

Individual Liability Under Environmental Protection Statutes

by Erik T. Salvesson and Gregory R. Merz

Between RCRA and CERCLA, you could be held responsible for your company's environmental violations.

Any corporation that generates, stores, transports, or disposes of hazardous waste should be acquainted with the provisions of certain statutes. The Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) are two laws that carry significant liability for companies with inadequate waste treatment. Also, these statutes are not limited to corporations. Their express language covers individuals as well. The courts have interpreted RCRA and CERCLA as applying to individuals who have performed certain acts in their capacity as employees on behalf of a company.

OVERVIEW OF THE STATUTES

RCRA. The Resource Conservation and Recovery Act of 1976 established a cradle-to-grave regulatory regime that governs the handling, storage, and disposal of hazardous waste. Permits are required to perform any of these activities. The Environmental Protection Agency has published numerous regulations under RCRA, including recordkeeping and reporting requirements, for owners and operators of facilities that deal with hazardous waste.

Any person who violates a requirement of RCRA or regulations promulgated under it is subject to civil or criminal penalties. The civil penalty for violation of RCRA may be as high as \$25,000 for each day the violation

occurs. This penalty may be assessed either by an administrative order following a public hearing or by a judgment of the district court.

RCRA imposes criminal penalties on any person who:

- 1) Knowingly transports any hazardous waste to a facility that does not have the required permit
- 2) Knowingly treats, stores, or disposes of any hazardous waste without obtaining the required permit or in knowing violation of any material provision of such a permit
- 3) Knowingly omits information or makes any false statement on documents required to be filed under the Act
- 4) Knowingly operates, disposes of, stores, treats, or otherwise handles hazardous waste and then destroys, alters, conceals, or fails to file any record required under the Act
- 5) Knowingly transports or causes to be transported used oil or hazardous waste without a proper manifest
- 6) Knowingly exports a hazardous waste without the consent of the receiving country or in violation of an international agreement between the U.S. and the receiving country
- 7) Knowingly stores, treats, transports, disposes of, or otherwise handles used oil in violation of a required permit or in violation of any requirements of RCRA.

The penalty for a first-time conviction for such conduct is a fine of up to \$50,000 and/or imprisonment of up to two years (five years if 1) or 2) are violated). For any conviction after the first conviction, the maximum penalty is doubled, with respect to the fine and imprisonment. RCRA also contains a knowing endangerment provision. This provision states that a person who commits one of the violations and knowingly places another person in imminent danger of death or serious bodily injury is subject to a fine as high as \$250,000 and/or imprisonment of up to 15 years. In the case of an organization, the fine may be up to \$1 million.

A person's state of mind is knowing if the person is aware of the nature of his or her conduct. A person is knowing with respect to an existing circumstance if he or she is aware of or believes the circumstance exists and with respect to the result of the conduct if the person is aware or believes that conduct is substantially certain to cause death or serious bodily injury. A person is responsible only for his or her actual awareness or belief and not for the knowledge or belief of a other person. However, a person's knowledge maybe proved by circumstantial evidence, including evidence that he or she took steps to shield him elf or herself from relevant information .

CERCLA. The Comprehensive Environmental Response, Compensation, and Liability Act imposes liability on

operators and transporters of hazardous wastes and on owners and operators of hazardous waste disposal facilities where there is a release or threatened release of a hazardous substance. Responsible parties are liable for all cleanup costs necessary. Additionally, responsible parties who fail, without sufficient cause, to provide removal or remedial action when ordered to do so may be subject to punitive damages of three times the cost incurred as a result of such failure.

A person failing to give notice of a release of hazardous substances may be subject to a civil penalty of \$25,000 for each day the violation continues and up to \$75,000 per day for the second offense. Possible criminal penalties include imprisonment for up to

three years for a first offense and up to five years for subsequent offenses plus a fine. A person who violates a consent order relating to cleanup of a hazardous waste site may be liable for a civil penalty of up to \$25,000 for a first offense and \$75,000 thereafter.

BASIS FOR INDIVIDUAL LIABILITY

Civil Liability. The individual liability of a corporate officer, director, or employee, whether civil or criminal, depends on that person's own actions in violation of an environmental statute and is not derivative of the corporation's liability. The employee's liability is the result of his or her own exercise of authority in directing the corporation's actions in ways that have adverse effects on the environment. RCRA and CERCLA expressly define a person to include individuals. Courts have not hesitated to apply the penalty provisions of those statutes to individual employees in appropriate circumstances.

Before finding an individual liable, the courts generally require some act by the employee that violates a provision of the statute. There are limited exceptions. In one case, a court held a corporate president individually liable based on his status as the corporation's ultimate decision-making authority. Even though the president was not personally involved in the decision to transport and dispose of the hazardous wastes, the court held him liable under RCRA because he was "the individual in charge of and directly responsible for all of the company's operations... and he had ultimate authority to control the disposal of the hazardous substances."

This case represents the furthest extension of individual environmental liability and has not yet been followed by other jurisdictions. Nevertheless, the decision is very significant. Corporate officers should be aware of and concerned about it.

The types of employees most vul-

nerable to individual civil liability under RCRA or CERCLA are those who exercise direct responsibility for the company's hazardous waste handling and disposal practices. When a corporation has violated either statute, the individual liability of any company employee generally depends on the authority exercised by that employee over the company's hazardous waste practices.

Sometimes the chief executive officer or managing shareholder will be subject to individual liability on the theory that he or she is ultimately responsible for directing and controlling the actions of the corporation. For example, a court held an owner of a waste disposal company individually liable because he was the person solely responsible for the management of the company.

One court has articulated what it describes as a prevention test for determining individual liability. Factors to be considered under this test include the individual's position in the corporate hierarchy, the responsibility undertaken by that employee for waste disposal practices, the extent to which the employee may have neglected his or her responsibility, and the affirmative efforts to prevent unlawful hazardous waste disposal. This court stated, "Here the focus of the inquiry is whether the corporate individual could have prevented the hazardous waste discharge at issue."

All courts that have addressed this issue have concluded that the determination of individual liability requires as specific inquiry into the facts of each case. The most significant factors are usually the level of responsibility a particular employee has for corporate hazardous waste practices and the manner in which he or she exercises that responsibility.

Criminal Liability. The criminal provisions of RCRA and CERCLA extend to individuals, even those acting on behalf of a corporation. Gener-

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ally speaking, the courts have been reluctant to impose criminal remedies, but some state courts have convicted individuals for environmental crimes.

Criminal liability under RCRA and CERCLA arises as a result of some knowing violation of the law. Accordingly, cases dealing with criminal sanctions under the statutes have usually focused on whether the defendant had the state of mind necessary for a criminal conviction. In one example, an employee was tried in criminal violation of RCRA for contracting with a waste transporter who disposed of hazardous wastes at a facility lacking the required permits. The court held that it was not a defense to criminal liability under RCRA for the defendant to claim either that he was unaware that the

particular material was considered hazardous or that he was unaware of the permit requirements.

However, the court decided that knowledge of the permit status of the facility was required for a criminal conviction. The court stated that if a defendant reasonably believed a site had a permit but had been misled, such conduct could not give rise to criminal liability because it would not constitute a knowing violation of the statute.

Although RCRA requires actual knowledge for criminal conduct, a person cannot avoid criminal liability by intentionally remaining ignorant. Evidence that a person took steps to shield himself or herself from relevant knowledge may be treated as circumstantial evidence of a knowing violation. For example, transporters of

hazardous wastes are presumed to be aware of the procedures they must follow to ensure that wastes are taken only to permitted facilities.

Failure to follow these procedures could reasonably give rise to inferences of guilty conduct. Further, it is a common knowledge that proper disposal of hazardous wastes is expensive. If someone takes away wastes for a price or under unusual circumstances, a court could infer that the defendant was aware the wastes were not being taken to a permitted facility. ■

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