ENVIRONMENTAL CRIMES: WHAT, WHO, AND NOW WHAT?

Liskow

Emily von Qualen

liskow.com

AGENDA

- What is a crime?
- Environmental Crimes and Mens Rea
- Corporate, Responsible Corporate Officer, and Individual Liability
- Internal Investigation
- Self Disclosure

Actus Rea

- Guilty Act



Crime

Mens Rea

- Guilty Mind



ENVIRONMENTAL CRIMES

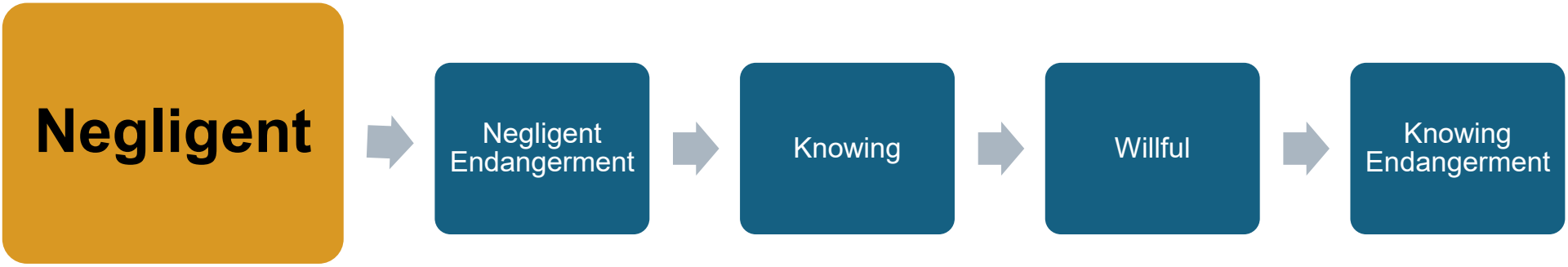
- Actus Rea—Guilty Acts
  - **Clean Air Act**—violating implementation plans, HAP standards, permit requirements; making a false statement.
  - **Clean Water Act**—violating regulations or permit requirements; making a false statement.
  - **RCRA**—violating regulations, sending waste to an unpermitted facility, etc.
  - **SDWA**—violating UIC requirements.

MENS REA

- Negligent
- Negligent Endangerment
- Knowing
- Willful
- Knowing Endangerment

Liskow

MENS REA



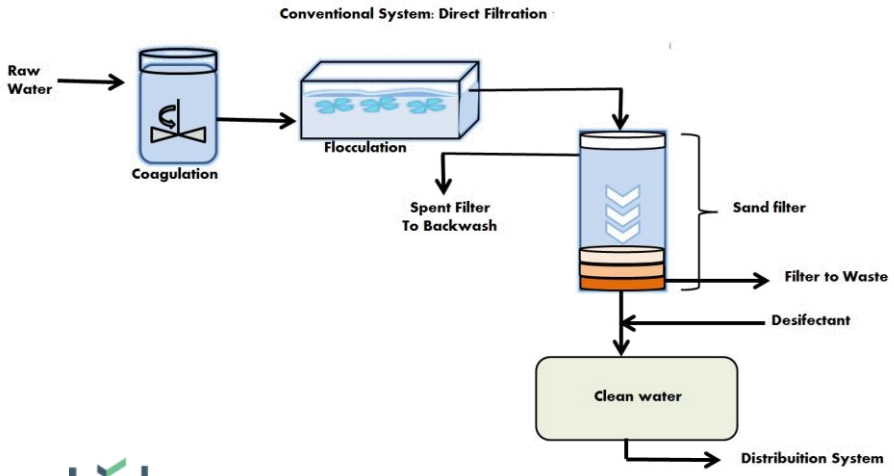
- Simple Negligence: Failure to use reasonable care
- Criminal Negligence: Gross, wanton, or reckless departure from a standard of reasonable care that creates a high risk of death or great bodily harm

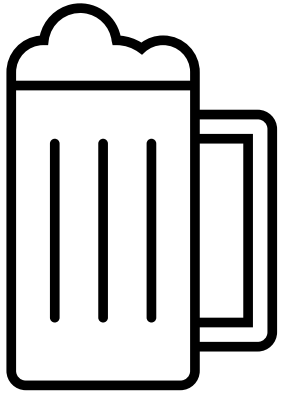
Liskow

MENS REA

Negligent → Negligent Endangerment → Knowing → Willful → Knowing Endangerment

- Clean Water Act: negligently violates effluent limitations, permit conditions, or other enumerated CWA requirements.



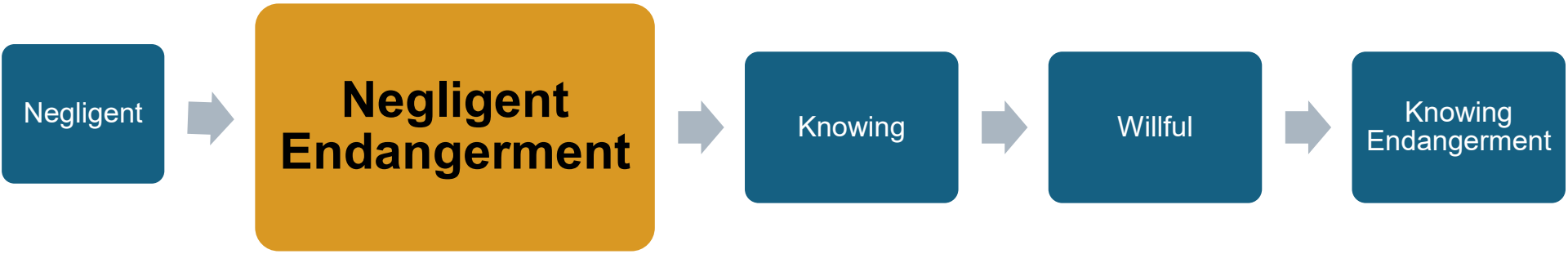


Liskow

REAL LIFE EXAMPLE

- ***United States v. Pruett***, 683 F.3d 597 (5th Cir. 2012)
- Negligent Discharge—Misdemeanor
- A wastewater treatment plant discharged sludge into a creek. The sludge drying beds had no sludge. The chlorine contact chamber, which treats water immediately prior to discharge had sludge, and the sludge was discharged from the facility's discharge pipe into the creek.
- They did not meet a reasonable standard of care in their treatment system.

MENS REA

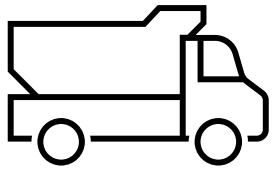


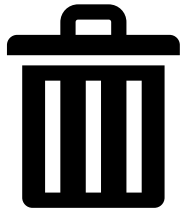
- CAA: any person who negligently releases a listed hazardous air pollutant or extremely hazardous substance and who at the time negligently places another person in imminent danger of death or serious bodily injury

MENS REA

Negligent → Negligent Endangerment → **Knowing** → Willful → Knowing Endangerment

- Based on actual awareness.
- Knowledge of the conduct; not knowledge of the law.
- RCRA: knowledge of the storage, transport, disposal, etc.; knowledge that the material was waste; knowledge that the material could be harmful.





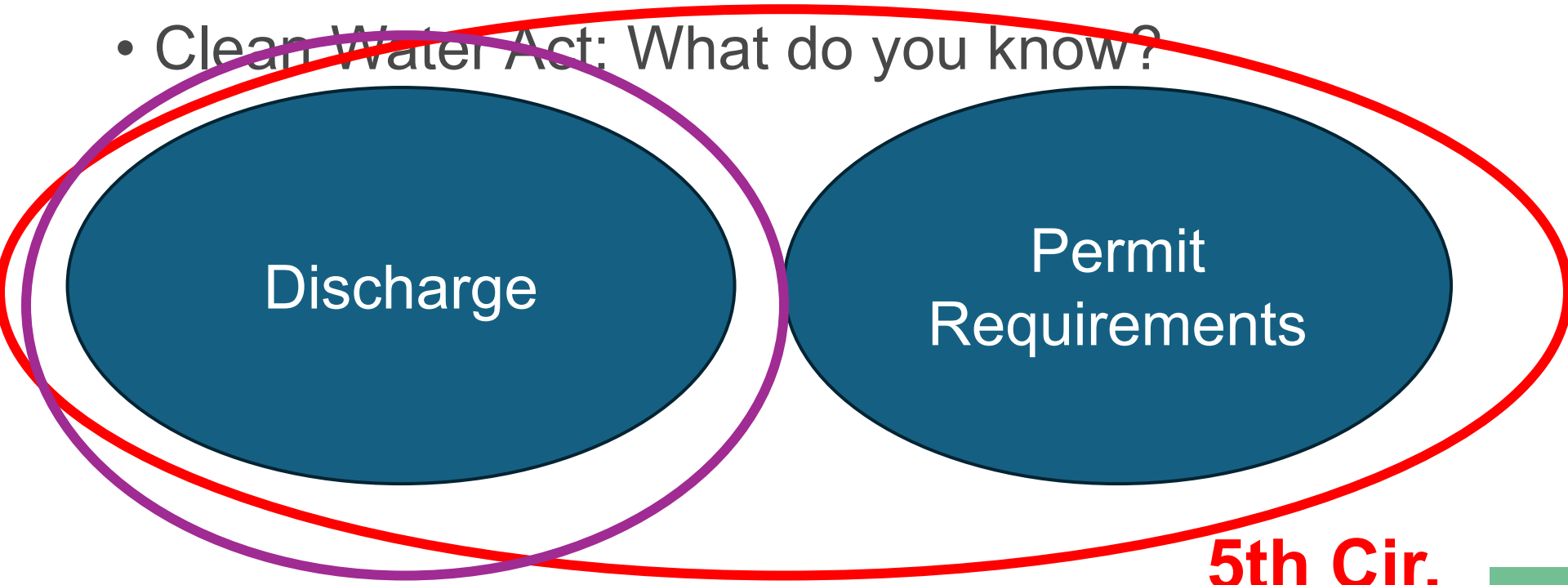


Liskow

MENS REA

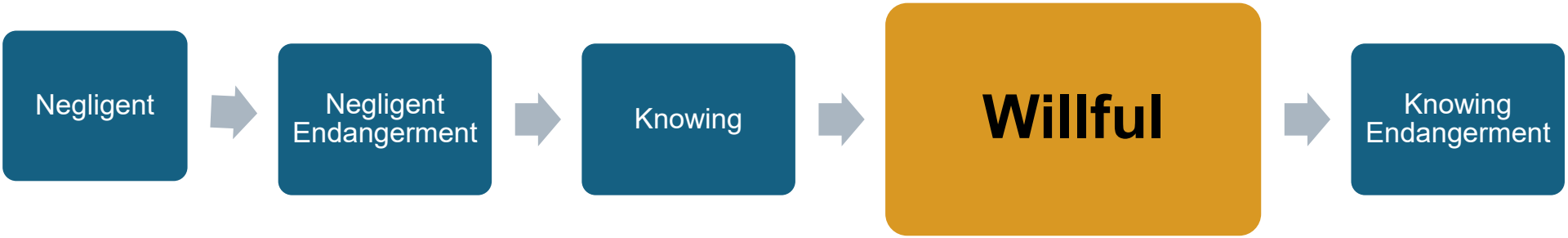


- Clean Water Act: What do you know?



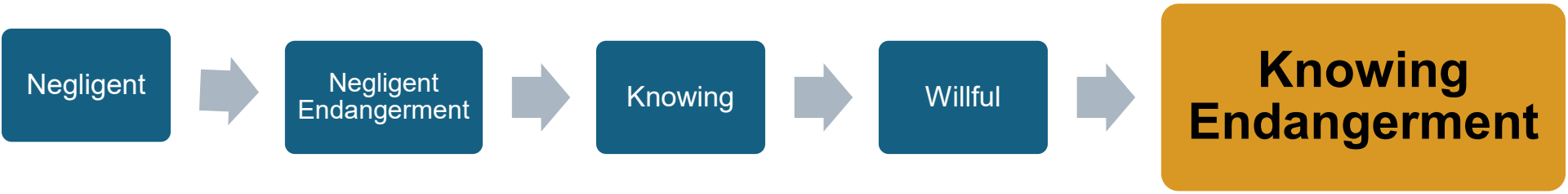
Liskow

MENS REA



- The defendant acted with knowledge that the conduct violated the law.
- SDWA

MENS REA



- The person is aware of the nature of the conduct; the person is aware or believes the circumstance exists; and the person is aware or believes the conduct is substantially certain to cause danger of death or serious bodily injury.
- RCRA, CWA, LEQA

Liskow



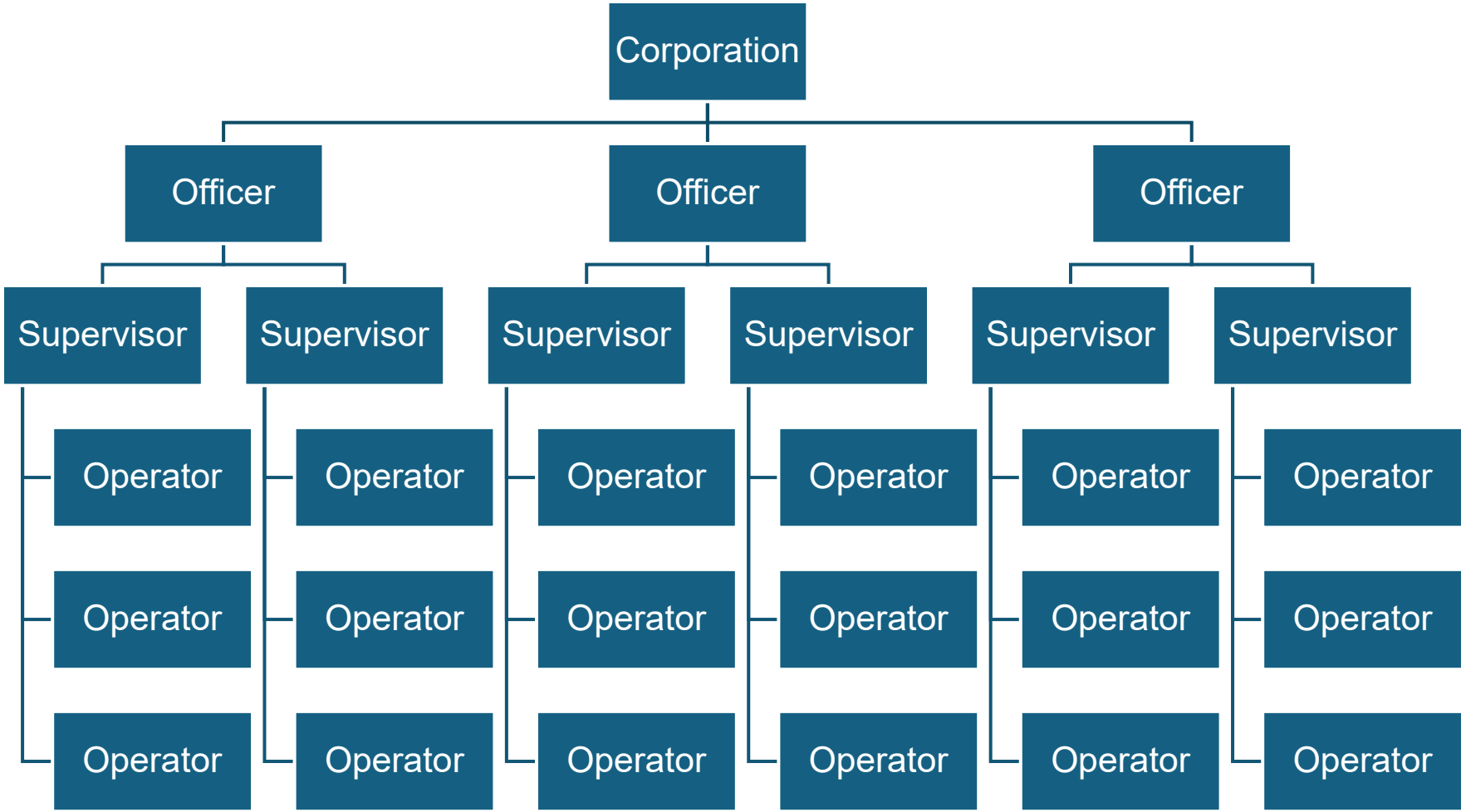


BYPASS

CEMS NOT WORKING

FALSE INFORMATION

WHO IS LIABLE? CORPORATE, INDIVIDUAL, AND CORPORATE RESPONSIBLE OFFICER LIABILITY


Corporation
Officer
Officer
Officer
Supervisor
Supervisor
Supervisor
Supervisor
Supervisor
Supervisor
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator

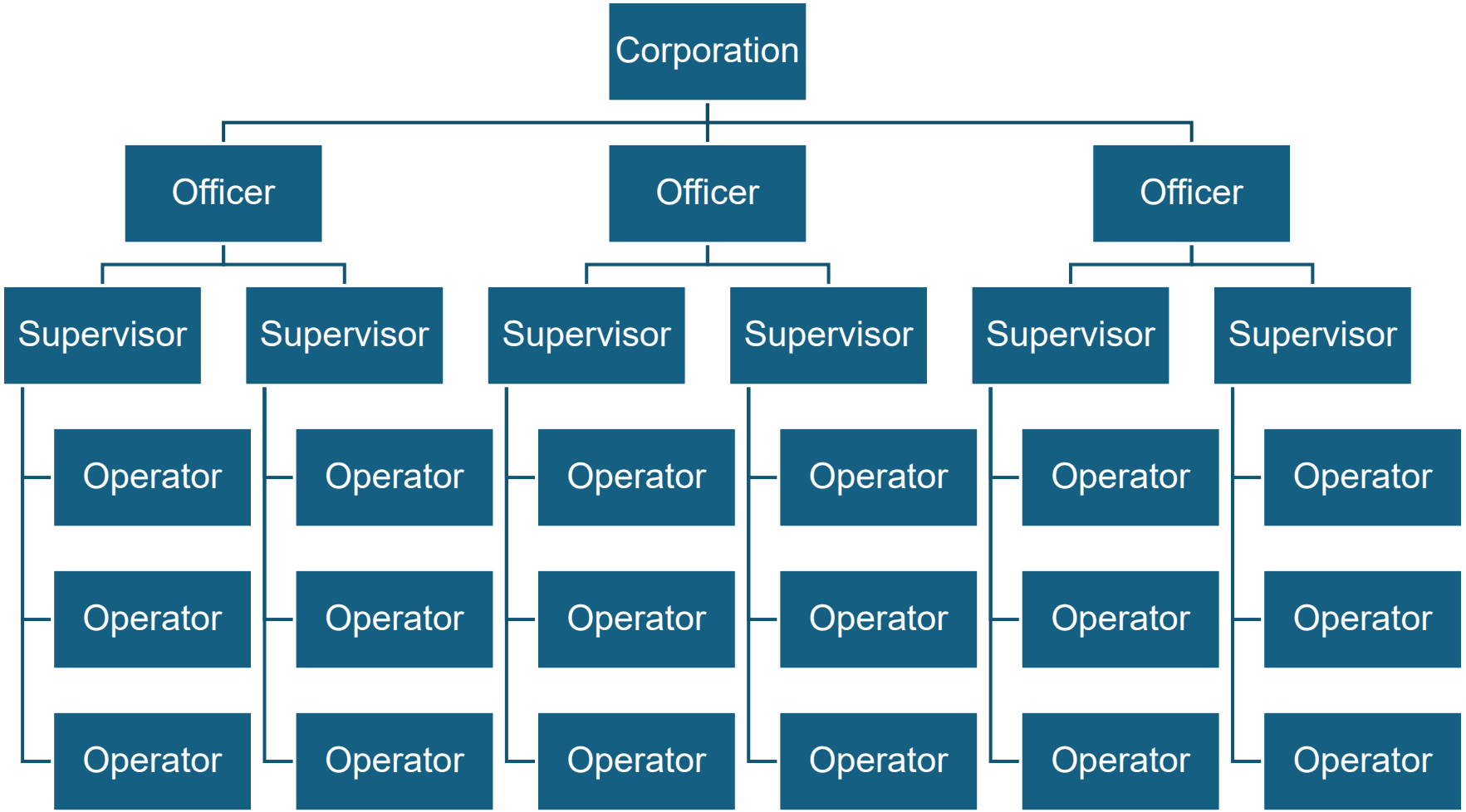
Liskow

FOR WHAT IS THE CORPORATION LIABLE?

- **Respondeat superior**: a corporation may be criminally liable for the illegal acts of its directors, officers, employees, and agents where the conduct was (1) within the scope of their duties and (2) intended, at least in part, to benefit the corporation.
  - No need to prove the corporation expressly authorized or ratified the conduct; mixed motives suffice if one is to benefit the corporation.

FOR WHAT IS THE CORPORATION LIABLE?

- Corporations typically face criminal penalties, which are often higher for corporations rather than individuals.


Corporation
Officer
Officer
Officer
Supervisor
Supervisor
Supervisor
Supervisor
Supervisor
Supervisor
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator
Operator

Liskow

RESPONSIBLE CORPORATE OFFICER

- **Responsible Corporate Officer doctrine**: a prima facie case arises where the officer, by reason of position, had responsibility and authority to prevent or promptly correct the violation and failed to do so.
  - This requires no actual knowledge or personal participation — authority and failure to act suffice.
  - Louisiana: an RCO has authority to control the activity causing the discharges, whether or not that authority is in fact exercised

RESPONSIBLE CORPORATE OFFICER

- Statutory incorporation: CAA § 7413(c)(6) and CWA § 1319(c)(6) include any RCO within "person"; La. R.S. § 30:2076.2(F) does the same for LPDES.
- Courts apply RCO-type liability to RCRA through general corporate criminal liability principles, even without a knowing or intentional violation.

EXAMPLE-GENERAL MANAGER







BYPASS

CEM NOT WORKING

FALSE INFORMATION

YOU SEE QUESTIONABLE ACTIVITY…WHAT DO YOU DO?

NOW WHAT?

- Stop the activity.



- Notify superiors.
- Call your lawyer.



Liskow

INTERNAL INVESTIGATION

- Need to understand what is happening.
- Why have a lawyer lead the internal investigation?
  - Attorney-client privilege
  - Attorney work product
- Consider who needs their own lawyer

- "It's not the crime, it's the cover-up."

SELF-DISCLOSURE

EPA SELF-AUDIT PROGRAM

- Does not specifically apply to criminal violations; however, **NO recommendation for criminal prosecution, where:**
  - Voluntary discovery
  - Prompt disclosure
  - Independent discovery
  - Correction and remediation
  - Prevent recurrence
  - No repeat violations
  - Violations excluded-No serious actual harm or imminent/substantial endangerment; no violation of an order, consent, or plea agreement
  - Cooperation
  - Systematic discovery is **NOT** required

DOJ CORPORATE CRIMINAL SELF-DISCLOSURE

The Department will decline to prosecute when four factors are met:

- (1) the company voluntarily self-disclosed the misconduct to an appropriate Department criminal component;
- (2) it fully cooperated;
- (3) it timely and appropriately remediated; and
- (4) there are no aggravating circumstances.

LOUISIANA SELF-AUDIT/SELF-DISCLOSURE

- The Louisiana self-audit program covers civil penalties and has substantially similar requirements to the federal program.
- Self-disclosure can reduce penalties under the program, and it is also a factor that must be considered when determining the appropriate civil penalty.

KEY TAKEAWAYS

- The mens rea component for environmental crimes is NOT high.
- RCOs can be held liable for the failing to catch someone completing the crime.
- Have a lawyer involved early in the process to help guide the internal investigation and any self-disclosure as may be necessary.

THANK YOU

FOR YOUR TIME AND CONSIDERATION

Emily von Qualen
evonqualen@liskow.com
504.556.4129

Liskow