Joint EPA OSHA Enforcement

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January 5, 2017
• Attorneys Raise Concerns With DOJ’s OSHA Enforcement Ahead of Trump Administration Oversight of federal safety standards
Raising the Environmental Stakes Under the MOU and Yates Memo: the Obama Administration’s approach has made it much easier for prosecutors to target companies, especially for civil violations of environmental statutes.
While attention has focused on an increased risk of criminal liability, companies also face greater risk of a civil action given the increased fines that accompany environmental statutes and the lower burden of proof prosecutors face in proving civil as compared to criminal allegations.
DOJ and the Labor Department have said the Occupational Safety and Health (OSH) Act provides inadequate penalties for addressing worker safety issues, limiting its effect as a deterrent.
For example, violations of the law’s worker safety provisions are generally considered only misdemeanors, but environmental crimes are often categorized as felonies, with harsher penalties including prison terms and larger fines.

- Port Arthur tank explosion - -
  - 1 death, 2 hospitalization
  - Violation of federal Clean Air Act
  - Guilty plea and $3.5M in fines
DOJ has taken similar steps to bolster enforcement of civil violations:

- Clean Air Act
- Clean Water Act
- Resource Conservation and Recovery Act
- Toxic Substance Control Act
Worker Endangerment Initiative

Deputy Attorney General Sally Yates issued a December 2015 memo that codified efforts to increase the department’s use of criminal and civil enforcement authorities in environmental statutes in cases where those violations occur along with workplace safety violations.
"On an average day in America, 13 workers die on the job, thousands are injured and 150 succumb to diseases they obtained from exposure to carcinogens and other toxic and hazardous substances while they worked. Given the troubling statistics on workplace deaths and injuries, the Department of Justice is redoubling its efforts to hold accountable those who unlawfully jeopardize workers' health and safety."

—Deputy Attorney General Sally Quillian Yates
Announcing the Expansion of the Worker Endangerment Initiative

ABOUT THE WORKER ENDANGERMENT INITIATIVE
In an effort to prevent and deter crimes that put the lives and the health of workers at risk, the Departments of Justice and Labor announced today a plan to more effectively prosecute such crimes. Under the new plan, the Justice Department's Environment and Natural Resources Division and the U.S. Attorneys' Offices will work with the Department of Labor's Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), and Wage and Hour Division (WHD) to investigate and prosecute worker endangerment violations.

Read More
JUSTICE NEWS
October 26, 2016
Speech
Assistant Attorney General John C. Cruden Delivers Keynote Address at the American Bar Association, Section of Environment, Energy and Resources, Environmental and Workplace Safety Criminal Enforcement Conference

October 13, 2016
Press Release
Owner and Operator of Asbestos Removal Training Course Pleads Guilty to Providing False Certifications

September 12, 2016
Press Release
Eufaula Woman Sentenced To 24 Months Probation, $500 Fine For DUI

https://www.justice.gov/enrd/worker-endangerment
• DOJ still looks for cases with clear cut *criminal* violations, rather than cases that could lead DOJ into a protracted *court* battle with dueling expert witnesses.
MEMORANDUM OF UNDERSTANDING
between
THE UNITED STATES DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
and
THE UNITED STATES CHEMICAL SAFETY
AND HAZARD INVESTIGATION BOARD
on
Chemical incident Investigations

I. PURPOSE AND SCOPE
The purpose of this Memorandum of Understanding (MOU) is to set forth the principles of the working relationship between the United States Chemical Safety and Hazard Investigation Board (CSB) and the United States Department of Labor, Occupational Safety and Health Administration (OSHA) in the area of chemical incident investigations. This MOU, entered into under the authority of section 112(c)(6)(E) of the Clean Air Act and the Occupational Safety and Health Act of 1970 (OSHA Act), establishes policy and general procedures for cooperation and coordination between the two agencies and minimizes duplication of activities so that each agency may carry out its specific statutory requirements in an efficient and effective manner.

BACKGROUND AND RESPONSIBILITIES

A. OSHA
OSHA is the federal agency with primary responsibility for worker safety and health. OSHA is authorized by the 0511 Act, 29 U.S.C. section 651 et seq., to promulgate and enforce mandatory safety and health standards for the purpose of assuring, so far as possible, safe and healthful working conditions for every worker in the United States.
To limit risk of prosecution, companies ideally should have a compliance plan in effect prior to an incident.

- No formal guidelines from DOJ
- Comprehensive – cover all enterprises
- Widely Disseminated – training, code of conduct
- Vigorously Enforced – discipline for offending workers
- Audited & analyzed
• **Criminal enforcement** of environmental laws has focused on whether a company obtained a permit or complied with its requirements.

• EPA’s Risk Management Plan (RMP) rule has a less clear standard, that companies have a program for preventing accidental releases and minimizing their consequences.
Given increased DOJ prosecutions of workplace safety issues, companies face greater risk that information given to government safety inspectors, particularly with the U.S. Chemical Safety and Hazard Investigation Board (CSB), may inform future prosecutions.
The CSB is an independent federal agency charged with investigating chemical incidents. Headquartered in Washington, DC, the agency's board members are appointed by the President and confirmed by the Senate.

The CSB conducts root cause investigations of chemical incidents at fixed facilities. Root causes are usually deficiencies in safety management systems, but can be any factor that would have prevented the accident if that factor had not occurred.

The agency does not issue fines or citations, but does make recommendations to plants, regulatory agencies such as the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA), industry organizations, and labor groups.

Congress designed the CSB to be non-regulatory and independent of other agencies so that its investigations might, where appropriate, review the effectiveness of regulations and regulatory
Information provided to CSB soon after an accident could become a roadmap for federal prosecutors.

- Failure or “root cause” analysis will seldom acknowledge worker misconduct.
- Only one interview, one set of records
Chemical release led to a shelter-in-place order
For thousands of residents
Companies have no way of challenging CSB findings when they are incorrect, which can complicate a subsequent DOJ criminal investigation.

They (OSHA, CSB) are now essentially operating under one umbrella.
Environmental Crimes Case Bulletin

Monthly bulletins summarize publicized investigative activity and adjudicated cases by EPA's Criminal Enforcement special agents, forensic specialists, and legal support staff.

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- November 2016 Bulletin (PDF) (20 pp, 3 MB)
- October 2016 Bulletin (PDF) (24 pp, 3 MB, October 2016)
- September 2016 Bulletin (PDF) (14 pp, 3 MB, September 2016)
- August 2016 Bulletin (PDF) (12 pp, 3 MB, August 2016)
- July 2016 Bulletin (PDF) (13 pp, 3 MB, July 2016)
- June 2016 Bulletin (PDF) (19 pp, 3 MB, June 2016)
- April-May 2016 Bulletin (PDF) (25 pp, 4 MB, May 2016)
- March 2016 Bulletin (PDF) (25 pp, 4 MB)
It is unclear how the incoming Trump Administration will pursue the cooperation between DOJ and OSHA.

- Attorney General nominee is former United States Attorney in Southern District of Alabama.
- Many career AUSAs are not being forced out.
• Companies’ workplace safety efforts are generally driven by the need to keep their workers safe and their business running and turning a profit, rather than government regulation.