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Judges' Bench Brief: Third Annual Pace National Environmental Moot Court Competition

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THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
Spring Term 1991

UNITED STATES OF AMERICA Appellee	)	
v.	)	Crim. No. 90-87
CHARLES CANNER and BERNARD BARKER, Appellants	)	

JUDGES' BENCH BRIEF

QUESTIONS PRESENTED

Defendants in a criminal case, Charles Canner and Bernard Barker, have appealed their convictions based on rulings from the district court in the course of their trial and on motions for judgment of acquittal. Each party is instructed to brief each of the following questions of law:

1. Whether, on the facts presented in this case, section 3008(d)(3) of the Resource Conservation and Recovery Act (RCRA) was violated? The government asserts, and the defendants deny, that the government has proven that a violation occurred.
2. Whether, on the facts presented in this case, either Canner or Barker, or both, are responsible for conduct alleged to have violated RCRA section 3008(d)(3)? The government asserts that both defendants are responsible for the conduct. Canner alleges that only Barker is responsible for the conduct. Barker alleges that neither Canner nor Barker is responsible for the conduct.

STATEMENT OF THE FACTS

Canner has served as Omni Manufacturing Company's President since its founding in 1982. Omni manufactures the

newest generation of computer technology, known as hypercomputers. Canner agreed to locate Omni in New Union City after considerable lobbying from the mayor and governor, who were seeking to expand the tax base and hoping for the social benefits a high-technology industry would bring to a depressed neighborhood. The predictions seem generally to have proven true, with the payroll swelling from twenty in 1982 to a total of 1200 today, the local crime rate and unemployment rates dropping and property values, and high school graduation rates improving.

Now forty-five years old, Canner completed his Ph.D. in applied chemistry at the age of twenty-four. He quickly rose to prominence in an older, established company before striking out on his own to found Omni. While at his former company, he invented several key components of the hypercomputer technology and was twice elected president of his professional society.

Canner has now shifted his intellectual focus from his own scientific research to managing his new business and enjoying his role as a leader of the community. Canner is president of the New Union City Chamber of Commerce. He is on the board of directors of New Union City General Hospital, is Chairman of the New Union Council of the Fine Arts, and is active in political fundraising.

Though Canner did not attend business school, he is nonetheless famous in business circles for his entrepreneurial spirit. He is often quoted for "Canner's Three Commandments of Business Success: 1. Pay attention to profits. 2. Pay still more attention to profits. 3. If you're paying attention to anything but profits, you probably shouldn't be." He has written memos to his staff and contributed to the corporate newsletter using this motto as his theme.

Bernard Barker, the plant manager, is sixty-four years old, and less than two years away from his contractual retirement date. He has a high school diploma and some college credits earned at night through his veteran's benefits. Barker worked his way up in the chemical industry, starting out as an enlisted man in the U.S. Army Chemical Corps, then joining a civilian chemical company as a machine operator. He rose

through the plant hierarchy in that company as crew chief, shift supervisor, assistant operations manager, and operations manager. Canner hired Barker in 1987 to join Omni as plant manager, where he runs all aspects of Omni's New Union City manufacturing plant. He supervises the total plant work force of 400 people, and reports directly to Barker.

Only the government offered testimony at trial. The following facts are no longer contested by either defendant.

On June 26, 1989, Edward Egger, a New Union City policeman on routine patrol in the neighborhood of Omni's plant, noticed an Omni truck leaving the plant. Egger saw the truck pull off the road onto a grassy shoulder while the driver seemed to review his paperwork for about two minutes. While the truck was parked in this position off the road, Egger noticed it was leaking a yellow liquid onto the grass beneath it. Egger estimates that he saw about two gallons of the liquid spill from the truck.

He attempted to follow the truck to speak to the driver, but did not consider the matter an emergency and did not use his police cruiser's emergency siren or dome lights. Egger lost sight of the truck in the heavy midday traffic. He noted the incident in his logbook of running observations, but did not follow through further.

On June 29 and 30, 1989, the EPA regional office in New Union City received several citizen complaints about chemical odors from a discolored patch of ground outside the gate of the Omni plant. EPA inspector Diane Durden visited the site and found near the road a three-foot patch of ground in which the vegetation was dying and the odor of synthetic chemical was strong. She took a soil sample and sent it to the EPA laboratory. The laboratory found a high concentration of DWE. DWE is a hazardous waste within the meaning of RCRA and is a by- product of Omni's manufacturing operations.

Durden wrote to Omni to inquire whether it knew anything about the source of the spill. The full text of her letter

is reprinted below:

United States Environmental Protection Agency
Region 11
August 2, 1989

Mr. Charles Canner, President
Omni Manufacturing Company
New Union City, New Union

Dear Mr. Canner:

We have detected DWE at a site just outside the street gate of the Omni manufacturing plant. We are investigating the source of the DWE.

Do you know its source?

Sincerely,
Diane Durden
Inspector, EPA Region 11

The letter never reached Canner personally. Frank Formes, his special assistant, opens and screens all Canner's office mail. Pursuant to Canner's standing instructions, Formes routes all correspondence concerning certain matters to Barker. These matters include the plant's environmental compliance, occupational safety and health compliance, and civil rights compliance. Canner personally reads mail having to do with relations with the plant's suppliers and customers, as well as the plant's production levels. Formes attached a pre-printed form to Durden's letter, wrote "Barker" in the "To" line, "Formes/Canner" in the "From" line, and checked a box labelled "Take appropriate action in accordance with standing company policies and procedures."

Omni's company procedures manual includes a brief section entitled "Environmental Laws," containing in its entirety the following text: "Environmental laws are important. The president expects all Omni employees to comply with them at all times."

Upon receiving Durden's letter, Barker called Adams into his office. Adams testified at trial that one of the plant's trucks had been pulled from service for repairs on June 28, and that one of the repairs needed was the sealing of a leak in the cargo area. Adams told Barker that Omni trucks periodi-

cally carry DWE to a recycler a few miles away, and that it was possible the spill had come from the leaking Omni truck. Adams remembered that a load of DWE was sent in late June just before the truck was repaired. However, no driver had reported a spill, Adams did not know whether the leaking truck or another truck had carried the DWE load, and DWE is also transported by other firms whose trucks pass by the front gate of the Omni plant.

Adams offered to interview the driver of the leaking truck and the service crew to determine whether they knew anything about a possible DWE leak. Barker instructed him not to. "That's not our job," he said. Adams testified that Barker went on to give him the following guidance:

> You're new to this business, and I'll give you some advice. Keep your mind on your work. We build hypercomputers. People like EPA inspectors are always asking a lot of questions. Answer their questions truthfully, but don't volunteer more than that.
>
> In this case we don't know anything for certain. Maybe there was a spill, maybe there wasn't. Maybe it was our truck that spilled, maybe it wasn't. If they want to interview our workers, they can, but it's not our job to do it for them.
>
> EPA's job is to protect the environment. We'll do our job and it's up to them to do theirs. If we spent time chasing down leads for them we'd never make any money.
>
> Now, I want you to call EPA to answer the letter. Be careful of what you say. Don't lie, but don't volunteer anything either. Say as little as possible.

Adams telephoned Inspector Durden on August 9. He told her, "about your letter of August 2: we do not know the source of the spill. Of course, you can always visit here if you want to." Adams reported the complete conversation to Barker, who nodded but said nothing. Inspector Durden testified that on receiving the telephonic response to her letter, she wrote a memo to her file summarizing Adams' call. Durden kept the file open but had no leads to pursue.

By coincidence, on August 16, Durden made a presenta-

tion on environmental crimes to the local police force, and one of the people in attendance was Officer Egger. Durden explained the ease with which hazardous waste can be dumped improperly and mentioned the DWE spill near the Omni gate as a recent example. Remembering the incident with the Omni truck driver, after class Egger explained to Durden what he had seen.

The next day Durden called Adams, and told him that a police officer had seen a yellow liquid spill from an Omni truck. "You know, I thought that might have happened," Adams said, and explained all that he knew about the repairs to the truck. He invited Durden to the plant to interview the driver and service crew and check the records. They found that the truck had been carrying DWE on June 26 and that when the service crew repaired the truck on June 28 they noticed dried yellowish splatterings on the underbody, consistent with a leak. The crew put the truck back up on a service rack, and Durden scraped samples from the underbody. EPA's laboratory analyzed the samples and found traces of DWE.

This prosecution resulted. Adams has cooperated with the government and was not charged. He resigned from Omni in September 1989.

PROCEDURAL HISTORY

This case involves two criminal convictions under the Resource Conservation and Recovery Act (RCRA), § 3008(d)(3), 42 U.S.C. § 6928(d)(3), the hazardous waste "false statements" provision. Defendants Charles Canner and Bernard Barker, two senior officials of Omni Manufacturing Company, appeal their convictions for violating RCRA. The Environmental Protection Agency commenced this prosecution in the United States District Court for the District of New Union in the fall of 1989. Canner and Barker were each convicted for false statements made by a subordinate manager to an EPA representative during a telephone conversation.

ISSUE 1: Was a Crime Committed?

The first issue, whether a violation of section 3008(d)(3) occurred, stems from an oral statement made by Adams, a former manager of Omni, to an EPA official. This statement was made during a telephone conversation in which the EPA was investigating a chemical leak.

The United States Environmental Protection Agency argues that Adams' failure to report the fact that an Omni truck was being repaired for leakage constitutes a section 3008(d)(3) violation. Both defendants assert that section 3008(d)(3) requires that a "report" under section 3008(d)(3) must be a written report, not oral, and, therefore, Adams' oral "report" cannot be a violation. Further, the defendants say that Adams' telephone message was not actually false, since Adams had no conclusive facts that a leak had occurred. Finally, the defendants claim the section states that the false information must be "filed, maintained, or used for purposes of compliance with regulations promulgated . . . under this subtitle." Because the EPA did not specify what they wanted the information for, the defendants claim that there can be no false statement violation.

ISSUE 2: Who is Responsible for the Crime?

The second issue is whether the "responsible corporate officer" doctrine can be invoked under RCRA to convict Canner and Barker, Adams' senior officials.

The District Court ruled that Barker's intent to allow Adams to withhold information from the EPA is not necessary; he knew what Adams told the EPA, and that is enough for a conviction. Further, with regard to both Barker and Canner, the district court reasoned that Congress must have intended corporate officers to be responsible for the actions of their employees, even though such a provision is not specified in RCRA. To hold otherwise would allow corporate executives to shield themselves from the knowledge of their company's environmental transgressions.

Barker asserts that the government must prove a higher threshold than "knowing," since knowledge is presumed in a

false statement offense. Further, Barker asserts that the responsible corporate officer doctrine does not apply in this case, since the Clean Water Act, § 309(c)(6), 33 U.S.C. § 1319(c)(6), the Clean Air Act, § 113(c)(3), 42 U.S.C. § 7413(c)(3), and the Federal Insecticide, Fungicide, and Rodenticide Act, § 14(b)(4), 7 U.S.C. § 136*l*(b)(4), all contain specific provisions for this doctrine, but RCRA has no such provisions.

Canner asserts that the responsible corporate officer doctrine may apply under RCRA in some instances, but here it does not apply to him. Canner claims he had no knowledge of any environmental problem, and knew no specific facts concerning the problem.

The district court denied Canner's and Barker's motions for judgments of acquittal. With respect to the issue of whether a violation has occurred, the district court ruled that Adams' telephone call to the EPA was in fact a "report," albeit an oral one. Further, the fact that he knew a truck had been repaired for leakage and failed to report it constituted a section 3008(d)(3) violation. Finally, it is irrelevant that EPA did not specify why it wanted the information from Omni; it suffices that EPA wanted the information for its environmental program.

Both Canner and Barker appealed their convictions to the United States Court of Appeals for the Twelfth Circuit to review both issues. The petitions were granted. Both Canner and Barker assert that no crime has been committed under RCRA's terms in section 3008(d)(3). Canner further asserts that even if a crime was committed, Barker, not Canner, is responsible. Barker asserts that neither he nor Canner is responsible, even if a crime occurred.

DISCUSSION OF THE ISSUES

INTRODUCTION

The first question to address is whether Adams' actions constituted a violation. This must be established before there can be any allegation that Canner or Barker is liable for the violation.

Once a violation is established, Barker's actions should next be analyzed, since they are most closely associated with Adams' actions. Barker's liability can be approached either on a direct participation or vicarious liability basis. Canner's actions and liability under the responsible corporate officer doctrine should be considered last.

OUTLINE OF THE ISSUES

I. WHETHER RCRA § 3008(d)(3) WAS VIOLATED?
   A. *Overview of issue one*
   B. *Does RCRA even apply to this case?*
      1. Overview
      2. Definitions
         a. Solid waste
         b. Hazardous waste
         c. Discarded material
      3. Case law: *American Mining Congress*
      4. Conclusion
   C. *Was Adams' statement false under RCRA § 3008?*
      1. Overview
      2. A *material* statement
      3. *Knowingly* made
      4. In a *report*
         a. Whether *plain meaning* should be used?
         b. *Legislative history* of section 3008(d)(3)
         c. *Narrow* versus *liberal* interpretation
         d. *Noscitur a sociis*
         e. *Lenity*
         f. *In pari materia*
      5. For *purposes of compliance* with EPA investigations

II. WHETHER BARKER, CANNER, OR BOTH ARE RESPONSIBLE?
   A. *Whether Barker is responsible for the violation?*
      1. Overview
      2. Degree of *knowledge* required for Barker to be liable
   B. *Whether Canner is responsible for the violation?*

1. Overview
2. Responsible corporate officer doctrine
   a. Can Canner *delegate* his *responsibility*?
   b. Can Canner avoid *liability* by *willful ignorance*?

ISSUES

I. WHETHER RCRA § 3008(d)(3) WAS VIOLATED?

A. *Overview of issue one*

There is a pervasive, yet subtle issue that should be addressed first, and that is whether RCRA even applies to this case. Note that the hazardous material was headed for a recycler, which raises the question of whether the material was yet a "waste" within the meaning of RCRA.

The next task is to place the subject actions into the context of section 3008(d)(3). Adams' oral statement is not demonstrably false, but it may omit material information. The questions under section 3008(d)(3) then are:

(1) Did Adams *knowingly* omit information? In answering this question, the issue is not whether Adams told the truth, but whether he told the whole truth.

(2) Was the omission of information a *material* omission?

(3) Was Adams' omission made in a *report*, even though it was oral and not written?

(4) Was the report once used for *purposes of compliance* with RCRA regulations?

The first two questions are answered by a combination of analyzing the facts of the case and case law defining "knowing" and "material." RCRA cases on "knowing" are discussed below.

"Material" omission cases must be examined under the analogous 18 U.S.C. § 1001, which addresses general criminal false statements. In 18 U.S.C. § 1001, Congress distinguishes mail and telephone fraud.

The third question requires an analysis of whether "report," that the only listed item the telephone call could fall into, encompasses both oral and written reports. This requires

statutory interpretation, starting with the plain meaning of the statutory provision, the statutory context of the provision, and the legislative history.

Arguments for interpreting the statute to cover oral reports should center on four major points:

(1) Whether a "report" is generally understood to include both oral and written statements (Government's position), or does the fact that the section ends with "or other documents" imply that *all* the items on the list are written (Defendants' position).

(2) Whether remedial and criminal statutes should be *liberally* (Government) or *narrowly* (Defendants) construed.

(3) Whether the *legislative intent* of section 3008(d)(3), aimed at expanding its scope to cover *material omissions* and *failure to file*, implies that Congress intended to include oral reports as well (Government) or whether the expansion, aimed at report *filing*, shows an intent to restrict §3008 to *written* reports (Defendants).

(4) Whether analogous U.S.C. sections (18 U.S.C. §§ 1001, 1341, and 1343), which clearly distinguish between oral and written reports, can be applied to this section in order to show that Congress knows how to distinguish between oral and written reports when it wants to (Defendants) or whether these sections do not apply to this statute (Government).

The final question to be addressed is whether the request for information falls within the "purposes of compliance" scope of section 3008(d)(3). The government is authorized under section 3007 to require information on hazardous wastes from anyone who handles them. If the wastes are not hazardous, then neither section 3007 nor section 3008(d)(3) applies. If they are hazardous, the government's inquiry appears within the scope of seeking information on compliance with RCRA.

B. *Does RCRA even apply to this case?*

1. Overview

The issue that should be first addressed is whether RCRA even applies to this case. RCRA jurisdiction applies only to

waste material. Since the DWE was being taken to a recycler, there is a technical question of whether the material can be defined as a "waste" within the meaning of RCRA. If the government fails to demonstrate that the DWE was a "waste" for RCRA purposes, then this court lacks proper subject-matter jurisdiction.

2. Definitions

a. Solid waste

Hazardous wastes are a subset of solid wastes. RCRA § 1004(5); 40 C.F.R. § 261.2(a)(2)(ii). The term "solid waste" is defined as any garbage, refuse, sludge, . . . and other discarded material . . . ." RCRA § 1004(27), 42 U.S.C. § 6903(27). Under RCRA jurisdiction, generators of hazardous wastes are required to assure that their hazardous wastes are disposed of in properly permitted facilities, to make various reports, and to manifest their shipments. RCRA § 3001; 40 C.F.R. Part 262.

b. Hazardous waste

The hazardous material, DWE, was headed for a recycler when it leaked from the truck. "Recycled" is defined in 40 C.F.R § 261.2(e). A question exists whether this material is actually a RCRA regulated waste. The term "hazardous waste" is defined under RCRA as a "solid waste, or combination of solid wastes, which . . . may . . . pose a substantial present or potential hazard to human health." RCRA § 1004(5), 42 U.S.C. § 6903(5).

c. Discarded material

RCRA does not define the term "discarded material." The question exists as to whether recycled materials are covered by RCRA as discarded material. EPA regulations attempt to rectify this issue. *See* 40 C.F.R. § 261.2 (1989). These regulations define "solid waste" as any material that is discarded. "Discarded" is further defined as: "1) abandoned material; 2) recycled material (or accumulated, stored, or treated before recycling) if applied to or placed on land in a manner

constituting disposal; or 3) inherently wastelike." *Id.* § 261.2.

3. Case law: *American Mining Congress*

Case law is sparse on this issue. In *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987), the court exempted certain recycled materials from RCRA. It held that "EPA need not regulate 'spent' materials that are recycled and reused in an on-going manufacturing process or industrial process." *Id.*

4. Conclusion

There is not enough factual information to identify how the DWE is to be recycled. Without this information a definite ruling on whether RCRA even applies to this recycled material cannot be made. Although much time should not be devoted to it, the argument is nevertheless a viable one for the defendants to raise. The government can overcome a contrary argument by arguing that the leaked DWE was literally disposed of, albeit unintentionally.

C. *Was Adams' statement false under RCRA § 3008?*

1. Overview

The basis of the government's charge of a false statement offense is the telephone call made by Adams, the former facilities manager at the plant. The call was in response to a letter from an EPA inspector, Durden, seeking information on whether the plant knew anything about the source of the spill that occurred outside the plant. The government alleges that this call was a false statement made in violation of RCRA § 3008(d)(3), 42 U.S.C. § 6928(d)(3).

The essential elements for a false statement under § 3008(d)(3) are:

(1) Did Adams *knowingly* omit information?
(2) Was the omission of information a *material* omission?
(3) Was Adams' omission made in a *report*?
(4) Was the report once used for *purposes of compliance* with RCRA regulations?

2. A material statement

In RCRA § 3008(3), 42 U.S.C. § 6928(3), the term "material" modifies both information (knowingly omits material information) and false statements (false material statements or representation). In reporting on the Solid Waste Disposal Act Amendments of 1980 the Conference Committee stated:

> The amendment to this subsection would clarify existing law by providing that only false "material" statements under the Act are covered by the criminal provision. Existing law does not specify that such statements or representations must be material. Federal criminal law generally reaches only those false statements that have a material bearing on the activity or program to which they relate.

S. Rep. No. 172, 96th Cong., 2d Sess. 37, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5019, 5036.

The Hazardous and Solid Waste Amendments of 1984 added "omission of material information" to section 3008(d)(3). In reporting on the amendments, the Committee on Energy and Commerce, to whom the bill was referred, noted that "only material omissions, i.e. omissions which will have a tendency to influence Agency action, are included, ensuring against the application of this section to incidental or insignificant violations." H.R. Rep. No. 198, pt.1, 98th Cong., 2d Sess. 55, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5614.

There has been no case law generated on the term "material" as used in RCRA § 3008(d)(3). However, definitions exist under the general false statement statute, 18 U.S.C. § 1001. The accepted test of materiality is "whether the false statement has a natural tendency to influence, or was capable of influencing, the decisions of the tribunal in making a determination required to be made, or was . . . one that could effect or influence the exercise of a governmental function." *United States v. Quirk*, 167 F. Supp. 462 (E.D. Pa. 1958). *See also United States v. Popow*, 821 F.2d 483 (8th Cir. 1987)(defendant's giving of fictitious identification to customs inspector

was "material" within meaning of statute as identification had a capability of influencing inspector's decision); *United States v. Chandler*, 752 F.2d 1148 (6th Cir. 1985) (falsified insurance claim letter was capable of influencing IRS decision).

It has also been held that the question of materiality is one of law; not an element of the offense that must be proved beyond a reasonable doubt but a "judicially imposed limitation to insure the reasonable application of the statute." *United States v. Chandler*, 752 F.2d at 1151 (quoting *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.) *cert. denied*, 104 S. Ct. 86, 87 (1983)). The purpose of the materiality requirement was to "exclude trivial falsehoods from the purview of the statute." *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975).

3. Knowingly made

This sub-issue is more significant as it pertains to the degree of knowledge required of Barker and Canner for their criminal liability. Since Adams is not a party to this case, the "knowing" element of section 3008(d)(3) is reserved for the second issue of the case.

4. In a report

a. Whether *plain meaning* should be used

The question for the court is whether the telephone call is to be considered a report as identified in section 3008(d)(3). This statute provides criminal penalties for "[a]ny person who . . . knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated . . . under this subchapter." RCRA § 3008(d)(3), 42 U.S.C. § 6928(d)(3).

In the inquiry of whether a telephone call or other oral report is included in the statute, courts give deference to the agency's interpretation of the statute. *Chevron v. NRDC*, 467 U.S. 837 (1984).

In general statutory analysis, it is appropriate to first look

at the statute's plain language and then, if necessary, at its legislative intent. *Dole v. United Steelworkers of Am.*, 110 S. Ct. 929, 934 (1990); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 (1984). The words of a statute should be interpreted according to their common meanings. Sutherland, *Statutory Construction*, § 47.28 (4th ed. 1984); *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Black's Law Dictionary, 1169 (5th Ed. 1979), defines *report* as "[a]n official or formal statement of facts or proceedings. To find an account of, to relate, to tell, to convey or disseminate information." By this definition, a report can be either an oral or written dissemination of information, which supports the government's position.

b. Legislative history of section 3008(d)(3)

After reviewing the plain meaning, a look at the legislative history of RCRA to determine congressional intent is in order. The conference committee report which accompanied H.R. 14,496 provided that, "the use of criminal penalties are sufficiently narrow in that they apply only to those who knowingly transport hazardous waste to a facility which does not have a permit, the actual disposal of hazardous wastes without a permit, or the falsification of documents . . . ." H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. 1, at 31, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6269. In reviewing the 1984 amendments to RCRA, the House Energy and Commerce committee made the following comment:

> RCRA provides criminal penalties for submitting false information in documents required to be filed under the Act. However, the statute presently does not specifically address material omissions or the failure to file required reports. These actions could obviously cause grave harm to regulatory process . . . . These amendments are proposed to clarify the criminal penalties that pertain to this conduct.

H.R. Rep. No. 198, 98th Cong., 1st Sess., pt. 1, at 54, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5613-

14. The above statements support the defendants' argument that section 3008(d)(3) focuses only on written documents, and not oral.

c. *Narrow* versus *liberal* interpretation

However, a contrary argument by the government can be made that the legislative intent was not meant to be so narrow. The RCRA conference committee report cited above also provided that "[t]he Committee justification for the penalties section is to permit a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes." H.R. Rep. No. 1491 at 31, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6269.

Also supporting the government's position is *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (1984). Here the court rejected a narrow interpretation of the word "person" as used in RCRA, basing part of its ruling on congressional intent. The court held that Congress, by amending the statute twice to broaden its scope, delivered a strong signal of its concern about the seriousness of the conduct to be prohibited. *Id.* at 667. Further, the court noted that it is well established that criminal penalties attached to public health statutes should be construed in a manner which best effectuates the regulatory purpose. *Id.* at 666.

The government in this case may argue that legislative history and case law interpret RCRA as a public welfare statute, enacted to address and control the serious national problem of hazardous waste disposal. *See Johnson & Towers* at 666 (*citing* H.R. Rep. No. 1491, 94th Cong., 2d Sess., at 11, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238). As such, a narrow reading excluding oral reports from section 3008(d)(3) would defeat the regulatory purpose of protecting the public welfare by stopping the illegal disposal of hazardous wastes.

d. *Noscitur a sociis*

"If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by

reference to their relationship with other associated words and phrases." Sutherland, *Statutory Construction* § 47.16 (4th ed. 1984). This is the doctrine known as *noscitur a sociis*. It is to serve as another guide to legislative intent. It is applied when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive. The general words will be limited and qualified by the special words. *Id.*; *United States v. Sumitamo Shoji New York, Inc.*, 534 F.2d 320, 322 (C.C.P.A. 1976) (the intent of a specific word may become clear by reference to the other words associated with it in the statute).

In *United States v. Iannone*, 610 F.2d 943 (D.C. Cir. 1979), the court of appeals sought to interpret narrowly section 208(g)(2) of the Department of Energy ("DOE") Organization Act, 42 U.S.C. § 7138 (Supp. I 1977). With wording nearly identical to section 3008(d)(3) of RCRA, this section authorizes the Inspector General of the DOE to subpoena "all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary." The court of appeals held that "in short, the language is directed at documentary evidence, as contrasted to oral testimony." *Iannone*, 610 F.2d at 945.

Applying this holding to RCRA § 3008(d)(3), a report may be considered the general term in the section, which should be restricted by the specific phrase "and other documents." The doctrine of *noscitur a sociis*, then, is of value to the defendants in arguing that *oral* reports should be excluded from section 3008(d)(3).

e. *Lenity*

If, after reviewing the language and legislative intent and after applying various statutory interpretation devices, the issue as to what Congress intended is still uncertain, then the rule of lenity may apply. This canon of statutory construction provides that "ambiguity concerning the ambit of criminal statutes . . . be resolved in favor of lenity." *United States v. Yermian*, 468 U.S. 63, 77 (1984)(quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Under this canon, doubt

over the application of the word "report" must be construed in favor of the defendant. *See United States v. Adamo-Wrecking Co.*, 434 U.S. 275 (1978)(interpretation of an ambiguous term under the CAA criminal statute to be interpreted in favor of the defendant).

f. *In pari materia*

A review of other closely related statutes may be of assistance to the government in this case. The doctrine of *in pari materia* pertains to statutes relating to the same person or thing or having a common purpose. Black's Law Dictionary 711 (5th Ed. 1979); Sutherland, *Statutory Construction* at § 51.02.

The federal false statement offense statute, 18 U.S.C. § 1001, provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined . . . .

18 U.S.C. § 1001.

The fifth Circuit has held that this statute covers both oral and written statements. *United States v. Massey*, 550 F.2d 300 (5th Cir. 1977). In *Massey*, the defendant was charged with making a false statement after he contacted the FBI and told them that he was involved in a conspiracy to assassinate the President. The defendant claimed that a false statement under 18 U.S.C. § 1001 could only be a written statement. In interpreting this statute, the court held that a statement or representation is oral and a writing or document is written. *Id.* at 305.

However, defendants can argue that the two statutes are separate and that Congress' language in 18 U.S.C. § 1001 is much broader and more inclusive. If Congress wanted RCRA

§ 3008(d)(3) and 18 U.S.C. § 1001 to be interpreted the same they could have used similar language. Therefore, the two statutes are distinguishable, and the meaning of one cannot be interpreted as being identical to the meaning of the other. Defendants should argue that if the government wanted to include oral reports in its charge, they should sue under 18 U.S.C. § 1001.

5. For *purposes of compliance* with EPA investigations

The final question to address is whether the EPA's request for information falls within the "purposes of compliance" scope of section 3008(d)(3). RCRA § 3007 authorizes the government to require information on hazardous wastes from anyone who handles them. Specifically, this section states:

> For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, any person who generates, stores, treats, transports, disposes of, or otherwise handles . . . shall, upon request of any officer, employee or representative of the EPA, . . . or any representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes.

RCRA § 3007.

From this section a duty exists to relate information to the EPA upon request. Whether this duty was breached depends on whether the information given by Adams was considered to be "false material information."

Defendants argue that they have complied with section 3007 by inviting the EPA to visit the plant to investigate and inspect it. They claim that in responding to Durden's letter they have not reported any false information.

II. WHETHER BARKER, CANNER, OR BOTH ARE RESPONSIBLE?

Plainly stated, the issue of Barker's (and Canner's) liability is whether either defendant intended and anticipated what Adams would say to the EPA, or whether it was enough that the defendants had laid down general guidance to be less than completely forthright ("Don't lie, but don't volunteer anything either"). The government should argue, and the defendants should refute, that the defendants' extra involvement in knowing about the conversation (between Adams and Inspector Durden) after it occurred is enough to tip the balance.

A. *Whether Barker is responsible for the violation?*

1. Overview

Barker can be approached either as a direct participant in Adams' actions or as a responsible officer because of his position in the chain of the corporate hierarchy. The second approach depends on whether the "responsible corporate officer" doctrine applies to section 3008(d)(3) of RCRA.

The conversation between Barker and Adams is purposefully ambiguous, so that reasonable arguments can be made to support different levels of knowledge by Barker. Concerning Barker's instructions (actual or implied), *See U.S. v. Greer*, 850 F.2d 1447 (11th Cir. 1988). General vicarious culpability probably deserves treatment here, as discussed in 18 U.S.C. § 2. Section 2 explicitly establishes the principle of punishment for offenses against the United States. Barker may be liable for counseling, commanding, or inducing a crime against the United States under section 2(a), or he may be liable for willfully causing an act to be done against the United States under section 2(b). The responsible corporate officer doctrine is reserved for the discussion on Canner's liability in this document, although the argument itself can and should be brought up by both parties.

2. Degree of *knowledge* required for Barker to be liable

The degree of knowledge required under RCRA § 3008 to inculpate Barker is the key issue for Barker's defense. On appeal, Barker asserts that the government must prove more than that he "knew" of the false statement. (R. 6). He claims that the government must prove a higher standard, that he "willed" or "intended," the false statement. (R. 6). For its part, in opposition to Barker, the government urges a literal interpretation of "knowing." It suggests that Congress knows how to use stronger language when it wants to. (R. 6). (Defendants may wish to note an inconsistency in the government's argument: note that now the government is attempting to interpret the statute *narrowly*, whereas the government seeks a *broad* interpretation of the definition of "report" (i.e. includes oral and written material)).

In a letter to Congress, the Department of Justice (DOJ) noted that criminal penalties are often more appropriate where there is a "clear, knowing disregard for the law." H.R. Rep. No. 1491 at 84, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6321. These statements support an argument that Congress intended a broader mental element in the statute than just knowledge that the statements were false.

However, in the 1980 comments on the RCRA amendments, Congress states that it had "not sought to define 'knowing' for offenses under section 3008(d) — that process has been left to the courts under general principles." S. Rep. No. 172, 96th Cong., 2d Sess. 39, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5019, 5038.

Certain crimes require not only the intent to act, but also the intent to violate the law. This interpretation was followed by the Third Circuit in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). In *Johnson & Towers*, the defendants were charged with unlawful disposal of hazardous waste without a permit under RCRA § 3008(d)(2). This section applies to: "any person who . . . (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter -

(A) without having obtained a permit under [section 3005] of this title . . . or (B) in knowing violation of any material condition or requirement of such permit." RCRA § 3008(d)(2), 42 U.S.C. § 6928(d)(2).

The government argued that "knowingly" applies only to "treats, stores, or disposes" of any hazardous waste, and that it did not have to show the defendant knew either that the waste was hazardous or that there was no permit. *Johnson & Towers*, 741 F.2d at 667. The court noted, however, that "purely as a verbal matter, the word 'knowingly' . . . may naturally be read to modify the entire remainder of the clause in which it appears." *Id.* at 669 (*quoting United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983)). The court held that all elements of the offense must be shown to have been knowing. *Id.* Accordingly, the jury must find: 1) the defendant knowingly disposed of the waste; 2) that defendants knew a permit was required; and 3) the defendants knew no permit was required. *Johnson & Towers*, 741 F.2d at 669.

It must be noted that although the court in *Johnson & Towers* called for the showing of specific intent, it lessened the burden on the government by holding that an inference could be made that; 1) a permit was required, and 2) the defendant knew he did not have a permit. Here, the court relied on language from *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565, ("Where . . . dangerous . . . 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 must be presumed to be aware of the regulation.").

Under 18 U.S.C. § 1001, it is a felony offense when a person "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, . . ., or makes any false, . . . statements or representations, or makes . . . any false writing . . . knowing the same to contain any false . . . statement." 18 U.S.C. § 1001. The Supreme Court, in *United States v. Yermian*, 468 U.S. 63 (1984), ruled that *no* specific intent to deceive the government was required ("no actual knowledge that false statements were made in a

matter within the federal agency jurisdiction" was necessary). To establish a violation of section 1001, the Court held that the government must prove that the statement was made with knowledge of its falsity. *Id.*

Applying the above analysis of intent to RCRA § 3008(d)(3), it appears that the government must show that the defendants:

— knew the false statements were made;
— knew that they were false;
— knew that they were included in a report; and
— knew that the report was used for purposes of compliance with regulations promulgated by the EPA.

Alternatively, the Government must state that the defendant knew the statements were filed in a report required by a government agency. *United States v. Little Rock Sewer Comm'n*, 466 F. Supp. 6 (E.D. Ark. 1978).

Defendants can argue that if "knowingly" was the only mental element required under RCRA § 3008(d)(3), it carries a lighter burden of proof than 18 U.S.C. § 1001, which requires "knowingly" *and* "willfully." This would seem inconsistent, as well as unfair, because section 3008(d)(3) imposes a stiffer penalty than section 1001.

The government could argue that it was Congress' intent to make section 3008(d) a public welfare statute and that the only reason "knowingly" was added was to prevent a felony conviction for an innocent or accidental false statement. As such, a lighter burden of proof is required and nothing more than knowledge of the false statements must be proved.

On the other hand, defendants can argue that the statute is ambiguous, and that "ambiguity concerning the ambit of criminal statutes . . . be resolved in favor of lenity" toward the defendant. *United States v. Yermian*, 468 U.S. at 77, (quoting *Rewis v. United States*, 408 U.S. 808, 812 (1971)).

B. *Whether Canner is responsible for the violation?*

1. Overview

Canner has been convicted of knowingly making false statements to the EPA in relation to a spill of the hazardous

waste DWE from one of the company's trucks. The letter sent by Durden to Canner was routed to Barker, his subordinate. Barker then questioned *his* subordinate, Adams, and warned Adams to say as little as possible to EPA inspectors when he called them.

Canner admits that the responsible corporate officer doctrine does apply to this case, but claims that it does not apply to *him*. Analysis must therefore focus on the degree of knowledge required to hold Canner responsible for the false statement. This will involve use of the framework provided by the United States Supreme Court in *Dotterweich* and *Park*, discussed below.

Particular factors that should be analyzed may be found in cases involving the responsible corporate officer doctrine in other statutes, or in cases where criminal liability has been imposed under RCRA. Thus, the issue is whether criminal conviction under section 3008(d)(3) may be upheld, given the degree of "knowledge" that Canner possessed in this case.

Canner's liability can be pursued on either a direct participation or a vicarious liability theory. The question for Canner's charge is whether Canner can delegate his responsibility and liability. *United States v. Park*, 421 U.S. 658 (1975), implies the contrary, but in that case the president of the company knew of earlier violations of the same nature as those charged against him. Here Canner was not aware of *any* violations.

The mixed signals sent out by Canner are also relevant. For instance, his repeated emphasis on profits above all else is not consistent with his environmental compliance policy. Has he in fact instructed his employees how to handle inquiries like this? If he has explicitly or implicitly told his employees to make incomplete and misleading reports to government agents, his liability is more justifiable than if he instructed them to respond completely and accurately.

2. Responsible corporate officer doctrine

a. Can Canner *delegate* his *responsibility*?

Criminal liability for "responsible corporate officer[s]" is

explicitly contained within the Clean Air Act (CAA) § 113(c)(3), and the Clean Water Act (CWA) § 309(c)(6), but neither section explains the degree of knowledge required for conviction of responsible corporate officers for acts of subordinates. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) § 14(b)(4), following the common law concept of *respondeat superior*, explicitly makes officers responsible for the acts, omissions or failures of their employees.

The criminal penalty provisions found in RCRA § 3008(d) do not mention "responsible corporate officers." Canner and Barker have been convicted as "persons" who "knowingly" made false material statements for purposes of compliance with RCRA regulations, in violation of section 3008(d)(3). The defendants argue that they are not the intended targets of the criminal provision, because they did not themselves make the false statement.

There are no cases directly on point involving criminal liability of corporate officers under RCRA section 3008(d)(3), although there are cases that have addressed the issue under related statutes.

Since, the RCRA criminal provisions have been amended a number of times since their enactment in 1976 (amended in 1978, 1980 and 1984), the defendants may argue that Congress deliberately left out the responsible corporate officer language found in other environmental statutes because it did not intend to impose liability on corporate officers.

The second point in favor of the defendants is that statutory provisions imposing criminal liability should be construed narrowly. The rationale follows a general policy that the serious implications of criminal sanctions on defendants necessitate a strict and narrow interpretation of the intended targets of the statute. *See United States v. Harris*, 177 U.S. at 309; and as the Court stated in *United States v. Dotterweich*:

> intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons

> who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.

United States v. Dotterweich, 320 U.S. at 277.

Thus, since RCRA does not contain the language that Congress felt was explicitly required in the CAA, CWA and FIFRA, or the more stringent requirement of "willful" violation found in Toxic Substances Control Act, the defendants argue that the responsible corporate officer doctrine does not apply in RCRA.

The defendants' third argument is that the legislative history does not directly indicate an intention to impose such liability on corporate officers. The legislative history hints that criminal penalties should be imposed only when the defendant actually knows of the violation. For example, the House Report stated that criminal penalties are appropriate when there is a "willful violation of a statute which seriously harms human health." H.R. Rep. No. 1491, 94th Cong., 2d Sess., Pt. 1, at 30, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6268. This statement would seem to support the defendants' position that an officer without knowledge should not be considered to have "willfully" violated the criminal provisions. In both *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975), the Court upheld the conviction of a corporate officer who claimed he did not have "knowledge" of the violation under the Federal Food, Drug, and Cosmetic Act (FDCA) of 1938. In the absence of explicit language, the U.S. Supreme Court has established that Congress may impose criminal liability upon corporate officers based on evidence "sufficient to warrant a finding . . . that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent . . . or promptly to correct, the violation complained of, and that he failed to do so." *Park*, 421 U.S. at 671.

The Court first looked to the purposes of the statute involved to determine if it may be interpreted as "dispens[ing] with the conventional requirement for criminal con-

duct—awareness of some wrongdoing." *Dotterweich*, 320 U.S. at 280-81. Thus, an intensive analysis of the legislative history of RCRA, particularly the criminal penalty provision of section 3008(d), is required. If a similar purpose can be found in RCRA, the Supreme Court's analysis in *Dotterweich* and *Park* will be applicable to the case at bar.

At least one case analyzing RCRA has held that its purposes are analogous to those of FDCA. *See United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989)(citing *United States v. Dotterweich*, 320 U.S. 277, 280 ("RCRA's purposes, like those of the Food and Drug Act, 'touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection' ")).

The Third Circuit, in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985), considered the purpose of RCRA and section 3008(d) to determine whether the criminal penalty provisions could apply to a foreman and service manager employed by a hazardous waste generator charged with disposal of hazardous wastes without a permit. *Id.* at 664. The corporation pleaded guilty to the charges, but the employees pleaded not guilty and moved to dismiss the charges on the basis that section 3008(d) applied only to "owners and operators" of facilities. *Id.*

The government argued for a more literal interpretation; that section 3008 applies to "any person who . . . (2) knowingly treats, stores or disposes of any hazardous waste identified or listed under this subchapter at a facility which does not have a permit [under 33 U.S.C. § 6928(d)]" or in violation of a permit. 741 F.2d at 666.

The defendants argued that section 3008 was merely a mechanism for enforcement against persons who come within the permitting requirements of section 3005 (owners and operators of treatment, storage and disposal facilities) and fail to comply. *Id.* The defendants further argued that the addition of "responsible corporate officer" to the Clean Air Act and the Clean Water Act definitions of "person" supported a more restrictive reading of RCRA's definition. *Id.* at note 3.

Nevertheless, the court, citing *United States v. Dot-*

terweich, 320 U.S. 277, 282, stated that "an exercise of draftsmanship intended to broaden the scope of a criminal provision 'can hardly be found ground for relieving from such liability the individual agents of the corporation.' " *Johnson & Towers*, 741 F.2d at 667. The court concluded that the plain language of the statute did not support either interpretation, but that the broad definition of "person" in RCRA § 1003(15) applied to section 3008 and included individuals. *Id.* They held that "section [3008(d)(2)(A)] covers employees as well as owners and operators of the facility who knowingly treat, store, or dispose of any hazardous waste. However, employees can be subject to criminal prosecution only if they knew or should have known that there had been no compliance with the permit requirement of section 6925." *Id.* at 666.

b. Can Canner avoid *liability* by *willful ignorance*?

The strongest argument in favor of the government lies in the doctrine of *willful blindness*. This concept has been applied to extend the definition of the term "knowing" in RCRA. Reporting on H.R. 2867, the legislation which eventually became the Hazardous and Solid Waste Amendments of 1984 (HSWA), the House Judiciary Committee stated that "the term 'knowing' includes the concept of 'willful blindness' . . . so that it will not be possible for someone to avoid criminal responsibility by deliberately remaining ignorant about the material conditions and requirements of permits." H.R. Rep. No. 98, Pt. 3, 98th Cong., 1st Sess. 9, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5644. In *United States v. Ciampaglia*, 628 F.2d 632 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980), the court charged the jury with the following instruction: "The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to you . . . . [A] defendant's knowledge may be inferred from a willful blindness to the existence of the fact." *Id.* at 642. This principle may form the basis of an argument by the government that Canner and Barker refused to take notice of the reported leak from one of their trucks, or that they refused to alert the

EPA when they knew that this information might have been helpful to their investigation.

The government's argument for imposition of criminal liability upon Canner and Barker is supported by the legislative history of RCRA's criminal provision. During passage of the 1984 HSWA amendments, the committee report stated that "knowing," as it is used in section 3008(d)(2)(B) & (C), "includes the concept of willful blindness, see H.R. Rep. 96-1396, at 35-36, so that it will not be possible for someone to avoid criminal responsibility by deliberately remaining ignorant about the material conditions and requirements of permits." H.R. Rep. No. 198, 98th Cong., 2d Sess., Pt. 3, at 8-9 *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS AT 5643-44.

Investigation of H.R. Rep. 96-1396 indicates that the committee was concerned about "the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist." H.R. Rep. 96-1396 (quoting Model Penal Code Section 2.02, Comment at 129-30 (Tent. Draft No. 4, 1955)).

Thus, it is a question of fact whether Canner and Barker attempted to isolate themselves from the problem and deliberately did not investigate in order to avoid criminal liability. Considering Canner's actions, it would appear obvious that Canner was shielding himself from knowledge of the problem at hand.

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