxic Waste Problem

I. Introduction

Clandestine drug processing laboratories¹ pose a grave threat to the environment.² These laboratories, using easily obtainable precursor³ and essential chemicals,⁴ generate toxic fumes⁵ which are capable of traveling long distances.⁶ Law enforcement officers have experienced severe headaches, eye irritations, skin rashes, and mood swings after conducting investigations of illegal drug laboratories.⁷ Many chemicals used in illegal laboratories are carcinogenic.⁸ Other laboratory chemicals can damage the heart, lungs, liver, and blood.⁹ Individuals exposed to fumes from laboratory chemicals may face long-

1. A clandestine laboratory is defined as any laboratory, either sophisticated or makeshift, which covertly manufactures dangerous drugs. Clandestine laboratory chemists may be formally educated in chemistry or may follow a prescribed formula, obtained from an underground source. *Clandestine Manufacture of Illicit Drugs: Hearings Before the Subcomm. on Government Information, Justice, and Agriculture, of the House Government Operations Comm.*, 99th Cong., 2d Sess. 7 (1985) [hereinafter *Hearings*].

2. *Id.* at 1-2.

3. Precursor chemicals are used directly in the manufacturing of controlled substances and include: anthranilic acid and its salts; benzyl cyanide; ephedrine; its salts, optical isomers, and salts of optical isomers; ergonovine and its salts; ergotamine and its salts; n-acetylanthranilic acid and its salts; norpseudoephedrine, its salts, optical isomers, and salts of optical isomers; phenylacetic acid and its salts; phenylpropanolamine, its salts, optical isomers, and salts of optical isomers; piperidine and its salts; pseudoephedrine, its salts, optical isomers, and salts of optical isomers; 3, 4-methylenedioxypheyl-2-propanone, H.R. 5210, 100th Cong., 2d Sess. § 6054, 134 CONG. REC. 11,150 (1988).

4. Essential chemicals are used as solvents, reagents, or catalysts in manufacturing a controlled substance and include: acetic anhydride, acetone, benzyl chloride, ethyl ether, hydriodic acid, potassium permanganate, 2-butanone, and toluene. *Id.*

5. *People v. Messina*, 165 Cal. App. 3d 937, 212 Cal. Rptr. 75 (1985).

6. *People v. Osuna*, 187 Cal. App. 3d 845, 232 Cal. Rptr. 220 (1986).

7. *Hearings*, *supra* note 1, at 87.

8. *Id.* at 45.

9. *Id.*

term health problems because some fatty tissues in the body may store these chemicals¹⁰ and the effects are cumulative.¹¹

The extremely volatile nature of chemicals such as ether, used in drug processing, present another hazard.¹² Moisture, pressure, and thermal or mechanical shock can affect the explosive properties of ether.¹³ In Prince George's County, Maryland, residential drug producers were killed when ether triggered an explosion.¹⁴ The explosion also displaced ten families who were living in the same apartment building.¹⁵ In New York City, several buildings were damaged by a residential laboratory explosion and fire.¹⁶ The owner of the building was seriously burned in the fire.¹⁷

The illegal disposal of chemical waste from drug laboratories contaminates dwellings and pollutes the soil and water.¹⁸ The problem has become so severe that the California Emergency Response Coordinator for toxic substances control estimated that seventy to eighty percent of his calls involve drug laboratory waste.¹⁹ In March, 1988, more than 450 teachers and pupils were forced to vacate a San Diego elementary school because chemical waste from an illegal drug laboratory had been dumped next to the school yard.²⁰ Many people have required hospitalization from this chemical waste exposure.²¹

The operation of clandestine drug laboratories, resulting

10. *Id.*

11. *Id.* at 87.

12. *Id.* at 120.

13. *Id.* Ethyl ether can degrade and form peroxides when it is stored. Merely shaking a drum of ethyl ether with peroxides can cause an explosion. Government's Trial Brief, *United States v. Tumin*, No. CR 87-488, at 5 (E.D.N.Y. 1988) [hereinafter Trial Brief].

14. *Hearings*, *supra* note 1, at 87.

15. *Id.*

16. *Recent Explosions Reflect Increase in Cocaine Labs*, N.Y. Times, Mar. 25, 1987, at B3, col. 3.

17. *Id.* See *People v. Duncan*, 42 Cal. 3d 91, 227 Cal. Rptr. 654 (1986).

18. Witkin, *The New Midnight Dumpers*, U.S. NEWS AND WORLD REP., Jan. 1989, at 57.

19. *Id.*

20. *Id.*

21. *Id.*

in mass destruction of life and property, creates a law enforcement challenge. This article examines how existing laws may be used to alleviate the illegal drug manufacturing dilemma. The article first discusses the use of federal legislation, such as the 1988 anti-drug bill²² and environmental statutes, including the Toxic Substance Control Act (TSCA),²³ the Resource Conservation and Recovery Act (RCRA),²⁴ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),²⁵ and Title III of the Superfund Amendments and Reauthorization Act (SARA), also known as the Emergency Planning and Community Right-to-Know Act (EPCRA).²⁶

In addition, this article will also examine landlord liability and the role of nuisance law. This article concludes that litigation against landlords of illegal drug producers and, more importantly, convictions of drug operators under environmental statutes, can have a significant deterrent effect on illegal drug manufacturing activities.

II. Federal Anti-Drug Legislation

In 1988, the 100th Congress, recognizing the need for a strong response to the public health problem of drugs, passed an extensive anti-drug bill.²⁷ The law includes a provision to regulate the distribution of chemicals used to produce illegal drugs.²⁸ Chemical companies are required to keep records²⁹ of sales and purchases of regulated chemicals, to report any

22. Omnibus Anti-Substance Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

23. 15 U.S.C. §§ 2601-2629 (1988).

24. 42 U.S.C. §§ 6901-6991 (1988).

25. 42 U.S.C. §§ 9601-9675 (1988).

26. 42 U.S.C. §§ 11001-11050 (1988).

27. Omnibus Anti-Substance Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

28. *Id.* See 134 CONG. REC. S14,080 (1988).

29. Records must be kept for four years for precursor chemicals and two years for essential chemicals. 134 CONG. REC. S14,080 (1988). Records include "the date, identity of those involved in the transaction(s), the quantity and form of the transaction, and the method of transfer." *Id.*

transactions of an extraordinary quantity,³⁰ and to give notice to the Drug Enforcement Agency (DEA) of uncommon methods of payment and any excessive loss or disappearance of a listed chemical.³¹ The DEA hopes to use these records³² to locate illicit drug manufacturers by the surveillance and investigation of suspicious buyers.³³

Another provision establishes a task force to formulate and implement a program for the cleanup and disposal of hazardous waste produced by illegal drug laboratories.³⁴ However, the task force must first consider the following items:

- (1) The volume of hazardous wastes produced by illegal drug laboratories.³⁵
- (2) The cost of cleanup and disposal.³⁶
- (3) The effectiveness of the various methods of cleanup and disposal.³⁷
- (4) The coordination of efforts between the Environmental Protection Agency and the Drug Enforcement Administration in cleanup and disposal.³⁸
- (5) The dissemination of information to law enforcement agencies that are responsible for enforcement of drug

30. A threshold amount, including a cumulative threshold amount for multiple transactions is determined by the Attorney General in consultation with the chemical industry. The quantities of a listed chemical normally used for lawful purposes are considered. 134 CONG. REC. 11,150 (1988).

Chemical companies must report domestic sales of more than fifty gallons a month and foreign sales of more than 500 gallons a month for ethyl ether, acetone, methyl ether, ketone, and toluene. See *Problems Loom in Effort to Control Use of Chemicals for Illicit Drugs*, N.Y. Times, Oct. 24, 1989, at C1, col. 3.

31. 134 CONG. REC. S14,080 (1988).

32. "These reports shall be made available to agents stipulated by the Attorney General." *Id.*

33. A buyer placed a large order for 1,300 barrels of ether with J.T. Baker, Inc., a chemical distributor in Phillipsburg, N.J. The buyer paid cash for the chemical and requested that the fifty-five gallon barrels not be labeled. The company informed federal agents. The agents planted electronic beepers inside the barrels and were able to track the shipment to a cocaine laboratory. 134 CONG. REC. S14,098 (1988).

34. 134 CONG. REC. S16,191 (1988).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

laws.³⁹

The law also includes a provision providing state and local governments with grants for demonstration projects for the cleanup and safe disposal of substances associated with illegal drug laboratories.⁴⁰

III. Applicability of Environmental Statutes: Criminal Provisions

A. Background

Most federal environmental statutes contain civil and criminal sanctions.⁴¹ Prior to 1981, criminal enforcement was rare.⁴² In January, 1981, the Office of Criminal Enforcement (OCE) was created at the Environmental Protection Agency (EPA),⁴³ and the Land and Natural Resources Division of the Department of Justice also organized a special unit within its Environmental Enforcement Section to investigate and prosecute environmental crimes.⁴⁴ In October, 1982, the Environmental Protection Agency hired its first criminal investigators.⁴⁵ Investigators, now located in all ten regional EPA offices,⁴⁶ work directly with United States Attorneys' offices.⁴⁷

39. *Id.*

40. 134 CONG. REC. S14,109 (1988).

41. See Clean Water Act, 33 U.S.C. §§ 1319(c)(1)-(4), 1321(b)(5) (1988); Clean Air Act, 42 U.S.C. § 7413(c)(1)-(2) (1988); RCRA, 42 U.S.C. § 6928(d)-(e) (1988); TSCA, 15 U.S.C. §§ 2614, 2615(b) (1988); CERCLA, 42 U.S.C. § 9603(a)-(d) (1988); EPCRA, 42 U.S.C. § 11045(b)(4), (d)(2) (1988).

42. McMurray and Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 18 LAND USE & ENV'T L. REV. 428 (1987)[hereinafter McMurray and Ramsey]. Efforts were spent primarily "on defending challenges against EPA's promulgation of regulations or on actions against EPA for its failure to meet statutory deadlines." *Id.* Only fifteen criminal prosecutions occurred between December, 1972 and November, 1974. *Id.* n.2.

43. *Id.* at 434, 438.

44. *Id.* at 434.

45. *Id.*

46. *Id.* at 438. Regional offices are located in Boston, New York, Philadelphia, Atlanta, Chicago, Dallas, Kansas City, Denver, San Francisco and Seattle. 2 Toxic Substances Control Guide 14-15 (J.J. Keller ed. 1984).

47. McMurray and Ramsey, *supra* note 42 at 438. "As deputized marshalls, investigators have authority to carry firearms and execute search and arrest warrants."

B. Enforcement

1. *The Toxic Substances Control Act*

TSCA⁴⁸ authorizes the EPA to regulate the manufacturing,⁴⁹ processing,⁵⁰ distribution in commerce,⁵¹ use, and disposal of chemical substances and mixtures.⁵² While there are exceptions,⁵³ a chemical substance is defined as: "[A]ny organic or inorganic substance of a particular molecular identity, including: (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction, or occur-

Id. n.34. The FBI also agreed to investigate thirty cases per year upon request from EPA as evidenced in a 1982 memorandum. *Id.*

48. 15 U.S.C. §§ 2601-2629 (1988).

49. "'Manufacture' means to produce or manufacture in the United States or import into the customs territory of the United States." See 15 U.S.C. § 2602(7) (1988); 40 C.F.R. § 720.3(g) (1989).

50. "'Process' means the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce (A) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture, or (B) as part of a mixture or article containing the chemical substance or mixture." 15 U.S.C. § 2602(10) (1988); 40 C.F.R. § 720.3(aa) (1989).

51. "'Distribute in commerce' means to sell in commerce, to introduce or deliver for introduction into commerce, or to hold after introduction into commerce." 15 U.S.C. § 2602(14) (1988); 40 C.F.R. § 720.3(i) (1989). "'Commerce' means trade, traffic, transportation or other commerce (1) between a place in a State and any place outside of such State. . . ." 15 U.S.C. § 2602(3) (1988); 40 C.F.R. § 720.3(f) (1989). Federal officials estimate that mom-and-pop illegal crack (methamphetamine, a form of speed) labs in the West and Midwest will produce twenty-five tons of the narcotic in 1990, at a profit of \$3 billion. *The Newest Drug War*, NEWSWEEK, Apr. 3, 1989, at 20. See *United States v. Gomez*, No. 89-CR-92, slip. op. at 1-2 (N.D.N.Y. July 17, 1989) (enormous financial profits from cocaine labs); *United States v. Mendoza*, 722 F.2d 96, 103 (5th Cir. 1983) ("[P]ossession of a quantity of narcotics so large that it could not be used by the possessor alone justifies the conclusion that possession [is] for distribution rather than for personal consumption.").

52. 15 U.S.C. §§ 2601-2629.

53. *Id.* § 2602(B)(ii)(iii)(iv)(v). For example, the following are not regulated under TSCA: pesticides (regulated by EPA under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136-136y (1988), tobacco or tobacco products and firearms (regulated by the Department of Commerce and the Bureau of Alcohol, Tobacco, and Firearms), source material, special nuclear material or by-product material (regulated by the Nuclear Regulatory Commission), and food, food additives, drugs, cosmetics, or devices (regulated under the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. §§ 321-393 (1988)).

ring in nature and (ii) any element or uncombined radical.”⁵⁴
A mixture is defined as:

[A]ny combination of two or more chemical substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except that such term does include any combination which occurs, in whole or in part, as a result of a chemical reaction if none of the chemical substances comprising the combination is a new chemical substance and if the combination could have been manufactured for commercial purposes without a chemical reaction at the time the chemical substances comprising the combination were combined.⁵⁵

However, rules have been promulgated only for polychlorinated biphenyls (PCBs),⁵⁶ fully halogenated chlorofluoroalkanes,⁵⁷ dibenzo-para-dioxins/dibenzofurans,⁵⁸ asbestos,⁵⁹ and metalworking fluids.⁶⁰

TSCA imposes criminal penalties of up to \$25,000 for each day of knowing or willful violation of the prohibited acts⁶¹ and up to one-year imprisonment, or both.⁶² The laboratory operator may be indicted for failure to submit a notice to the EPA ninety days before initiating a significant new

54. 15 U.S.C. § 2602(2)(A).

55. *Id.* § 2602(8).

56. *Id.* § 2605(e); see 40 C.F.R. § 761 (1989).

57. See 40 C.F.R. § 762 (1989).

58. *Id.* § 766.

59. *Id.* § 763.

60. *Id.* § 747. “‘Metalworking fluid’ means a liquid of any viscosity or color containing intentionally added water used in metal machining operations for the purpose of cooling, lubricating, or rust inhibition.” *Id.* § 747.115(2).

61. 15 U.S.C. § 2614 (1988).

62. *Id.* § 2615(b). A bill, H.R. 3375, introduced Sept. 28, 1989 by Reps. Henry J. Nowak (D.N.Y.) and John J. LaFalce (D.N.Y.), includes new criminal penalties under TSCA:

[A]ny company or person knowingly violating TSCA's Section 15 by placing another person's life in danger could be fined and sentenced to a maximum 15 year prison term. The bill also contains an informant provision that would allow the EPA to award up to \$10,000 to persons who provide information or services leading to a criminal conviction or a civil judgment of liability.

In Search of Felons, Chem. Substances Control (BNA) No. 237, at 2 (Oct. 19, 1989).

use⁶³ of an identified chemical.⁶⁴ The Administrator of the EPA (Administrator) can commence an action in a United States district court for seizure of an imminently hazardous substance or mixture.⁶⁵

[I]mminently hazardous chemical substance or mixture means a chemical substance or mixture which presents an imminent and unreasonable risk of serious or widespread injury to health or the environment. Such a risk to health or the environment shall be considered imminent if it is shown⁶⁶ that the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or mixture of the chemical substance or mixture or that any combination of such activities, is likely to result in such injury to health or the environment before a final rule⁶⁷ under section 2605 of this title can protect against such risk.⁶⁸

In order to enforce TSCA's provisions and rules, EPA representatives "may inspect any establishment, facility, or other premises in which chemical substances or mixtures are

63. A determination by the Administrator that a use of a chemical substance is a significant new use . . . shall be made by a rule promulgated after a consideration of all relevant factors, including-

- (A) the projected volume of manufacturing and processing of a chemical substance.
- (B) the extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- (C) the extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance and
- (D) the reasonably anticipated manner and methods of manufacturing, processing, distributing in commerce, and disposal of a chemical substance.

15 U.S.C. § 2604(a)(2) (1988).

64. 15 U.S.C. § 2603(a)(1)(B). See 40 C.F.R. §§ 721.25 & 721.350-.1750 (1989).

65. 15 U.S.C. § 2606(a)(1)(A).

66. "[T]he Administrator may direct attorneys of the Environmental Protection Agency to appear and represent the Administrator. . . ." *Id.* § 2606(e).

67. The Administrator is required to initiate a proceeding for the promulgation of a rule in compliance with the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1988). The Administrator, by publication in the Federal Register, must give prior notice of the proposed rule, and information about the opportunities for public participation. 5 U.S.C. § 553(b) (1988). After considering public opinions, by holding public hearings and by the submission of written comments, a final rule can be issued. 5 U.S.C. § 553(c); see 15 U.S.C. § 2605(c)(2)-(3).

68. 15 U.S.C. § 2606(f).

manufactured, processed, stored or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce."⁶⁹ In *Boliden Metech, Inc. v. United States*,⁷⁰ the court ruled that Congress implicitly granted *ex parte* search warrants after the EPA had determined that a targeted owner would not consent to an inspection.⁷¹

Enforcement authorities may be able to use section 2610 of TSCA as a right of entry into suspect drug laboratories in order to gather evidence for conviction. In *EPA v. Alyeska Pipeline Service Co.*,⁷² the court held that the EPA can subpoena a witness based on the mere suspicion of TSCA violations.⁷³ The subpoena power is not limited to investigations involving chemicals for which the EPA had issued regulations.⁷⁴ Also, even if another environmental statute is being violated, a drug prosecutor can use the TSCA subpoena power to question witnesses about that violation.⁷⁵ Failure to comply with a TSCA subpoena order may result in contempt charges.⁷⁶ However, the EPA will have to exercise caution in pursuing criminal cases because the agency's resources for litigation have not increased substantially during the last few years.⁷⁷

2. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA)⁷⁸ regulates the storage,⁷⁹ treatment,⁸⁰ and disposal⁸¹ of hazard-

69. 15 U.S.C. § 2610(a).

70. No. 88-0081, slip op. (D.R.I. Sept. 20, 1988).

71. *Id.* at 9.

72. 836 F.2d 443 (9th Cir. 1988).

73. *Id.* at 444.

74. *Id.*

75. *Id.*

76. 15 U.S.C. § 2610(c).

77. *Enforcement*, Chem. Reg. Rep. (BNA) No. 12, at 1301 (1989).

78. 42 U.S.C. §§ 6901-6991 (1988).

79. "The term 'storage,' when used in connection with hazardous waste means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste." 42 U.S.C. §

ous waste.⁸² To be legal under RCRA, the treatment, storage, or disposal of hazardous waste must occur at a facility⁸³ with a RCRA permit.⁸⁴

The criminal penalty for (1) knowingly transporting⁸⁵ or

6903(33) (1988).

80.

The term "treatment," when used in connection with hazardous waste means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

Id. § 6903(34).

81.

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Id. § 6903(3).

82.

The term "hazardous waste" means a solid waste, or combination of solid waste, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

The term "solid waste" includes discarded solid, liquid, semisolid, or contained gaseous material. 42 U.S.C. § 6903(27).

83. "'Facility' means all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them)." 40 C.F.R. § 260.10 (1989).

84. "RCRA requires a permit for the 'treatment,' 'storage,' and 'disposal' of any 'hazardous waste' as identified or listed in 40 CFR Part 261." 40 C.F.R. § 270.1(c) (1989). "The RCRA permit program has separate additional Regulations that contain technical requirements. These separate regulations are used by permit issuing authorities to determine what requirements must be placed in permits if they are issued. These separate regulations are located in 40 CFR Parts 264, 266, and 267." 40 C.F.R. § 270.1(a)(3) (1989).

85. "Transportation" is defined as "the movement of hazardous waste by air, rail, highway, or water." 40 C.F.R. § 260.10 (1989).

causing to be transported a hazardous waste to a facility without a permit,⁸⁶ or (2) knowingly treating, storing, or disposing of RCRA listed hazardous waste without a permit⁸⁷ is a maximum fine of \$50,000 for each day of violation, and up to five years imprisonment, or both.⁸⁸ Under the harsher "knowing endangerment" provisions,⁸⁹ the defendant faces an aggregate fine of up to \$250,000, fifteen years of imprisonment, or both.⁹⁰

In *United States v. Tumin*,⁹¹ the defendant, Tumin, suspected of participating in illegal drug activities, was the first individual to be prosecuted under RCRA sections 6928(d)(1) and 6928(e).⁹² The government became aware of the defendant's illegal activities when a chemical supplier reported to the Drug Enforcement Administration in the Department of Justice the defendant's purchase of fifty-five gallon drums of ethyl ether.⁹³ Although ethyl ether has legitimate uses,⁹⁴ it is also widely used in the production of cocaine. The government noted that it was suspicious for an individual to buy such a large quantity.⁹⁵ The defendant was convicted for

86. 42 U.S.C. § 6928(d)(1).

87. *Id.* § 6928(d)(2)(A).

88. *Id.* § 6928(d).

89. *Id.* § 6928(e). Criminal penalties are provided for "[a]ny person who knowingly transports, treats, stores, disposes of . . . any hazardous waste identified or listed under this subchapter . . . who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury . . ." *Id.*

90. *Id.*

91. No. 87-488, slip op. (E.D.N.Y. Oct. 11, 1988), noted in *Toxics L. Rep.* (BNA) No. 50, at 1399 (May 18, 1988).

92. *Id.*

93. *Id.*

94. Trial Brief, *supra* note 13, at 4.

Ethyl ether is a colorless, highly volatile liquid with a characteristically sweet pungent odor. It is also commonly referred to as ether, diethyl ether, ethoxyethane, ethyl oxide, diethyl oxide and sulfuric ether. The chemical is used in many industrial operations as a solvent for cellulose acetate, cellulose nitrate, dyes, fats, gums, oils, perfumes, pharmaceuticals, resins and waxes. It is also used as a reaction medium for certain organic compound synthesis. Ethyl ether was one of the first successful inhalation anesthetics and is still used extensively for this purpose.

Id.

95. *Tumin*, No. 87-488, slip op. Tumin used \$100 bills and paid in cash. Tumin attempted to return the ether when he realized that he was being followed. The seller

abandoning the drums of ether⁹⁶ in a vacant lot.⁹⁷ According to the legislative history of RCRA: "The state of mind for all criminal violations under section 3008 [42 U.S.C. section 6928] is 'knowing.' The conferees have not sought to define 'knowing' for offenses under subsection (d); that process has been left to the courts under general principles."⁹⁸

In *United States v. Hayes*,⁹⁹ the court found that:

Section 6928(d)(1) is not drafted in a manner which makes knowledge of illegality an element of the offense In addition, section 6928(d)(1) is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for public health and safety. As the Supreme Court has explained, it is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions Accordingly, in a prosecution under 42 U.S.C. § 6928(d)(1) it would be no defense to claim no knowledge that the paint waste was a hazardous waste within the meaning of the regulations; nor would it be a defense to argue ignorance of the permit requirement.¹⁰⁰

Thus, a drug laboratory operator may be prosecuted under section 6928(d)(1) because it would not be necessary to prove the defendant's knowledge of the law.¹⁰¹ Furthermore, a drug

refused to accept the drums and warned Tumin of the flammability of ether. Trial Brief, *supra* note 13, at 1.

96. Toxics L. Rep., May 18, 1988 at 1399. Pursuant to RCRA, 42 U.S.C. § 6921, ethyl ether is listed as a hazardous waste. See 40 C.F.R. § 261.33(f) (1989). Ethyl ether is considered a hazardous waste because of its ignitability. See 40 C.F.R. § 261.3 (1989).

97. Tumin was sentenced to five years imprisonment on October 21, 1988. EPA, SUMMARY OF CRIMINAL PROSECUTION RESULTING FROM ENVIRONMENTAL INVESTIGATIONS (1990).

98. H.R. CONF. REP. NO. 1444, 96th Cong., 2d Sess. 39, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5028, 5038 [hereinafter H.R. CONF. REP. NO. 1444].

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

100. *Id.* at 1503. See also *United States v. International Minerals and Chem. Corp.*, 402 U.S. 558 (1974). The Court held that when "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565.

101.

processor, as in *Tumin*, may be charged with violating the knowing endangerment provision of RCRA.¹⁰²

Unlike RCRA section 6928(d), for RCRA section 6928(e), Congress defined the term "knowing": a person is responsible for the result of his conduct "if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury."¹⁰³ However, the knowing endangerment provision's legislative history indicates that "no concrete harm need actually result for a person to be prosecuted under [the] section"¹⁰⁴ Thus, in the case of a drug laboratory operator, the prosecutor would have to prove merely that the operator was aware that disposal of hazardous waste from the drug laboratory had the *potential* to cause serious bodily injury. In addition, the plain language of the statute indicates that circumstantial evidence may be used to prove the defendant's awareness of his dangerous actions.¹⁰⁵

In *United States v. Gomez*,¹⁰⁶ Gomez, an illegal drug laboratory operator, pleaded guilty to the disposal, by abandonment, of 230 fifty-five gallon drums of ethyl ether, and was found to be "aware" that his conduct could seriously endanger lives.¹⁰⁷ Gomez was sentenced to a ten-year term of imprison-

A plain reading of the statute leads to the conclusion that "knowingly" modifies the verbs "transports or causes to be transported." It does not modify the phrase "hazardous waste identified or listed" While the provision requires knowledge, it does not, by its terms, require knowledge that the actions engaged in violate the statute.

Trial Brief, *supra* note 13, at 12.

102. 42 U.S.C. § 6928(e).

103. 42 U.S.C. § 6928(f)(1)(c). "The term 'serious bodily injury' means-

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 42 U.S.C. § 6928(f)(6).

104. H.R. CONF. REP. NO. 1444, *supra* note 98, at 5038.

105. 42 U.S.C. § 6928(f)(2)(B). For example, drums of ethyl ether may contain specific warnings regarding the hazards of this chemical. Similar to *Tumin*, witnesses can testify that the defendant was specifically informed of the dangers of drug processing chemicals. See Trial Brief, *supra* note 13, at 18.

106. No. 89-CR-92, slip. op. (N.D.N.Y. July 17, 1989).

107. *Id.*

ment for violating RCRA provisions.¹⁰⁸ The danger of imminent serious bodily injury or death was demonstrated when the laboratory exploded and Gomez was thrown from the laboratory by the force of the explosion.¹⁰⁹

3. *The Comprehensive Environmental Response, Compensation, and Liability Act*

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹¹⁰ authorizes the government to respond to actual or threatened releases¹¹¹ of hazardous substances¹¹² into the environment. CERCLA includes provisions addressing the issues of liability, compensation, cleanup, and emergency action procedures for such releases.¹¹³ CERCLA section 9603 contains a criminal sanction for the failure to notify the appropriate federal agency of the release of hazardous substances at a facility.¹¹⁴

108. *Id.* See also 42 U.S.C. § 6928(d)(2)(A), (e).

109. Letter from Frederick J. Scullin, Jr., United States Attorney, to Honorable Con G. Cholakakis, United States District Judge (July 10, 1989) (requesting that the court impose upon Gomez, a ten-year prison term for the "knowing endangerment" crime, concurrent with his prison term for other narcotic offenses). The Department of Justice, Environmental Crimes Section, wanted "to obtain the most valuable precedent possible." *Id.*

110. 42 U.S.C. §§ 9601-9675.

111. "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacle containing any hazardous substance or pollutant or contaminant)" 42 U.S.C. § 9601(22).

112. 42 U.S.C. § 9601(14) states: "'[H]azardous substance' means . . . (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921]"

Discarded ethyl ether has been identified as a hazardous waste under RCRA. 42 U.S.C. § 6921; 40 C.F.R. § 261.33(f). Ethyl ether is listed as a hazardous substance under CERCLA. 42 U.S.C. § 9602; 40 C.F.R. § 302.4 (1989).

113. 42 U.S.C. §§ 9601-9675.

114. Any person—

....
(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify

In *United States v. Tumin*,¹¹⁵ a federal jury convicted the defendant, Tumin, of failing to report a release of a hazardous substance into the environment¹¹⁶ to the National Response Center.¹¹⁷ In *Tumin*, the government argued successfully that the defendant "had knowledge of the release since he caused the release to occur."¹¹⁸ Likewise, sanctions could be imposed against the drug processor upon a showing that immediate notification of chemical releases from the drug laboratory was never made under CERCLA section 9603(a).

4. *Emergency Planning and Community Right-to-Know Act*

Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA)¹¹⁹ to provide local governments, states, and citizens with enough information to plan for, and respond to, emergencies involving releases of dangerous chemicals. By requiring the dissemination of this information, Congress hoped to minimize risks to public health and the environment.¹²⁰

immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

Id. § 9603(b)(3).

The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located

Id. § 9601(9).

115. No. 87-488, slip op. (E.D.N.Y. Oct. 11, 1988).

116. *Id.* See 42 U.S.C. § 9603(a).

117. The National Response Center, established under the Clean Water Act [33 U.S.C. §§ 1251-1387], will promptly notify all appropriate government agencies, including the governor of any affected state. *Tumin*, No. 87-488, slip. op. (E.D.N.Y. Oct. 11, 1988). See also 42 U.S.C. § 9603(a).

118. Trial Brief, *supra* note 13, at 48.

119. Title III of SARA, 42 U.S.C. §§ 11001-11050 (1988).

120. H.R. REP. No. 253(I), 99th Cong., 2d Sess. 59, reprinted in 1986 U.S. CODE

EPCRA requires all states to establish state emergency response commissions and local emergency planning committees.¹²¹ The committees are responsible for developing plans for emergency response¹²² and disseminating information to the public regarding dangerous chemicals.¹²³ EPCRA requires owners and operators of facilities¹²⁴ that produce, use, or store a hazardous chemical¹²⁵ to notify the state emergency planning commission and the community emergency coordinator when there are releases of these substances.¹²⁶ The criminal penalties for knowingly and willfully violating EPCRA section 11004 are an aggregate fine of not more than \$25,000, imprisonment for up to two years, or both.¹²⁷

Prior to the enactment of EPCRA, there was no federal law regarding the public's right to know about the hazards of chemicals that are routinely manufactured, stored, used, and released in our communities. EPCRA provides for the establishment of a national toxic chemical inventory on a computer data base which is accessible to the public.¹²⁸ However, public access to EPCRA information has been limited because of procedural difficulties and the potential for misinterpretation of the largely technical data.¹²⁹ Yet, members of local emer-

CONG. & ADMIN. NEWS 2835, 2841.

121. 42 U.S.C. § 11001(a),(c).

122. *Id.* § 11003.

123. *Id.* § 11044.

124. *Id.* Section 11049 states:

The term "facility" means all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person). For purposes of section 11004 of this title, the term includes motor vehicles, rolling stock, and aircraft.

125. See 42 U.S.C. § 9601(14); 40 C.F.R. § 302.4 (1989). Ethyl ether, often used in drug labs, is covered by EPCRA.

126. 42 U.S.C. § 11004.

127. *Id.* § 11045(b)(4).

128. *Id.* § 11023(j).

129. *Localities Not Benefitting Fully From Right-To-Know Law, Texas Study Says*, *Env't Rep. (BNA)* No. 19, at 745 (Aug. 26, 1988). "The researchers concluded that it is unlikely that large numbers of citizens will become involved in community environmental issues as a result of right-to-know laws unless federal and state agencies provide local emergency planning committees with direction and resources to

gency planning committees can encourage citizens to assist environmental authorities by reporting things as simple as strange or strong chemical odors in their neighborhoods.¹³⁰

IV. General Provisions in Conjunction with Environmental Statutes

Federal enforcement agents can use general criminal laws with environmental statutes to prosecute drug operators.¹³¹ The illegal operator may be fined \$10,000 and/or given five years imprisonment for making false statements to a government agency.¹³² Federal mail and wire fraud statutes can be used against a drug processor who, under false pretenses, uses the mail or interstate wires or airways to obtain property.¹³³ The drug processor may use the mail or wire services to buy laboratory chemicals from suppliers by claiming that the chemicals are needed for a legitimate purpose. In addition, if the drug operator is connected to a large organization with previous racketeering charges, the drug operator may be indicted under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹³⁴

meet their responsibilities." *Id.* For example, in New Jersey and Massachusetts, the number of citizen requests had doubled since the September 1987 survey because both states are working to improve citizen access to right-to-know data. *Id.*

130. "The authorities say signs of an illegal drug laboratory include chemical odors coming from . . . houses, discarded chemical containers, fans whirring through the night, unusually high consumption of water or electricity, extreme fluctuations in power use and large cash purchases of land and equipment, especially by new residents." *Pennsylvania Workers to Look for Drug Labs*, N.Y. Times, Nov. 24, 1989, at A22, col. 1 (nat'l ed.).

131. See McMurray and Ramsey, *supra* note 42, at 443.

132. Crimes and Criminal Procedure 18 U.S.C. § 1001 (1982), *construed in* McMurray and Ramsey, *supra* note 42 at 443.

133. 18 U.S.C. § 1341 (mail fraud); *Id.* § 1343 (fraud by wire, radio, or television), *construed in* McMurray and Ramsey, *supra* note 42, at 443.

134. 18 U.S.C. §§ 1961-1968, *construed in* McMurray and Ramsey, *supra* note 42, at 444. In *United States v. McDonald & Watson Waste Oil Co.*, No. CR 32 (D.R.I. Apr. 26, 1988) reported in *Toxic L. Rep. (BNA)* No. 2, at 1342 (May 4, 1988), the defendants were prosecuted under RICO for violating hazardous waste disposal laws and committing mail fraud. *Id.* This is the first federal hazardous waste case involving a racketeering charge. *Id.* MacDonald and Watson Waste Oil Co. of Rhode Island, its president and several employees and Naragansett Improvement Co. of Providence, Rhode Island, assured customers that the waste oil company could legally dispose of

V. Landlord and Tenant: Common Law Actions

A tenant suffering from the effects of a neighbor's drug laboratory can file a private nuisance¹³⁵ action against the landlord. In *State v. Monarch Chemicals*,¹³⁶ the court held that a landlord may be held responsible for negligence in the selection of a tenant and for the wrongdoing of the tenant.¹³⁷ The record in *Monarch* reflected that because of an engineer's investigation of the site, the landlord was made aware of the hazard of chemical seepage from his tenants' activities and failed to abate the nuisance.¹³⁸ The court noted that the continuing control of the site was a matter for factual determination because the lease contained a covenant to repair and a right of entry.¹³⁹

Moreover, under common law public nuisance,¹⁴⁰ a state can bring an action against the landlord. In *State v. Shore Realty Corp.*,¹⁴¹ the court found a landowner liable for maintaining a public nuisance.¹⁴² The court noted that the release or threat of release of hazardous waste into the environment from the defendant's land unreasonably infringed upon the public's rights.¹⁴³ The court found liability regardless of fault and noted:

contaminated soils, even though it lacked a permit to do so. *Id.* MacDonald and Watson, its president, and three employees were also charged with transporting hazardous wastes to a facility that had no permit to store or dispose of such wastes. *Id.*

135. RESTATEMENT (SECOND) OF TORTS § 821B (1979). A private nuisance can occur when the odors and vapors of toxic chemicals interfere with the use and enjoyment of land. An individual is liable for a nuisance "only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." *Id.* § 821C. "Occupancy is a sufficient interest in itself to permit recovery. . . ." *Id.* § 821E comment (d).

136. 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982).

137. *Id.*

138. *Id.*

139. *Id.* at 910, 456 N.Y.S.2d at 869.

140. RESTATEMENT (SECOND) OF TORTS § 821B (1979). "(1) A public nuisance is an unreasonable interference with a right common to the general public." *Id.*

141. 759 F.2d 1032 (2d Cir. 1988).

142. *Id.*

143. *Id.* at 1052.

[L]iability [of a possessor of land] is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others. Thus a vendee . . . of land upon which a harmful physical condition exists may be liable under the rule here stated for failing to abate it after he takes possession, even though it was created by his vendor, lessor or other person and even though he had no part in its creation.¹⁴⁴

Illegal residential drug activities were judged actionable nuisances when neighbors in San Francisco and Berkeley filed small claims actions against the owners of two buildings.¹⁴⁵

VI. Conclusion

The widespread health and environmental injuries caused by illegal drug laboratories are clear. The availability of legal¹⁴⁶ and inexpensive, over-the-counter chemicals¹⁴⁷ and equipment¹⁴⁸ used in drug processing presents a difficult task for law enforcement personnel.¹⁴⁹ Existing criminal, environmental, and nuisance laws provide numerous ways to prose-

144. *Id.* at 1051 (citing RESTATEMENT (SECOND) OF TORTS § 839 comment (d) (1979)).

145. Bishop, *Neighbors in West Use Small Claims to Combat Drugs*, N.Y. Times, Oct. 17, 1989, at A16, col. 2.

146. In addition to cocoa leaves and ethyl ether the chemicals used to manufacture cocaine include: acetone (the chemical used in nail polish remover); methyl ethyl ketone (found in rubber cement); toluene (used in paint thinners); kerosene; ammonia (used to make cleaning agents, fertilizers, and synthetic fibers); lime (used to make bricks and mortar); sodium carbonate (used in glass, soap, and cleaners); sulfuric acid (used in automobile batteries); potassium permanganate (used in tanning leather and purifying water); and hydrochloric acid (used for cleaning metal and preparing food products). Browne, *Problems Loom in Effort to Control Use of Chemicals for Illicit Drugs*, N.Y. Times, Oct. 24, 1989, at C1, col. 2.

147. The crank (illegal methamphetamine) manufacturer needs only about \$10,000 for chemicals and \$2,000 for lab equipment to concoct \$200,000 worth of crank. *The Newest Drug War*, NEWSWEEK, Apr. 3, 1989, at 21.

148. *Hearings*, *supra* note 1, at 120. A popcorn making machine or a common household heater is often used for processing and drying the coca base. *Id.*

149. *The Newest Drug War*, NEWSWEEK, Apr. 3, 1989, at 21.

cute the illegal drug operator.

The Omnibus Anti-Substance Abuse Act of 1988¹⁵⁰ requires chemical companies to report suspicious transactions and provides for a task force to recommend actions regarding the cleanup and disposal of hazardous waste from illegal laboratories. Landlords who fail to report the illegal activities of their tenants can be indicted under nuisance law. However, the illegal drug laboratory operator can be penalized perhaps more effectively by the creative use of criminal and environmental statutes. Federal mail and wire fraud statutes, RICO, and environmental statutes such as TSCA, CERCLA, RCRA, and EPCRA may be used concurrently against a drug violator. The "inspections and subpoenas" section of TSCA offers prosecutors a good starting point. *Tumin*¹⁵¹ and *Gomez*¹⁵² have set a precedent. With the cooperation of federal environmental and criminal law enforcement agencies and the business community, drug laboratory operators can be vigorously prosecuted under the existing system.

Geraldine Gardner

150. Pub. L. No. 100-690, 102 Stat. 4181 (1988).

151. *United States v. Tumin*, No. 87-488, slip. op. (E.D.N.Y. Oct. 11 1988). See *supra* text at 203-207 and note 91.

152. *United States v. Gomez*, No. 89-CR-92, slip. op. (N.D.N.Y. July 17, 1989). See *supra* text at 205.