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Protecting America’s Workers

In This Issue

| | |
|---|-----|
| Introduction | 1 |
| By Jeffrey Bossert Clark | |
| Criminal Prosecutions Under the Occupational Safety and Health Act | 5 |
| By Deborah Harris | |
| Prosecuting Mine Safety Cases | 39 |
| By Samuel “Charlie” Lord | |
| Criminally Unsafe: Prosecuting Violations of Section 112(r) of the Clean Air Act | 53 |
| By Peter Kenyon and Tyler Amon | |
| Worker Exposure to Asbestos: Recent Trends Observed in NESHAP Prosecutions | 69 |
| By Todd Gleason and Matthew T. Morris | |
| Effective Use of Federal Criminal Statutes to Achieve Justice in Worker Protection Cases | 93 |
| By Lana Pettus | |
| Protecting Workers: Enforcement of Hazardous Materials Laws | 127 |
| By Jennifer A. Whitfield | |
| When Pollution Threatens the Workplace: Occupational Safety & Environmental Endangerment Crimes | 147 |
| By Michael R. Fisher | |
| Worker Safety in Offshore Oil and Gas Exploration and Production—The Outer Continental Shelf Lands Act | 179 |
| By Emily K. Greenfield and Kenneth E. Nelson | |
| Note from the Editor-in-Chief | 191 |
| By Chris Fisanick | |

Introduction

Jeffrey Bossert Clark

Assistant Attorney General

Environment and Natural Resources Division

It is my honor to introduce this edition of the *Department of Justice Journal of Federal Law and Practice* focused on enforcing laws that protect America's workers.

Every day, millions of Americans go to work in industries that are vital to the national interest—coal mining, construction, petrochemicals, iron and steel manufacturing, offshore energy production, and transportation, just to name a few. These hardworking men and women labor to make our nation stronger and wealthier while also seeking to provide for their own families. There can be no doubt that America has the best workforce in the world. Indeed, our economy—built with the hands of American workers—remains the envy of the world.

As we recognize the incredible contributions of our nation's workforce, we must remain mindful of the risks they encounter in the workplace each day. Hazardous situations are ever-present in many industries, and federal laws have developed over time to ensure that these risks are properly addressed and that the safety of American workers is safeguarded.

Federal law gives the Department of Justice (Department) and our partner agencies powerful tools to ensure that violations of worker protection statutes are prosecuted: administratively in some cases, civilly in others, and criminally where called for. Still, notwithstanding comprehensive federal workplace safety laws and regulations, an average day in the United States is marked by 14 workplace fatalities, nearly 150 deaths from occupational diseases, and roughly 9,000 nonfatal injuries and illnesses.

I was fortunate to serve as a Deputy Assistant Attorney General in 2003 when the Environment and Natural Resources Division's (ENRD) Environmental Crimes Section (ECS) formed a partnership with the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) to identify and single out for prosecution the nation's most flagrant workplace safety violators. In doing so, the partnership relied on existing laws that carried considerably stiffer penalties than those governing workplace safety alone, including environmental laws and criminal statutes more

commonly used in white-collar crime cases, such as conspiracy to defraud federal agencies, false statements, obstruction of justice, and mail fraud. The effort gained traction and was even reported in the *New York Times*.¹

Over the course of the next decade, ECS developed an expertise in worker safety enforcement. The Justice Manual was amended in July 2015 to transfer the responsibility—shared with the United States Attorney’s Offices (USAOs)—for criminal worker safety prosecutions from the Criminal Division’s Fraud Section to ECS. The changes were designed to allow ENRD to provide support and resources to USAOs in this critical area. ECS has trained hundreds of Occupational Safety and Health Act (OSH Act) inspectors to recognize and document environmental and Title 18 offenses, and ENRD provides additional resources on its worker endangerment web page.²

Later in 2015, the Department formalized its partnership with the Department of Labor (DOL) through a Memorandum of Understanding on Criminal Prosecutions of Worker Safety Laws.³ ECS and USAOs across the country are currently investigating a record number of criminal referrals from the DOL. Moreover, ENRD continues to pursue—both civilly and criminally—cases that involve worker safety violations under statutes such as the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act. Violations of these statutes can directly affect workers tasked with handling dangerous chemicals and other materials, cleaning up spills, and responding to hazardous releases.

This issue represents another stage in ENRD’s longstanding commitment to close collaboration with the U.S. Attorney community. The articles in this journal are designed to support these efforts by identifying matters appropriate for investigation and prosecution and building strong workplace safety cases using tools available under the U.S. Code.

¹ See David Barstow & Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws*, N.Y. TIMES (May 2, 2005), <https://www.nytimes.com/2005/05/02/politics/with-little-fanfare-a-new-effort-to-prosecute-employers-that-flout.html>.

² *Worker Endangerment, Environment and Natural Resources Division*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/enrd/worker-endangerment> (last visited Feb. 7, 2020).

³ Memorandum of Understanding from the Dep’t of Labor and the Dep’t of Justice on Criminal Prosecutions of Worker Safety Laws (Dec. 17, 2015).

Among the articles are primers on two of the worker safety statutes transferred to ENRD in July 2015—the OSH Act and the Federal Mine Safety and Health Act. Other articles address regulations governing particular substances (for example, asbestos) or particular activities (for example, hazardous materials transportation). I commend the authors from across the Department and EPA for sharing their insights and expertise with us.

I also want to thank the Executive Office for U.S. Attorneys and the editors of the Journal for devoting this issue exclusively to worker safety enforcement. We welcome and encourage interest in this issue and encourage all Assistant U.S. Attorneys to become involved in the effort to keep our working men and women safe. Please feel free to contact Deborah Harris, Chief of the Environmental Crimes Section, for further assistance.

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Criminal Prosecutions Under the Occupational Safety and Health Act

Deborah Harris
Chief
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I. Introduction

In 1970, an average of 38 people died on American jobsites every day. In response, Congress enacted the Occupational Safety and Health Act of 1970 (OSH Act or Act).¹ This comprehensive legislation—designed to reduce workplace injuries, illnesses, and deaths—has had a profound and beneficial effect over its 50-year existence.

Today, despite a much larger working population, the average daily number of work site fatalities has decreased by nearly 63% to 14 fatalities a day.² This improvement is attributable to the many regulatory standards promulgated under the Act that make work sites safer. By and large, these standards, and conscientious employers, have vastly improved workplace safety in the United States. But there are still many dangerous work sites run by employers who are either ignorant of the law or know it and reject its mandates. This article addresses enforcement directed at those employers. In particular, this article provides a guide to navigating the OSH Act's criminal provisions.

Most enforcement of worksite safety standards are handled by roughly 2,100 federal and delegated state compliance safety and health officers through citations that carry civil penalties and corrective actions.³ The OSH Act also contains three criminal provisions: (1) willfully violating an Occupational Safety and Health Administration (OSHA) safety standard that causes the death of an

¹ 29 U.S.C. §§ 651–678.

² News Release, Census of Fatal Occupational Injuries Summary, 2018, Bureau of Labor Statistics, U.S. Dep't of Labor (Dec. 17, 2019).

³ 29 U.S.C. § 666(a)–(d), (i).

employee;⁴ (2) giving advance notice of an OSHA inspection activity;⁵ and (3) falsifying documents filed or required to be maintained under the Act.⁶

The maximum penalty for each of these offenses is six months in jail and a fine. These low misdemeanor penalties may explain why fewer than 100 criminal cases have been pursued over the course of five decades.⁷ OSH Act convictions, however, can pay dividends in both industry-wide deterrence and heightened public awareness. Accordingly, it is important to pursue them when the facts support the charge. In the absence of criminal enforcement, noncompliance with worker safety laws is just another cost of doing business.

II. Overview of the OSH Act regulatory program

The purpose of the OSH Act is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”⁸ To achieve this purpose, employers have a duty to comply with all occupational safety and health standards promulgated by the Secretary of Labor.⁹ These industry-specific standards are set out in Title 29 of the Code of Federal Regulations, parts 1900–1990. Employers have a further “general duty” to protect employees from “recognized hazards that . . . [cause] or are likely to cause death or serious physical harm” and are not otherwise covered by a specific OSHA standard.¹⁰

If a compliance officer finds a violation of a standard or of the General Duty Clause during a workplace inspection, he issues a citation to the employer that specifies a date by which the violation must be abated.¹¹ A monetary penalty is assessed for each violation based on its classification as “willful,” “repeated,” “serious,”

⁴ 29 U.S.C. § 666(e).

⁵ 29 U.S.C. § 666(f).

⁶ 29 U.S.C. § 666(g).

⁷ See AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT: A NATIONAL AND STATE-BY-STATE PROFILE OF WORKER SAFETY AND HEALTH IN THE UNITED STATES 21 (2019).

⁸ 29 U.S.C. § 651(b).

⁹ 29 U.S.C. § 654(a)(2).

¹⁰ 29 U.S.C. § 654(a)(1).

¹¹ 29 U.S.C. § 658(a).

“other-than-serious,” “failure to correct,” and “failure to post.”¹² OSHA can propose a penalty up to \$134,937 for each repeat and willful violation and a penalty up to \$13,494 for each other-than-serious and serious violation.¹³ Failure to correct a violation for which a citation was issued may result in penalties up to \$13,260 for each day the violation continues.¹⁴

The Occupational Safety and Health Review Commission (Commission) is responsible for adjudicating citations issued by the Secretary of Labor. Upon notice, employers may contest the citation, the penalty amount, or the abatement date before an Administrative Law Judge (ALJ) of the Commission.¹⁵ ALJ decisions may then be reviewed by the Commission.¹⁶ If the Commission does not opt for review, the decision of the ALJ becomes the final order of the Commission. Further review, if any, is before the federal court of appeals in the circuit where the violation occurred or where the employer has its principal office.¹⁷

III. State plan programs and preemption

Twenty-eight states have their own delegated occupational safety and health program, as provided for in 29 U.S.C. § 667. After an initial evaluation period of at least three years, during which OSHA retains concurrent regulatory authority, a state with an approved program gains exclusive authority over standard setting, inspections, and enforcement.¹⁸ In other words, the federal government may not criminally enforce OSH Act crimes in delegated states.

The following states and territories have OSHA-approved state programs: Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, the

¹² 29 U.S.C. § 666.

¹³ 29 C.F.R. § 1903.15(d) (Penalty amounts are adjusted for inflation each year in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015, Pub. L. No. 114-74, 129 Stat. 584).

¹⁴ 29 U.S.C. § 666(d); 29 C.F.R. § 1903.15(d)(5).

¹⁵ 29 U.S.C. § 659(c).

¹⁶ 29 U.S.C. § 661(j).

¹⁷ 29 U.S.C. § 660(a).

¹⁸ 29 U.S.C. § 667(e); *see, e.g.*, *United States v. Pacific Gas and Elec. Co.*, 153 F. Supp. 3d 1128, 1132 (N.D. Cal. 2015).

U.S. Virgin Islands, Virginia, Washington, and Wyoming. With that said, the programs for Connecticut, Illinois, Maine, New Jersey, New York, and the U.S. Virgin Islands cover state and local government employees only.

Notably, the OSH Act does not preempt prosecution under state criminal laws. This means that charges such as reckless endangerment, manslaughter, or negligent homicide may still be brought by state prosecutors for work-related deaths and injuries when appropriate.

IV. The OSH Act criminal provisions

A. Willful violation causing death to an employee

The first of the three OSH Act criminal provisions is applicable only if an employee dies. Section 17(e) of the OSH Act provides the following:

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both.¹⁹

There is *no* criminal penalty under the OSH Act for a violation that causes serious bodily injury to an employee or places an employee at risk of serious bodily injury or death. Moreover, as discussed below, section 666(e) defines a limited pool of potential defendants, requires a willful mental state, and involves proof of a causal link between the violation of a promulgated standard and an employee death.

¹⁹ 29 U.S.C. § 666(e).

1. Prosecution limited to employers

To be subject to criminal sanctions under section 666(e), the defendant must be an “employer.”²⁰ The OSH Act defines “employer” as “a person engaged in a business affecting commerce who has employees.”²¹ “The term ‘person’ means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.”²² “Employee” is defined as “an employee of an employer who is employed in a business of his employer which affects commerce.”²³ Thus, while an individual is a “person” under the Act, in order to be an employer, that individual needs to have employees.

Corporate employees are not, generally, prosecutable employers

The OSH Act provides that “each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.”²⁴ Nevertheless, employees *cannot* be sanctioned for OSH Act violations.²⁵ This leaves open the question whether individuals within corporations can be held accountable for criminal violations—that is, whether a manager in a corporation has employees himself or merely manages the employees of the corporation.

The definition of “person” above is noticeably silent on the issue. It is, thus, left to federal courts to determine the reach of section 666(e). Through three criminal cases in the early 1990s—and in accordance with the position of the Department of Labor—courts established that an employee who is not an officer or director of the corporation can neither directly commit a section 666(e) violation nor aid and abet an employer in committing an offense.²⁶ Individual liability within a

²⁰ *Id.*

²¹ 29 U.S.C. § 652(5).

²² 29 U.S.C. § 652(4).

²³ 29 U.S.C. § 652(6).

²⁴ 29 U.S.C. § 654(b).

²⁵ See *Atlantic & Gulf Stevedores Inc. v. Occupational Safety and Health Review Comm’n*, 534 F.2d 541, 553 (3d Cir. 1976).

²⁶ See *United States v. Shear*, 962 F.2d 488, 490–95 (5th Cir. 1992); *United States v. Doig*, 950 F.2d 411 (7th Cir. 1991); *United States v. Cusack*, 806 F. Supp. 47 (D.N.J. 1992).

corporation may, however, extend to officers or directors who exercise pervasive and total control over the business.

In *United States v. Doig*, three employees were killed in an explosion during the construction of a tunnel. S.A. Healy Company (Healy) was their corporate employer and was charged with 12 section 666(e) violations.²⁷ Project manager Patrick Doig was also charged—not as an employer—with aiding and abetting Healy in the violations.²⁸ The district court dismissed the indictment against Doig, and the Seventh Circuit affirmed.²⁹

In this case of first impression, the Seventh Circuit declined to extend liability to a corporate employee under an aiding and abetting theory. Section 2(a) of Title 18 provides that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”³⁰ In affirming the dismissal of Doig’s criminal charges, the court held that although “[g]enerally, the provisions of § 2(a) apply automatically to every criminal offense,” here “the affirmative legislative policy placing the onus of workplace safety upon employers precludes finding that an employee may aid and abet his employer’s criminal OSHA violation.”³¹ The court noted the logical inconsistency in holding a corporation liable on the basis of the acts of its agent and simultaneously holding the agent liable for aiding and abetting himself.³²

The *Doig* court relied heavily on a Third Circuit case analyzing the OSH Act in the context of civil penalties. In *Atlantic & Gulf Stevedores*, employers sought to vacate OSHA citations for violating the standard requiring longshoremen to wear hardhats, pointing out that the longshoremen refused to wear them.³³ At the heart of the controversy was whether the OSH Act authorized actions against employees. The strongest argument for that proposition was section 654(b), cited above, which obligated every employee to comply with all safety standards issued under the Act applicable to their own actions and conduct.

²⁷ *Doig*, 950 F.2d at 412.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 18 U.S.C. § 2(a).

³¹ *Doig*, 950 F.2d at 412–13.

³² *Id.* at 415.

³³ 534 F.2d 541 (3d Cir. 1976).

But the Third Circuit held that Congress did not intend to confer on the Secretary of Labor or the Commission the power to sanction employees.³⁴ The court noted that the “employee-duty provision” in section 654(b) could not be read apart from the detailed scheme of enforcement that was clearly directed only against employers.³⁵ The *Atlantic & Gulf Stevedores* court quoted from the legislative history in support of its conclusion and stated the following:

The committee does not intend the employee-duty provided in section [654(b)] to diminish in anyway the employer’s compliance responsibilities or his responsibilities to assure compliance by his own employees. Final responsibility for compliance with the requirements of this act remains with the employer.³⁶

The court in *Doig* “agree[d] with the Third Circuit’s conclusion that sanctioning employees for OSHA violations is not part of the detailed scheme of enforcement Congress established in the statute” and refused to extend liability to employee-agents who participate in OSHA violations.³⁷ In dicta, however, the *Doig* court opined that “[a] corporate officer or director acting as a corporation’s agent could be sanctioned under [section] 666(e) as a principal, because, arguably an officer or director would be an employer.”³⁸ But an employee who is not a corporate officer cannot be held liable.³⁹

Additionally, liability does not extend to supervisory employees of a corporation who are not officers or directors. The Fifth Circuit addressed that issue in *United States v. Shear*. Bruce Shear, a construction company superintendent, and his employer, ABC Utilities Services Inc. (ABC), were charged with two section 666(e) violations after an unbraced trench collapsed and killed an ABC employee.⁴⁰

³⁴ *Id.* at 553.

³⁵ *Id.* at 554.

³⁶ *Id.* (quoting S. Rep. No. 91-1282, reprinted in 1970 U.S.C.C.A.N. 5177, 5187 (1970)).

³⁷ *Doig*, 950 F.2d at 415.

³⁸ *Id.* at 414. The court left open the possibility that a corporate officer or director could, in the appropriate circumstance, also be subject to employer liability as an aider and abettor. *Id.* at 415 n.5.

³⁹ *Id.* at 414.

⁴⁰ *United States v. Shear*, 962 F.2d 488, 489 (5th Cir. 1992).

Shear was an on-site supervisor with decision-making power to bind ABC.⁴¹ In reversing Shear's conviction, the court concluded that, in separately defining the duties of employers and employees in section 654 of the Act and distinguishing between employers and broader classes of individuals in imposing liability in the other criminal provisions of section 666, "Congress intended to subject employers, but not employees, to criminal liability under section 666(e)."⁴² The court rejected the government's argument that, as a supervisory employee of ABC, Shear could be held principally liable under section 666(e).

As the court pointed out, the indictment did not allege that Shear was an employer, nor did the evidence at trial show that he acted as an employer:

Shear was not an officer, director, or stockholder of ABC, and had no financial interest in the job that was being performed. . . . The fact that Shear's actions as an employee, in failing to order use of a trench box or sloping of the ditch as required by [OSHA standards], were a cause of Luna's death cannot mysteriously transform Shear into an employer criminally liable under the Act.⁴³

Having concluded that Shear could not be convicted directly under section 666(e), the court further held that he could not be held liable as an aider and abettor.⁴⁴

The third defining case, *United States v. Cusack*, involved the death of an employee of Quality Steel Inc. during construction of a warehouse. Quality Steel was a closely-held corporation in the steel-erection business. It had two directors, one of whom supplied its capital, and the other of whom, John Cusack, was its president and only officer.⁴⁵

The government stood ready to prove that Cusack exercised complete control over Quality Steel, essentially running it as a sole proprietorship.⁴⁶ In denying Cusack's motion to dismiss the

⁴¹ *Id.*

⁴² *Id.* at 490.

⁴³ *Id.* at 492.

⁴⁴ *Id.* at 495.

⁴⁵ *United States v. Cusack*, 806 F. Supp. 47, 48 (D.N.J. 1992).

⁴⁶ *Id.* at 49.

indictment, the district court relied on dicta in *Doig* and *Shear* to conclude that “an officer’s or director’s role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director *is in fact* the corporation and is therefore an employer under § 666(e).”⁴⁷ Thus, the court did not decide whether Cusack as a corporate officer was a person under section 652(4), but rather that Cusack “was” the corporation and, therefore, an employer under the Act.

OSH Act liability has not been premised on responsible corporate officer status

Doig, *Shear*, and *Cusack* each reference the “responsible corporate officer” (RCO) doctrine.⁴⁸ The RCO doctrine grew out of two cases construing the meaning of “person” under the Food, Drug, and Cosmetic Act⁴⁹ (FDCA): *United States v. Park*⁵⁰ and *United States v. Dotterweich*.⁵¹

Like the OSH Act, the FDCA did not mention corporate officers in the definition of “persons” who could be punished under the Act. But the Supreme Court held that an individual corporate officer who, by reason of his or her position in the corporation, has responsibility and authority either to prevent in the first instance, or to correct, the violation at issue and fails to do so can be criminally liable. Although the FDCA is a strict liability statute, there are statutes based on knowing violations that include RCOs in the definition of “person.”⁵²

In any event, neither *Doig*, *Shear*, nor *Cusack* premised OSH Act criminal liability on the RCO doctrine, nor does there appear to be any court that has done so. The *Doig* court indicated that even if the RCO doctrine were invoked, the government would still have to show that

⁴⁷ *Id.* at 51 (emphasis added).

⁴⁸ See *United States v. Doig*, 950 F.2d 411, 413–14 (7th Cir. 1991); *United States v. Shear*, 962 F.2d. 488, 489–93 (5th Cir. 1992); *Cusack*, 806 F. Supp. at 50–51.

⁴⁹ 21 U.S.C. §§ 301–392.

⁵⁰ 421 U.S. 658, 673–74 (1958).

⁵¹ 320 U.S. 277, 279–80 (1943).

⁵² See, e.g., 33 U.S.C. § 1319(c)(6) (Clean Water Act); 42 U.S.C. §§ 7413(c)(6), 7602(e) (Clean Air Act).

the RCO was an “employer” and that he acted willfully before applying the criminal sanctions of section 666(e).⁵³

The multi-employer doctrine prevents one kind of defense by technicality

The “multi-employer” doctrine provides that an employer who controls or creates a worksite safety hazard may be liable under the OSH Act even if the employees threatened by the hazard are employees of another employer. This doctrine grew out of the construction industry, where many employers—often subcontractors—work in proximity to one another, and the hazards created by one employer often pose dangers to employees of other employers. The doctrine has been used to impose liability since the 1970s.

An oft-cited example is *United States v. Pitt-Des Moines Inc.*⁵⁴ Pitt-Des Moines was a steel erection subcontractor working on the building site of a U.S. Postal Service facility. Pitt-Des Moines, “in turn[,] contracted out part of the steel erection work to MA Steel.”⁵⁵ Pitt-Des Moines allowed its employees to improperly fasten steel beams in violation of an OSHA regulation.⁵⁶ As a result, a portion of the structure being erected collapsed, killing one employee of Pitt-Des Moines and one employee of MA Steel.⁵⁷ Pitt-Des Moines challenged its conviction for the death of the employee of its subcontractor. The Seventh Circuit affirmed the conviction, holding that the multi-employer doctrine applies to violations of section 666(e).⁵⁸

The doctrine, the court explained, is based on the specific language of section 654(a) and the fact that the broad remedial scope of the Act is designed to make places of employment, rather than specific employees, safe from work-related hazards.⁵⁹ Section 654(a) provides the following:

⁵³ See *Doig*, 950 F.2d at 414 (citing *United States v. Pinkston-Hollar Inc.*, 4 BNA OSHC 1697, 1699 (No. 76-33-CR6, 1976) (ALJ)).

⁵⁴ 168 F.3d 976 (7th Cir. 1999).

⁵⁵ *Id.* at 980.

⁵⁶ *Id.* at 980–81.

⁵⁷ *Id.* at 981.

⁵⁸ *Id.* at 985.

⁵⁹ *Id.* at 982–85.

Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.⁶⁰

The first provision, known as the General Duty Clause, requires that an employer “protect [his] own employees from obvious hazards even when those hazards are not covered by specific safety regulations [promulgated under] the Act.”⁶¹ The second provision requires that an employer comply with all promulgated safety standards without limiting the protected class to the employer’s own employees.

Thus, section 654(a)(1) imposes a general duty to a specific class, and section 654(a)(2) imposes a specific duty to a more general class.⁶² Also, while the General Duty Clause refers to “his employees,” section 666(e) refers to “any employee,” “indicat[ing] that the class of employees whose deaths will trigger it is broader than those of the violator.”⁶³

All of the circuit courts have upheld the multi-employer doctrine—albeit most often in cases adjudicating OSH Act civil penalties.⁶⁴ The courts agree, however, that “the class of employees who will trigger liability . . . should be limited to those with regular access to the areas controlled or directly impacted by the [violator (not a passersby or unrelated third person)].”⁶⁵

Further, the Seventh Circuit, which decided *Pitt-Des Moines*, held in *United States v. MYR Group Inc.* that the multi-employer doctrine cannot be used to expand liability to business affiliates who are not

⁶⁰ 29 U.S.C. § 654(a).

⁶¹ *Pitt-Des Moines, Inc.*, 168 F.3d at 982.

⁶² *Id.*

⁶³ *Id.* at 984.

⁶⁴ For nearly four decades the Fifth Circuit refused to apply the multi-employer doctrine. *Melerine v. Avondale Shipyards*, 659 F.2d 706, 712 (5th Cir. 1981) (“In this circuit . . . the class protected by OSHA regulations comprises only employers’ own employees.”). In 2018, the court overturned *Melerine* in *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723 (5th Cir. 2018).

⁶⁵ *Pitt-Des Moines, Inc.*, 168 F.3d at 985 (citation omitted).

engaged in the work site activities.⁶⁶ There, both L.E. Myers Company (the subsidiary) and MYR Group (the parent company) were indicted for willfully violating training requirements thereby causing two employee deaths.⁶⁷

The court dismissed the indictment against MYR Group because, although it oversaw the safety programs of its subsidiaries, it had no employees engaged in the work of repairing high-voltage lines and no control over any part of the work site.⁶⁸ The court compared charging the parent company to charging a university that had been hired—but failed—to train the employees who then died on the job.⁶⁹

2. Proving “willfulness”

Having established who the defendant-employer is, prosecutors must demonstrate the requisite mental state. Under section 666(e), an employer must have “willfully” violated the standard that caused the employee death. The term “willful” is not defined under the Act. In extensive and uniform case law, however, appellate courts have adopted the view that a willful violation requires proof that the violative act was done voluntarily with either an intentional disregard of, or plain indifference to, the OSH Act’s requirements.⁷⁰

The majority of cases discussing this mental state arise under section 666(a), which provides elevated civil penalties for willful violations of the OSH Act.⁷¹ In these cases, courts find “intentional

⁶⁶ 361 F.3d 364, 366–67 (7th Cir. 2004).

⁶⁷ *Id.* at 365.

⁶⁸ *Id.* at 366.

⁶⁹ *Id.*

⁷⁰ *See, e.g.,* United States v. Dye Constr. Co., 510 F.2d 78, 81 (10th Cir. 1975).

⁷¹ *See* A. Schonbek & Co. v. Donovan, 646 F.2d 799, 800 (2d Cir. 1981); Bianchi Trison Corp. v. Chao, 409 F.3d 196, 208 (3d Cir. 2005) (quoting Ensign-Bickford Co. v. Occupational Safety and Health Review Comm’n, 717 F.2d 1419, 1422 (D.C. Cir. 1983) (gathering cases from courts of appeals)); Intercountry Constr. Co. v. Occupational Safety and Health Review Comm’n, 522 F.2d 777, 780 (4th Cir. 1975); Chao v. Occupational Safety and Health Review Comm’n, 401 F.3d 355, 367 (5th Cir. 2005); Lakeland Enter. of Rhinelander Inc. v. Chao, 402 F.3d 739, 747 (7th Cir. 2005); Dakota Underground, Inc. v. Secretary of Labor, 200 F.3d 564, 566–67 (8th Cir. 2000); National Steel & Shipbuilding Co. v. Occupational Safety and Health Review Comm’n, 607 F.2d 311, 314 (9th Cir. 1979); Interstate Erectors Inc. v. Occupational Safety and Health Review Comm’n, 74 F.3d 223, 229 (10th Cir. 1996); Fluor Daniel v. Occupational Safety Health and Review Comm’n, 295

disregard” when an employer has actual knowledge of the OSH Act requirements but still fails to comply. In other words, intentional disregard is proven when “[the] employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard.”⁷²

Courts find “plain indifference” to OSH Act requirements when, although “the employer did not know of an applicable standard or provision’s requirements, it exhibited such ‘reckless disregard for employee safety or the requirements of the law generally that one can infer that . . . the employer would not have cared that the conduct or conditions violated [the standard].”⁷³

Equating willfulness to a voluntary act plus “intentional disregard of,” or “plain indifference” to, an OSH Act requirement is in accord with Supreme Court precedent. The Supreme Court has said that “willfully” is “a word of many meanings’ whose construction is often dependent on the context in which it appears.”⁷⁴ Interpreting a statute that included both “knowing” and “willful” crimes, the Supreme Court, in *Bryan v. United States*, explained that, “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.”⁷⁵ The Court described a “willful” act as one undertaken with a “bad purpose.”⁷⁶

Thus, to establish a willful violation of a statute, the government must prove that the defendant acted both with knowledge of the facts that constitute the offense and knowledge that the conduct was

F.3d 1232, 1239 (11th Cir. 2002). The First Circuit has held that “willfulness” exists when “the relevant company actor exhibits ‘plain indifference’ toward a safety requirement or when he or she has evidenced a state of mind such that, lacking actual knowledge of a given rule, if he or she were informed of the requirement, ‘he [or she] would not care.’” *A.C. Castle Constr. Co. v. Acosta*, 882 F.3d 34, 44 (1st Cir. 2018) (citations omitted). The Sixth Circuit defines willfulness as an action taken “[knowingly] by one subject to the statutory provisions” and “in disregard of the action’s legality.” *National Eng’g & Contracting Co. v. Herman*, 181 F.3d 715, 721 (6th Cir. 1999).
⁷² *Fluor Daniel*, 295 F.3d at 1240 (quoting *J.A.M. Builders Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000)).

⁷³ *Id.* (citations omitted); see also *A.C. Castle Constr. Co.*, 882 F.3d at 44.

⁷⁴ *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citation omitted).

⁷⁵ *Id.* at 193 (internal footnote omitted).

⁷⁶ *Id.* at 191.

unlawful.⁷⁷ In providing examples of conduct sufficient to establish willfulness, the *Bryan* court specifically listed “disregard of a known legal obligation” and “indifferen[ce] to the requirements of the law,”⁷⁸ mirroring the OSH Act formulation.

An important question is whether willfulness requires the government to prove a defendant’s knowledge of the specific statutory provision he is charged with violating. This issue was addressed in *Bryan*, where the petitioner, convicted of willfully dealing in firearms without a federal license, argued that willfulness under 18 U.S.C. § 924(a)(1)(D) required proof that he knew of the federal licensing requirement.⁷⁹

The evidence at trial showed that Bryan was dealing in firearms and that he knew his conduct—using straw purchasers and removing serial numbers from guns—was unlawful, but was silent as to whether he knew his conduct was unlawful *because* he lacked the necessary license.⁸⁰ In holding that general knowledge of illegality was sufficient, as contrasted to specific knowledge of the law making the act illegal, the Court distinguished contrary holdings in prior cases involving “highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct,” such as statutes concerning tax fraud and structured financial transactions.⁸¹

Prosecutors should expect opposing counsel to defend their clients on the basis of the “highly technical” nature of OSHA’s industry-specific standards. Presenting those regulations as complex, the defense will argue that the willful mental state must be interpreted as it has been in tax cases and that the government must prove the defendant had specific knowledge that he was violating a particular standard. Notably, one cannot say that there is an overall purpose in the tax code. To the contrary, some tax provisions are designed to collect as much revenue as possible, and some to reduce the amount of tax due.

Because the tax code lacks any guiding principle allowing someone to infer that a particular act would be illegal, it is fair to require

⁷⁷ *Id.* at 191–92 (citing *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)).

⁷⁸ *Id.* at 197.

⁷⁹ *Id.* at 186.

⁸⁰ *Id.* at 189.

⁸¹ *Id.* at 194–96.

specific knowledge of the provision alleged to be violated. By contrast, the OSH Act has the singular purpose of protecting workers: “to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions.”⁸² In light of that purpose and *Bryan*, courts should reject the argument that willfulness requires more proof beyond general knowledge of unlawfulness on the defendant’s part.

In other words, if a defendant directs an employee to work on scaffolding without fall protection or to enter a confined space without breathable air safeguards—either of which is plainly necessary to assure safe and healthful working conditions—courts should only require the government to prove that the defendant knew his conduct was “bad” and generally unlawful.

Knowledge of “bad” conduct was an issue in one of the few cases specifically addressing willfulness under section 666(e) of the OSH Act. *United States v. Dye Construction Co.* involved a trench cave-in that caused the death of an employee.⁸³ The employer argued that it was exempt from shoring requirements because it had been digging in stable ground—shale. On appeal, the employer challenged the jury instruction provided by the court as having omitted an essential element of “evil motive.”⁸⁴ Reasoning that neither the OSH Act nor the regulatory standard required “moral turpitude,” the court rejected appellant’s challenge: “The object of these provisions is prevention of injury or death and its application is not limited to the situation in which the employer entertained a specific intent to harm the employee.”⁸⁵

The instruction [upheld by the Tenth Circuit] reads as follows:

The failure to comply with a safety standard under the Occupational Safety and Health Act is willful if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An

⁸² 29 U.S.C. § 651 (emphasis added).

⁸³ 510 F.2d 78, 81 (10th Cir. 1975).

⁸⁴ *Id.*

⁸⁵ *Id.* at 82.

omission or failure to act is willfully done if done voluntarily and intentionally.⁸⁶

In *United States v. Ladish Malting Co.*, a worker “fell to his death when a rickety fire escape platform collapsed.”⁸⁷ At trial, Ladish Malting argued that it did not know about the fire escape’s poor condition. A federal magistrate instructed the jury that it could find Ladish Malting guilty if it *should have known* that the platform’s condition violated the OSHA standard:

A violation of an OSHA regulation, either by act or omission, is “willful” if it is done knowingly and voluntarily, either in reckless disobedience of the regulation or in reckless disregard of the requirements of the regulation.

“Reckless disregard” of a regulation means that the company, having knowledge of the hazardous condition, made no reasonable effort to determine whether its conduct would constitute a violation of the regulation, but acted with deliberate indifference toward the requirements of that regulation, about which the company actually knew or about which the company *reasonably should have known*.

In this context, “having knowledge of the hazardous condition” means the company knew or *should have known* of the hazardous condition.⁸⁸

Unsurprisingly, the Seventh Circuit reversed the conviction, holding that willfulness requires proof of “actual knowledge” of both the hazardous condition in question and the associated legal obligations.⁸⁹ It was error to instruct that the employer merely “should have known,” which the court equated to a civil negligence standard.⁹⁰

The *Ladish Malting* court stated that criminal recklessness could suffice, but not as defined by the magistrate court in its instruction. Rather, “criminal recklessness means awareness of facts from which

⁸⁶ *Id.* at 81.

⁸⁷ 135 F.3d 484, 486 (7th Cir. 1998).

⁸⁸ *Id.* at 486–87 (emphasis added).

⁸⁹ *Id.* at 490.

⁹⁰ *Id.* at 488.

an inference could be *and* is drawn” and differs only very slightly from actual knowledge.⁹¹ Actual knowledge can be proved “by showing deliberate indifference to the facts or the law . . . or by showing awareness of a significant risk coupled with steps to avoid additional information.”⁹² With respect to deliberate ignorance, the Seventh Circuit cited to the Supreme Court decision in *Farmer v. Brennan*, defining “deliberate indifference” in the context of a *Bivens* action as requiring a showing that the official was *subjectively* aware of the risk.⁹³

Only a handful of other courts have addressed willfulness in the context of worker endangerment crimes. In *Pitt-Des Moines*, issued shortly after *Ladish Malting Co.* and *Bryan*, the Seventh Circuit cited to *Dye Construction Co.* as correctly setting out the definition of willfulness.⁹⁴ Ten years later, a nearly identical definition was being used,⁹⁵ as was true 20 years later.⁹⁶

3. Imputing knowledge to corporate employers

Corporations are responsible for the acts and omissions of their authorized agents acting in the scope of their employment.⁹⁷ Notably, conduct is “within the scope of employment when [it is] ‘actuated, at least in part, by a purpose to serve the [employer],’ even if it is forbidden by the employer.”⁹⁸ Thus, employers have been found to

⁹¹ *Id.*

⁹² *Id.* at 490.

⁹³ 511 U.S. 825, 837 (1994). The *Farmer* court equated deliberate indifference with recklessness, which, in the criminal context, means disregard of a risk of harm of which one is aware. *Id.* at 836–37.

⁹⁴ *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 991 (7th Cir. 1999).

⁹⁵ *United States v. L.E. Myers Co.*, 562 F.3d 845, 851 (7th Cir. 2009) (“A violation of an OSHA regulation or safety standard is willful if the employer had actual knowledge that its actions did not comply with the regulation or standard, and the employer intentionally disregarded the requirements of the regulation or standard or was deliberately indifferent to those requirements. The employer need not have acted maliciously or specifically intended to harm its employees.”).

⁹⁶ *United States v. DNRB Inc.*, 895 F.3d 1063, 1067 (8th Cir. 2018) (willfully “requires that DNRB ‘intentionally disregarded or was plainly indifferent to the requirements of the Act.’”).

⁹⁷ *United States v. A&P Trucking Co.*, 358 U.S. 121 (1958).

⁹⁸ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (quoting Restatement (Second) of Agency §§ 228(1)(c), 230 (1957)).

have knowingly and voluntarily violated the OSH Act even though the supervisor with knowledge of the violation was acting against company policy.

In civil OSH Act litigation, however, courts have not imputed an employee's knowledge of the facts in cases of "unforeseeable misconduct or negligence" by the employee. This "unforeseeable employee misconduct doctrine" defense does not apply unless *all* of the following elements are met: The employer (1) established a work rule to prevent the violative behavior; (2) adequately communicated the rule to its employees; (3) took steps to discover non-compliance; and (4) effectively enforced safety rules when violations were discovered.⁹⁹

"[A] supervisor's knowledge can be imputed to his employer."¹⁰⁰ In *Ladish Malting Co.*, the convicted employer argued that "corporate knowledge means *supervisors'* knowledge."¹⁰¹ The appellate court rejected that understanding of corporate knowledge as too narrow, but it also rejected as too broad the proposition that a corporation "knows" what *any* of its employees know. The court determined that "If 'authorized agents' with reporting duties acquire actual knowledge, it is entirely sensible to say that the corporation has acquired knowledge."¹⁰²

Stated more directly, corporations know what their employees who are "responsible for a [relevant] aspect of the business know."¹⁰³ In *United States v. L.E. Myers Co.*, the Seventh Circuit reversed a section 666(e) conviction for omitting "the *Ladish [Malting]* requirement that the employee acquiring knowledge of a hazard must also have a duty to report the hazard up the corporate chain for the employee's knowledge to be considered the corporation's."¹⁰⁴

4. The violation must be of a promulgated standard

As discussed above, section 654(a) of the OSH Act imposes a general duty on employers to provide a workplace free from recognized hazards that could cause death or serious physical harm to their

⁹⁹ See, e.g., *D.A. Collins Constr. Co. v. Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997).

¹⁰⁰ *DNRB Inc.*, 895 F.3d at 1067.

¹⁰¹ *United States v. Ladish Malting Co.*, 135 F.3d 484, 492 (7th Cir. 1998) (emphasis added).

¹⁰² *Id.* at 493.

¹⁰³ *Id.* at 492.

¹⁰⁴ 562 F.3d 845, 852–53 (7th Cir. 2009).

employees, as well as a duty to comply with specific OSHA standards. OSHA uses the General Duty Clause to address recognized hazards where no OSHA standard exists.

For example, following the death of an animal trainer at SeaWorld of Florida, the General Duty Clause was the basis for a willful citation for exposing its employees to struck-by and drowning hazards when interacting with killer whales.¹⁰⁵ The clause was also the basis of a serious citation against Walmart Stores following the death of a worker crushed by Black Friday shoppers.¹⁰⁶ But the violation of the General Duty Clause *cannot* be the basis for a criminal prosecution because section 666(e) on its face applies only to violations of “any standard, rule, or order promulgated pursuant to section 655 of this title.”¹⁰⁷

5. Proving causation

The *Pitt-Des Moines* case, discussed above in the context of the multi-employer doctrine, is significant for a lower-court holding as well. In trial proceedings, the government moved in limine to preclude evidence and argument suggesting that it was the improper design of the steel beam used by Pitt-Des Moines and not the violation of an OSHA standard (here, the connection rule and the training requirement) that caused the collapse that killed two employees.¹⁰⁸ The district court thoroughly reviewed the general principles of causation and the legislative history of the OSH Act and ruled that the government must prove that the defendant’s violation of a safety standard was both the “cause in fact” and the “legal cause” of the death.¹⁰⁹

Cause in fact means that “but for” the defendant’s conduct, the harm would not have occurred, and legal or “proximate” cause means that the harm was a foreseeable and natural result of the conduct.¹¹⁰ Combined, this standard mirrors the standard required to prove

¹⁰⁵ *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1216 (D.C. Cir. 2014).

¹⁰⁶ News Release, Occupational Safety and Health Admin., U.S. Dept. of Labor, U.S. Labor Department’s OSHA Cites Wal-Mart Stores Inc. Following Crushing Death of Worker at Long Island, N.Y., Store (May 26, 2009).

¹⁰⁷ 29 U.S.C. § 666(e).

¹⁰⁸ *United States v. Pitt-Des Moines Inc.*, 970 F. Supp. 1359, 1363 (N.D. Ill. 1997).

¹⁰⁹ *Id.* at 1364.

¹¹⁰ *Id.* at 1364–65.

negligence in a tort action in most jurisdictions. Applying the standard, the trial court concluded, on the record before it, that the company's argument that the steel beam was improperly designed had no relevance to cause in fact or legal cause.¹¹¹ Some kinds of defenses to causation that might have more traction include the following: (1) that the harm would have occurred in any event, regardless of the defendant's conduct; and (2) that the harmful result caused was so remote as to make it unjust to hold the defendant liable for it.

6. Unit of prosecution

If an employer's violation of a single standard causes multiple employee deaths, should it be charged with a single count for the one standard violated or a count for each resulting fatality? That issue has not been addressed by the courts. The cases reflect a practice of charging a count (or in some cases, multiple counts) for each victim killed.

Following the death of an employee in a trench cave-in, Dye Construction Co. was charged with a single section 666(e) count based on a violation of one regulation.¹¹² S.A. Healy Co. and Patrick Doig were each charged with 12 counts arising out of violations of four safety regulations resulting in three deaths.¹¹³ ABC Utilities Services Inc. and Bruce Shear were both charged with two counts arising out of two violations resulting in one death.¹¹⁴ John Cusack was charged in one count with violating two standards and, thereby, causing the death of an employee.¹¹⁵ Pitt-Des Moines Inc. was indicted in count one for violating two standards resulting in the death of one employee, and in count two with the same violations resulting in the death of a second employee.¹¹⁶ Ladish Malting Co. was charged with violating one regulation that resulted in one death.¹¹⁷ MYR Group Inc. was charged with one count of violating the training rule for each of two employees electrocuted.¹¹⁸ Co-defendant L.E. Myers Co. was charged in count one with five regulatory violations resulting in one death and

¹¹¹ *Id.* at 1367–69.

¹¹² *United States v. Dye Constr. Co.*, 510 F.2d 78, 79 (10th Cir. 1975).

¹¹³ *United States v. Doig*, 950 F.2d 411, 412 (7th Cir. 1991).

¹¹⁴ *United States v. Shear*, 962 F.2d 488, 489 (5th Cir. 1992).

¹¹⁵ *United States v. Cusack*, 806 F. Supp. 47, 48 (D.N.J. 1992).

¹¹⁶ *United States v. Pitt-Des Moines*, 168 F.3d 976, 981 (7th Cir. 1999).

¹¹⁷ *United States v. Ladish Malting Co.*, 135 F.3d 484, 486 (7th Cir. 1998).

¹¹⁸ *United States v. MYR Group Inc.*, 361 F.3d 364, 365 (7th Cir. 2004).

in count two with six regulatory violations resulting in a second death.¹¹⁹ DNRB Inc. was charged in one count with violating two safety regulations and causing a death.¹²⁰

B. Making false statements in an OSHA document

The next OSH Act crime is making false statements, familiar territory to federal white-collar prosecutors. Section 17(g) of the OSH Act provides the following:

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.¹²¹

This criminal prohibition differs from section 666(e) in two important ways. First, the false statement provision is not limited to employers but, instead, imposes liability upon “whoever” commits the offense. Second, it requires only a knowing mental state instead of a willful one.

When the evidence in a worker safety case supports a charge under section 666(g), most prosecutors turn, instead, to the general false statement provision found at 18 U.S.C. § 1001. This provision is not limited to false statements in OSHA records, but it applies to misrepresentations made in any matter within OSHA’s jurisdiction. It provides a far more significant penalty than section 666(g), carrying five years in prison and a fine of up to \$250,000 (for an individual) or \$500,000 (for a corporation).

Section 1001, however, requires proof of willfulness.¹²² Section 1001 also requires a showing of materiality: That is, the false statement must have “a natural tendency to influence, or [be] capable of influencing, the decision of” the [decision-making] body to which it

¹¹⁹ United States v. L.E. Myers Co., 562 F.3d 845, 850 (7th Cir. 2009).

¹²⁰ United States v. DNRB Inc., 895 F.3d 1063, 1066 (8th Cir. 2018).

¹²¹ 29 U.S.C. § 666(g).

¹²² See, e.g., Brief for United States in Opposition to Petitioner for Writ of Cert., Ajoku v. United States, No. 13–7264 (U.S.), 2014 WL 1571930, at *10 (Mar. 10, 2014) (conceding error, the government states that willfully in section 1001 requires that a defendant deliberately engage in the forbidden conduct *and* possess a guilty state of mind).

was addressed.”¹²³ Whether materiality is an element of the OSH Act’s false statement provision has not been adjudicated. Because the plain language of the statute does not mention materiality, however, the Supreme Court’s holding in *United States v. Wells* should govern, and the requirement should not be read into it.¹²⁴

Having been convicted under 18 U.S.C. § 1001 of making a false statement on a confined space entry permit (an OSHA document), defendant Allan Elias argued that section 1001 was preempted by 29 U.S.C. § 666(g).¹²⁵ Although the Ninth Circuit declined to consider the argument, which had not been raised in Elias’s previous appeal, a compelling argument for why the argument fails can be found in the government’s brief.¹²⁶

C. Advance notice of inspections

The third OSH Act criminal provision addresses a particular, and not at all unusual, kind of obstruction that occurs in this field. Section 17(f) provides:

Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than \$1,000 or by imprisonment for not more than six months, or by both.¹²⁷

There are no published opinions interpreting an application of this provision. Like the OSH Act false statement prohibition, this provision is not limited to employers but covers, instead, “any person.” Recall that “‘person’ means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or

¹²³ *Kungys v. United States*, 485 U.S. 759, 770 (1988) (citation omitted); see *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

¹²⁴ 519 U.S. 482 (1997) (materiality, which is not mentioned in the statute, is not an element of knowingly making a false statement to a federally insured bank under 18 U.S.C. § 1014).

¹²⁵ Brief for Appellant, *United States v. Elias*, No. 03-30450, 2004 WL 1125562, at *16–*20 (9th Cir. Apr. 2, 2004).

¹²⁶ Brief for United States as Appellee, *United States v. Elias*, No. 03-30450, 2004 WL 1533728, at *29–*32 (9th Cir. Jun. 3, 2004).

¹²⁷ 29 U.S.C. § 666(f).

any organized group of persons.”¹²⁸ Accordingly, this provision includes both employees and OSHA personnel.

The Mine Safety and Health Act contains an advance notice provision at 30 U.S.C. § 820(e), which is virtually identical to the OSH Act provision. Section 820(e) has been discussed in the context of the notorious practice in the mining industry of broadcasting the arrival of on-site mine safety inspectors so that safety violations, which are routinely ignored at some mines, can be ameliorated before inspectors can write them up.¹²⁹ Given the same practice throughout other industries, section 666(f) should be applicable to persons broadcasting the arrival of on-site OSHA personnel.

As with the OSH Act false statement provision, there are alternatives to using section 666(f). For example, one could charge a conspiracy to defraud (*Klein* conspiracy) under 18 U.S.C. § 371, or obstruction of an agency proceeding under 18 U.S.C. § 1505. Note, however, that section 1505 requires proof of an element that the OSH Act advance notice provision does not: Under section 1505, the government has to show that the defendant acted “corruptly” when providing the notice, and under the OSH Act, there is no such requirement.

V. Criminal penalties

The three OSH Act criminal provisions each carry a term of imprisonment of up to six months. Federal offenses carrying a maximum term of six months in jail are classified as Class B misdemeanors.¹³⁰ The Sentencing Guidelines do not apply to Class B misdemeanors.¹³¹

Through the Sentencing Reform Act of 1984, Congress standardized penalties and sentences for federal offenses. Thus, even though the OSH Act authorizes a fine of no more than \$10,000 for a violation of section 666(e), 18 U.S.C. § 3571 makes a misdemeanor resulting in

¹²⁸ 29 U.S.C. § 652(4).

¹²⁹ See, e.g., *United States v. Stover*, No. 5:11-cr-38, 2012 WL 638787, at *2–*5 (S.D. W.Va. Feb. 27, 2012) (mine operator’s chief of security convicted of false statement for lying about routine violations of the advance-notice prohibitions).

¹³⁰ 18 U.S.C. § 3559(a)(7).

¹³¹ U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 1B1.9 (U.S. SENTENCING COMM’N 2018).

death punishable by a fine of up to \$250,000 for an individual and up to \$500,000 for an organization.¹³²

Furthermore, pursuant to the alternative fine provision of section 3571, a defendant is subject to a fine equal to the “greater of twice the gross gain or twice the gross loss” resulting from the offense.¹³³ In the context of a worker death, this would be a fine equal to twice the estimated lifetime earnings of an employee killed by the employer’s willful violation of an OSHA standard, although no cases have sought such a fine to date. An alternative fine must be specified in the indictment and proved beyond a reasonable doubt to a jury.¹³⁴

The penalty for an individual convicted of violating the advance notice provision (a Class B misdemeanor that does not result in death) is a fine of up to \$5,000,¹³⁵ and for an organization, a fine up to \$10,000.¹³⁶ The maximum fine for an OSH Act false statement is \$10,000 for both individuals and organizations, because the fine amount in section 666(g) is greater than the fine amount for a Class B misdemeanor.¹³⁷

VI. Restitution

In determining what sentence to impose, a federal court must consider “the need to provide restitution to any victims of the offense.”¹³⁸ For section 666(e) offenses, restitution may be imposed in one of two ways. The first is as a condition of probation or supervised release. The second is as agreed upon by the parties in a plea agreement.

The federal restitution provisions in Title 18 provide that a court *shall* order restitution in accordance with section 3663A and *may*

¹³² 18 U.S.C. § 3571(b)(4), (c)(4); *see, e.g.*, United States, L.E. Myers Co., 562 F.3d 845, 852 (7th Cir. 2009); United States v. Ladish Malting Co., 135 F.3d 484, 486 (7th Cir. 1998) (applying 18 U.S.C. § 3571 to convictions under 29 U.S.C. § 666(e)).

¹³³ 18 U.S.C. § 3571(d).

¹³⁴ *See* Southern Union Co. v. United States, 567 U.S. 343, 360 (2012).

¹³⁵ 18 U.S.C. § 3571(b)(6).

¹³⁶ 18 U.S.C. § 3571(c)(6).

¹³⁷ 18 U.S.C. § 3571 (providing for a fine not more than the greatest of (1) the amount specified in the law setting forth the offense, or (2)–(7), which each specify certain amounts depending on the grade of the violation (felonies, misdemeanors, and infractions)).

¹³⁸ 18 U.S.C. § 3553(a)(7).

order restitution in accordance with section 3663.¹³⁹ Section 3663A, the Mandatory Victims Restitution Act (MVRA), requires courts to order restitution to any person who suffers physical injury or pecuniary loss as a direct or proximate result of the commission of (1) a crime of violence; (2) an offense against property under Title 18 or Section 856(2) of Title 21; or (3) an offense under Section 1365 of Title 18, relating to the act of tampering with consumer products.¹⁴⁰ Section 3663, the Victim and Witness Protection Act (VWPA), grants courts discretion to order restitution for certain Title 18, 21, and 49 offenses.¹⁴¹ Neither statute includes OSH Act offenses.

Federal courts, however, have authority to order restitution as a condition of probation, consistent with the provisions of the VWPA, the MVRA, and the procedures set out in 18 U.S.C. § 3664, even if the offense of conviction is not among those set forth in the VWPA and MVRA.¹⁴² This same authority applies to restitution as a condition of supervised release.¹⁴³ Restitution may be ordered only for the offense of conviction and not for other related offenses of which the defendant is not convicted.¹⁴⁴

If, however, an offense of conviction involves as an element “a scheme, conspiracy, or pattern of criminal activity,” any person directly harmed as a result of the defendant’s criminal conduct in the course of that “scheme, conspiracy, or pattern” qualifies as a victim.¹⁴⁵ Moreover, “the court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.”¹⁴⁶ A

¹³⁹ 18 U.S.C. § 3556.

¹⁴⁰ 18 U.S.C. § 3663A(a)(1), (c)(1).

¹⁴¹ 18 U.S.C. § 3663(a).

¹⁴² 18 U.S.C. § 3563(b)(2); *see* *United States v. Nachtigal*, 507 U.S. 1, 5 n.* (1993) (per curiam) (recognizing the authority of federal courts “to attach a host of discretionary conditions to [a] probationary term” pursuant to section 3563(b), and more specifically, to order restitution as a condition of probation for offenses set forth in the Code of Federal Regulations.).

¹⁴³ 18 U.S.C. § 3583(d).

¹⁴⁴ 18 U.S.C. §§ 3663(a)(1)–(2), 3663A(a)(1)–(2); *see also* *Hughey v. United States*, 495 U.S. 411, 413 (1990) (“[T]he language and structure of the [VWPA] make plain Congress’ intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction.”).

¹⁴⁵ 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2).

¹⁴⁶ 18 U.S.C. § 3663(a)(3); *see also* 18 U.S.C. § 3663A(c)(2).

restitution order issued pursuant to a plea agreement may authorize restitution in an amount greater than the loss attributable to the offense of conviction, as well as restitution to persons other than the victim of the offense.¹⁴⁷

If one of the goals of your criminal prosecution is to secure restitution for a victim, you must be sure that the charge you select will provide the court authority to order it. In the worker safety context, that might mean including a section 666(e) count, even if other felony offenses are being pursued.¹⁴⁸ Additionally, be aware that restitution payments ordered as a condition of supervised release do not begin until the defendant has completed the term of incarceration. Depending on the length of the sentence, the delay may impact a victim's granted restitution.

In the average section 666(e) case, the most significant economic loss is likely to be lost future income. The VWPA and MVRA provide that a defendant must make restitution for a victim's "lost income" in cases involving bodily injury, and courts have held that lost income includes lost future income.¹⁴⁹ The government carries the burden of establishing restitution losses, and a court may decline to award restitution if it concludes that determining a restitution award will unreasonably prolong or complicate sentencing.¹⁵⁰

Because courts have recognized that the concepts and analyses involved in calculating future lost income are "well-developed in federal law,"¹⁵¹ there is no reason that a district court should decline to award lost future income in a section 666(e) case, provided that the prosecution has planned ahead. In order to obtain a lost future income calculation, the prosecution should hire a forensic economist with experience in this area.

¹⁴⁷ 18 U.S.C. §§ 3663(a)(1)(A), (a)(3), 3663A(a)(3).

¹⁴⁸ *See United States v. Elias*, 269 F.3d 1003, 1021 (9th Cir. 2001) (restitution for an injured employee could not be based on defendant's conviction for making a false statement to a government agency, because the employee was not harmed by that particular crime).

¹⁴⁹ 18 U.S.C. §§ 3663(b)(2), 3663A(b)(2); *see, e.g., United States v. Messina*, 806 F.3d 55, 67–70 (2d Cir. 2015) (collecting cases upholding restitution for lost future income).

¹⁵⁰ 18 U.S.C. § 3663(a)(1)(B)(ii). MVRA made the "complexity exception" inapplicable to crimes of violence. *See* 18 U.S.C. § 3663A(c)(3).

¹⁵¹ *United States v. Cienfuegos*, 462 F.3d 1160, 1169 (9th Cir. 2006).

Restitution is also available for the costs of medical, funeral, and related services.¹⁵² In many section 666(e) cases, a portion of the costs of medical services and funeral expenses would have been paid by the workers compensation carrier, but costs paid by insurers must be included in a restitution award.¹⁵³ Medical care providers, insurance companies, or other third parties who have suffered pecuniary losses as a result of the offense conduct will be paid restitution amounts after the victim or victim's family are paid.¹⁵⁴

Among the recent examples of OSH Act criminal sentences that include restitution is *United States v. Behr Iron & Steel Inc.*¹⁵⁵ Behr Iron & Steel pleaded guilty to failing to meet safety standards, causing the death of an employee who got caught in a moving, unguarded conveyor belt. Behr Iron was sentenced to five years' probation and ordered to pay \$350,000 of restitution to the victim's estate.

In *United States v. C & J Well Services Inc.*,¹⁵⁶ an oilfield services company pleaded guilty to violating the standard requiring the cleaning of tanker trailers prior to welding on them. This failure caused an explosion that fatally injured an employee. C & J Well Services was sentenced to three years' probation and ordered to pay a \$500,000 fine as well as \$1.6 million in restitution to the victim's estate.

VII. General criminal law principles

A. Indictment versus information

There is no constitutional right to an indictment if the offense charged is a misdemeanor.¹⁵⁷ Although an indictment may be used in the case of a misdemeanor, the prosecution may also proceed by an information.¹⁵⁸

¹⁵² 18 U.S.C. § 3663(b)(2).

¹⁵³ 18 U.S.C. § 3664(f)(1)(B).

¹⁵⁴ 18 U.S.C. § 3664(j).

¹⁵⁵ No. 16-CR-50015, Dkt. No. 18 (N.D. Ill. July 12, 2016).

¹⁵⁶ See No. 1:19-cr-79, Dkt. No. 2 (D. N.D. June 3, 2019).

¹⁵⁷ See U.S. CONST. amend. V; *Duke v. United States*, 301 U.S. 492, 494–95 (1937).

¹⁵⁸ FED. R. CRIM. P. 7(a), 58(b)(1).

B. Right to a jury trial

The Sixth Amendment guarantees that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”¹⁵⁹ The Supreme Court interpreted the scope of the right to jury trial, in light of the common law, as applying only to criminal prosecutions for “serious” offenses, meaning that offenses deemed to be “petty” may be tried without a jury.¹⁶⁰

In defining a serious offense, the Supreme Court later held that “a potential sentence in excess of six months’ imprisonment is sufficiently severe by itself to take the offense out of the category of ‘petty.’”¹⁶¹ On the other hand, an offense with an authorized penalty of six months or less is deemed presumptively “petty.”¹⁶² A defendant can overcome that presumption and trigger the right to a jury trial “only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one.”¹⁶³ The Court noted that it would be a “rare situation where a legislature packs an offense it deems ‘serious’ with onerous penalties that nonetheless ‘do not puncture the 6-month incarceration line.’”¹⁶⁴

Each OSH Act criminal offense authorizes a potential jail sentence of only six months or less and is, therefore, presumptively petty. For a violation of section 666(e), however, there are compelling arguments to overcome that presumption. First, Congress has defined a petty offense as

¹⁵⁹ U.S. CONST. amend. VI.

¹⁶⁰ *Duncan v. Louisiana*, 391 U.S. 145, 159–62 (1968).

¹⁶¹ *Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970) (The statute at issue in *Baldwin*, “jostling” or pickpocketing, was a misdemeanor punishable by up to a year in jail).

¹⁶² *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (no right to jury trial for DUI carrying maximum penalty of 6 months in jail, a \$1,000 fine, automatic loss of driver’s license for 90 days, and alcohol abuse education course).

¹⁶³ *Id.* at 543.

¹⁶⁴ *Id.* (citation omitted). The Supreme Court applied a *Blanton* analysis one other time in *United States v. Nachtigal*, 507 U.S. 1, 3–4 (1993) (no right to jury trial for DUI carrying maximum penalty of 6 months in jail and a \$5,000 fine or 5 years’ probation).

a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is not greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization.¹⁶⁵

Because the possible fine for a misdemeanor resulting in death (\$250,000 for an individual¹⁶⁶ and \$500,000 for an organization)¹⁶⁷ is considerably higher than the fine for a Class B misdemeanor that does not result in death (\$5,000 for an individual¹⁶⁸ and \$10,000 for an organization),¹⁶⁹ a violation of 29 U.S.C. § 666(e) is not “petty” according to 18 U.S.C. § 19. Moreover, the possible fine for a section 666(e) violation could be even greater than \$250,000 or \$500,000 if calculated as an alternative fine based on gain or loss (here, lost income) under 18 U.S.C. § 3571(d). Restitution for lost wages ordered as a condition of probation or supervised release could easily be well over \$1,000,000.

Although the statutory definition of petty offense does not determine whether an offense is petty in the constitutional sense,¹⁷⁰ a potential penalty of \$1,000,000 or more would strike most as serious.¹⁷¹ The reported decisions clearly reflect a practice of proceeding by jury trial in section 666(e) cases.

C. Double jeopardy

A single worker safety violation may subject a defendant to both civil and criminal sanctions, and defendants have raised double jeopardy arguments in such situations. The Double Jeopardy Clause prevents multiple *criminal* punishments for the same offense.¹⁷² In *Hudson v. United States*, the Supreme Court set out the test for

¹⁶⁵ 18 U.S.C. § 19.

¹⁶⁶ 18 U.S.C. § 3571(b)(4).

¹⁶⁷ 18 U.S.C. § 3571(c)(4).

¹⁶⁸ 18 U.S.C. § 3571(b)(6).

¹⁶⁹ 18 U.S.C. § 3571(c)(6).

¹⁷⁰ *Muniz v. Hoffman*, 422 U.S. 454, 476–77 (1975).

¹⁷¹ See *United States v. Soderna*, 82 F.3d 1370, 1379 (7th Cir. 1996) (“If the fine for a first-time nonviolent obstruction of a clinic or other facility covered by the Freedom of Access to Clinic Entrances Act were \$1 million, it would be hard to resist the inference that the offense was serious rather than petty.”).

¹⁷² See U.S. CONST. amend. V; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

determining whether the Double Jeopardy Clause is violated.¹⁷³ First, a court must determine whether the legislature intended the sanction at issue to be civil in nature.¹⁷⁴ This assessment can be made from the expressed or implied intent of the legislature.¹⁷⁵ Second, if the court determines that the sanction was intended to be civil in nature, then it must determine whether the sanctions are so punitive as to render them criminal despite congressional intent to the contrary.¹⁷⁶

To answer this question, courts are to consider seven factors set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.¹⁷⁷

Applying these principles, the Seventh Circuit held the Double Jeopardy Clause did not forbid \$249,000 in civil sanctions under section 666(a), following a \$750,000 criminal fine under section 666(e) for the same offense (three employee deaths caused by a methane explosion).¹⁷⁸ In *LaCrosse v. Commodity Futures Trading Commission*, the Seventh Circuit made clear that the order of proceedings was irrelevant under *Hudson*, stating, “whether the civil penalty precedes or follows the criminal punishment is of no moment to the analysis; the question remains whether the [defendant] is subject to ‘multiple criminal punishments for the same offense.’”¹⁷⁹

Conversely, it is not a prerequisite for a criminal prosecution under section 666(e) that a willful citation has been issued by OSHA.

¹⁷³ 522 U.S. 93, 96 (1997).

¹⁷⁴ *Id.* at 99–101.

¹⁷⁵ *Id.* at 99.

¹⁷⁶ *Id.* at 99–100.

¹⁷⁷ 372 U.S. 144, 168–69 (1963) (footnotes omitted).

¹⁷⁸ *S.A. Healy Co. v. Occupational Safety and Health Review Comm’n*, 138 F.3d 686, 688 (7th Cir. 1998).

¹⁷⁹ 137 F.3d 925, 929 n.2 (7th Cir. 1998).

Moreover, the issuance of a serious citation for the violation of a standard that causes the death of an employee does not preclude a subsequent indictment for a willful violation under section 666(e), nor is it admissible as evidence that, in the judgment of OSHA, the conduct was not willful.¹⁸⁰ Citations must be issued within six months. In many instances, the criminal investigation—which often does not begin until after the issuance of citations—reveals evidence of wrongdoing unavailable to OSHA.¹⁸¹

VIII. Statute of limitations

Section 658(c) of the OSH Act mandates that all citations be issued no later than six months following the occurrence of any violation.¹⁸² This provision applies to civil citations only. The statute of limitations for OSH Act criminal offenses is the five-year limitation period set out in 18 U.S.C. § 3282.¹⁸³

IX. Parallel proceedings

Parallel civil enforcement actions usually accompany criminal OSH Act cases. If OSHA has issued citations, one of the first things to consider is staying the civil proceedings. Rule 63 of the Occupational Safety and Health Review Commission’s Rules of Procedure governs stays during criminal cases. The party seeking a stay must file a motion with the judge assigned to the case and copy the Chief ALJ.¹⁸⁴

The motion must state the position of the other parties, the reasons a stay is sought, and the length of the stay requested.¹⁸⁵ The judge, with the concurrence of the Chief Judge, “may grant . . . [the] stay for the period requested or for such period as is deemed appropriate.”¹⁸⁶ Thereafter, the parties must submit reports to the judge at least every

¹⁸⁰ See *United States v. Pitt-Des Moines*, 168 F.3d 976, 991–92 (7th Cir. 1999).

¹⁸¹ *But cf.* *United States v. Egan Marine Corp.*, 843 F.3d 674, 678–79 (7th Cir. 2016) (holding that issue preclusion from a civil case controlled in subsequent criminal case, leading to reversal of conviction).

¹⁸² 29 U.S.C. § 658(c).

¹⁸³ *United States v. Dye Constr. Co.*, 510 F.2d 78, 83 (10th Cir. 1975).

¹⁸⁴ 29 C.F.R. § 2200.63(a).

¹⁸⁵ *Id.*

¹⁸⁶ 29 C.F.R. § 2200.63(b).

90 days.¹⁸⁷ Although the regulation states that “stays are not favored,”¹⁸⁸ they have historically been routinely granted.

Of course, legal requirements controlling communication and cooperation between prosecutors and civil enforcement personnel working on parallel proceedings must be adhered to. This includes reports to the ALJ for the purpose of extending stays. Because many OSHA personnel are not familiar with criminal law and procedure, it is important to explain the criminal process to them and keep them generally informed of progress in the criminal investigation.

X. Investigative resources

The Department of Labor has not been provided with resources to investigate worker safety crimes. Although the Department of Labor has an Office of the Inspector General, that Office conducts criminal investigations relating to alleged or suspected violations of laws only as they pertain to Department of Labor programs, operations, and personnel. Most prosecutors turn to the FBI for assistance in an OSH Act criminal investigation. If the incident has an environmental crimes nexus, then the Environmental Protection Agency Criminal Investigation Division will assist.

XI. Conclusion

The OSH Act criminal provisions have not been enhanced since enactment in 1970. Repeated attempts to increase the breadth of coverage and penalties under the Act, most notably through the Protecting America’s Workers Act, have failed. Even so, the statutory provision penalizing the willful violation of an OSHA standard causing a death can be a useful tool.

This is particularly true in cases that have no related Title 18 or environmental nexus and, thus, no other applicable charge. A workplace death is, all too often, a preventable death. Such a death due to an employer’s plain indifference or intentional disregard should be investigated and prosecuted whenever possible. Word of an OSH Act conviction spreads quickly through a given industry, resulting in safer workplaces far beyond the one where a violation occurred.

An OSH Act conviction also means a great deal to the family dealing with the tragic loss of a loved one, and it impresses upon employers

¹⁸⁷ 29 C.F.R. § 2200.63(c).

¹⁸⁸ 29 C.F.R. § 2200.63(a).

that the government will not tolerate treating loss of life as just another cost of doing business.

About the Author

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Prosecuting Mine Safety Cases

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For centuries, mining has been—and remains—an “essential occupation to the commercial health of a growing industrial society.”¹ But mining also has a “notorious history of serious accidents and unhealthful working conditions.”² This article discusses criminal enforcement of the federal mine safety statute, the Mine Safety and Health Act (Mine Act).³ First, the article provides an overview of the history of the Mine Act from its enactment in 1977 until the present. Second, the article discusses two criminal offenses that Congress provided for persons who violate the Mine Act’s safety and health standards. Third, the article reviews how federal prosecutors have used Title 18 charges to promote mine safety and uphold the integrity of the Mine Act’s regulatory scheme. Fourth, the article offers practice pointers for investigating potential Mine Act offenses. Overall, the article seeks to encourage prosecutors to bring appropriate Mine Act criminal prosecutions that promote compliance and safety.

I. Overview of mine safety and health since the Mine Act’s enactment

Congress enacted the Mine Act in 1977 in response to a series of mining disasters and mounting grassroots activism.⁴ To strengthen

¹ *National Mining Ass’n v. Secretary, U.S. Dep’t of Labor*, 812 F.3d 843, 852 (11th Cir. 2016).

² *Donovan v. Dewey*, 452 U.S. 594, 603 (1981).

³ 30 U.S.C. § 801, *et seq.* The Mine Act applies to all facilities that meet the statutory definition of “mine,” including operations that supply sand and gravel to construction projects; coal that fires power plants; precious metals and valuable stones; and minerals needed for specialized agricultural and industrial applications. *See* 30 U.S.C. § 802(h) (statutory definition of “mine”).

⁴ Prominent tragedies during this period included the 1968 explosion in Farmington, West Virginia, that killed 78 coal miners, *see* Douglas Imbrogno & 100 Days in Appalachia, *Farmington No. 9: The West Virginia Disaster*

earlier legislation, the Mine Act made the U.S. Department of Labor responsible for mine safety and created a new agency focused on the issue: the Mine Safety and Health Administration (MSHA). Congress required the MSHA to promulgate safety and health standards that would prohibit the kinds of dangerous practices that repeatedly injured, sickened, and killed miners.⁵ To enforce the rules, Congress required the MSHA to inspect each surface mine in its entirety twice a year and each underground mine four times a year.⁶ Inspectors are directed to issue stop work orders for ongoing hazards or noncompliance, require prompt corrections of violations, and issue fines to mine operators who fail to follow safety rules.⁷

Since the enactment of the Mine Act, mining has become. Between 1983 and 2018, the fatality rate for miners dropped to about 10 deaths

that Changed Coal Mining Forever, WV PUBLIC BROADCASTING (Nov. 20, 2018), <https://www.wvpublic.org/post/farmington-no-9-west-virginia-disaster-changed-coal-mining-forever#stream/0>; the 1969 coal mine strike in the Appalachian coalfields and march to the West Virginia state capitol to demand government action to prevent black lung disease, see West Virginia Encyclopedia, *December 30, 1969: President Nixon Signs Federal Coal Mine Health and Safety Act*, WV PUBLIC BROADCASTING (Dec. 30, 2018), <https://www.wvpublic.org/post/december-30-1969-president-nixon-signs-federal-coal-mine-health-and-safety-act#stream/0>; the 1972 fire in Big Creek, Idaho, that killed 91 silver miners, see Phyllis Silver, *Idaho's Silver Valley Marks 40 Years Since Sunshine Mine Disaster*, NPR (Apr. 27, 2012), <https://www.npr.org/templates/story/story.php?storyId=151560759>; and the failure of a mine impoundment in Buffalo Creek, West Virginia, that flooded a narrow valley, killed 125 residents, injured 1,000, and left thousands homeless, see West Virginia Encyclopedia, *February 26, 1972: Coal Mining Dam Collapses in Buffalo Creek*, WV PUBLIC BROADCASTING (Feb. 26, 2019), <https://www.wvpublic.org/post/february-26-1972-coal-mining-dam-collapses-buffalo-creek#stream/0>. According to the legislative history, at the time of the Mine Act's enactment "an average of one miner died and sixty-six miners were injured each day, and the incident of work-related injuries and illnesses for miners exceeded the 'all-industry' rate at the time by about 14 percent." *Big Ridge, Inc. v. Federal Mine Safety and Health Review Comm'n*, 715 F.3d 631, 635 (7th Cir. 2013) (citing S. Rep. No. 95-181, at 4, 7, 1977 U.S.C.C.A.N. 3404, 3407).

⁵ *National Min. Ass'n v. Secretary, U.S. Dep't of Labor*, 812 F.3d 843 (11th Cir. 2016).

⁶ 30 U.S.C. § 813(a) (inspection provision).

⁷ 30 U.S.C. §§ 814 (citation and order provisions), 815(a) (administrative fine provision).

per 100,000 miners, a decrease of over 75%.⁸ That said, mining remains an unusually dangerous profession, with a fatality rate about three times higher than the national average.⁹ Large mining disasters and black lung disease are not things of the past. Just nine years ago, 29 workers died when a coal mine exploded in West Virginia,¹⁰ and rates of black lung disease are *increasing* in central Appalachia.¹¹

A review of calendar year 2019 fatality reports posted to the MSHA's website¹² shows that miners continue to die from preventable hazards that have long plagued the industry and for which proscriptive Mine Act standards already exist: runaway vehicles and collisions in rugged terrain, fires and roof collapses in underground mines, electrocutions, and falls from heights. And thousands of miners suffer serious, "lost-time" injuries each year, as shown in Figure 1.¹³

⁸ *Number and Rate of Occupational Mining Fatalities by Year, 1983–2018*, NIOSH Mining, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://wwwn.cdc.gov/NIOSH-Mining/MMWC/Fatality/NumberAndRate> (last visited Dec. 10, 2019).

⁹ According to the Bureau of Labor Statistics, the national average of worker deaths per 100,000 employees in 2017 was 3.5. Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Census of Fatal Occupational Injuries News Release (Dec. 18, 2018).

¹⁰ Ian Urbina, *No Survivors Found After West Virginia Mine Disaster*, N.Y. TIMES (Apr. 9, 2010), <https://www.nytimes.com/2010/04/10/us/10westvirginia.html>.

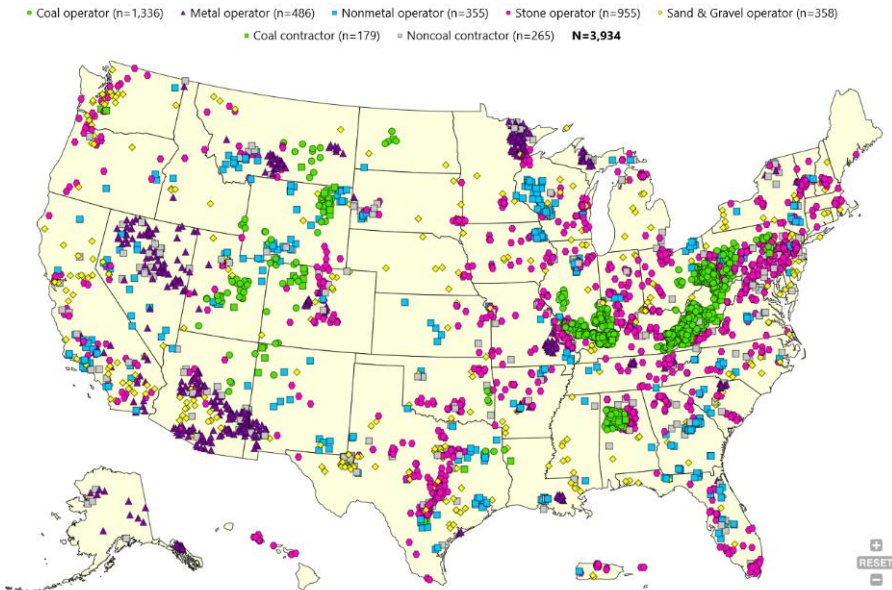
¹¹ *Prevalence of Black Lung Continues to Increase Among U.S. Coal Miners*, *The Nat'l Inst. for Occupational Safety and Health (NIOSH)*, CTRS. FOR DISEASE CONTROL AND PREVENTION (July 20, 2018), <https://www.cdc.gov/niosh/updates/upd-07-20-18.html>.

¹² *Fatality Reports*, U.S. DEP'T OF LABOR, <https://www.msha.gov/data-reports/fatality-reports/search> (last visited Dec. 10, 2019).

¹³ Published injury rates do not capture reportable injuries that are not actually reported. See *United States v. Turner*, 102 F.3d 1350, 1359 n.8 (4th Cir. 1996) (noting that failures to report accidents will distort a mine's accident rate). For an opinion discussing MSHA's efforts to investigate injury under-reporting, see *Big Ridge, Inc. v. Federal Mine Safety and Health Review Comm'n*, 715 F.3d 631 (7th Cir. 2013).

II. Criminal penalties for violating Mine Act standards

The Mine Act contains two criminal provisions—sections 820(c) and 820(d)—that apply to persons who violate the Mine Act’s safety and health standards.¹⁴ The criminal provisions supplement the MSHA’s administrative enforcement scheme, which is based on the issuance of citations and fines that range from \$167–\$70,000, depending on the severity of the violation and the size of the employer.¹⁵ The legislative history of the Mine Act indicates that Congress included criminal provisions “to punish ‘habitual’ and ‘chronic’ violators that choose to pay fines rather than remedy safety violations.”¹⁶ By subjecting individuals to personal criminal liability, including incarceration, Congress “forced mine operators to internalize the costs associated with noncompliance with mine safety laws, even when such noncompliance would maximize profits from a business perspective.”¹⁷



¹⁴ 30 U.S.C. §§ 820(d), 820(c).

¹⁵ 30 U.S.C. §§ 820(a), (i); 30 C.F.R. § 100.5(e). Fines for “flagrant” violations as that term is statutorily defined can range up to \$266,275. 30 U.S.C. § 820(b)(2); 30 C.F.R. § 100.5(e).

¹⁶ *United States v. Blankenship*, 846 F.3d 663, 675 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 315 (Oct. 10, 2017) (reviewing legislative history).

¹⁷ *Id.* at 677.

The figure above demonstrates 3,934 reported, non-fatal, lost-time injuries from 2018, which includes each mining sector.¹⁸

A. Section 820(c): knowing violations by responsible individuals

Section 820(c) of the Mine Act makes it a crime for any “director, officer, or agent” of a “corporate” mine operator to “knowingly [authorize], [order], or carr[y] out” a violation of a standard.¹⁹ The statutory definition of “agent” generally covers mine managers since it applies to “any person charged with responsibility for the operation of all or a part of a . . . mine or the supervision of the miners in a . . . mine.”²⁰ The “corporate operator” referred to in section 820(c) includes any entity (such as a limited liability company) having the essential attribute of a corporation, that is, a shield from personal liability, even if the entity is not technically incorporated.²¹

A conviction under section 820(c) is punishable by imprisonment of up to a year and maximum fines set forth in the Alternative Fines Act. After the application of Sentencing Guidelines (Guidelines) enhancements reflecting a section 820(c) defendant’s managerial role, the Guidelines range will typically include the statutory maximum of one year imprisonment.

The mental state requirement for the section 820(c) offense is “knowing,” which requires the prosecution to prove only a “knowing performance of a prohibited act” and does not require proof of “knowing disobedience of the law.”²²

¹⁸ *Non-fatal, Lost-time Injuries, 2018, NIOSH Mining*, CTDS FOR DISEASE CONTROL AND PREVENTION, <https://wwwn.cdc.gov/NIOSH-Mining/MMWC/InjuryMap/Pins> (last visited Dec. 10, 2019).

¹⁹ 30 U.S.C. § 820(c); *see* *United States v. Gibson*, 409 F.3d 325, 335 (6th Cir. 2005) (affirming convictions of mine superintendents and foremen under section 820(c)).

²⁰ 30 U.S.C. § 802(e).

²¹ *Sumpter v. Secretary of Labor*, 763 F.3d 1292 (11th Cir. 2014).

²² *United States v. Jones*, 735 F.2d 785, 790, 792 (4th Cir. 1984) (affirming conviction of “inexperienced” night shift supervisor who knowingly ordered his crew to enter a mine without a pre-shift inspection first taking place, but who claimed not to know that a pre-shift inspection was legally required).

One example of how prosecutors have successfully pursued section 820(c) charges occurred in *United States v. Gibson*.²³ As set forth in the appellate decision affirming the convictions, the defendants personally observed violations of the Mine Act’s safety rules but took no action to correct them or direct their correction. Two mine managers were convicted of knowingly authorizing, ordering, or carrying out violations of the mine’s ventilation plan.²⁴ Another superintendent was convicted because he personally observed obvious ventilation violations—the working section had insufficient ventilation to remove methane and coal dust, and the ventilation curtains needed to guide air to critical work areas was missing—but the superintendent did not intervene to stop the violation.²⁵

Another successful section 820(c) prosecution is described in *United States v. Jones*.²⁶ There, a defendant mine superintendent personally observed a violation related to an electrical shock hazard but failed to correct it or order its correction. Instead, he “encouraged [the violation] to continue at a more rapid rate.”²⁷ The mine at which the superintendent worked later exploded, killing five miners.

B. Section 820(d): willful violations by mine operators

Section 820(d) makes it a crime for any “mine operator” to “willfully [violate] a mandatory health or safety standard.”²⁸ Convictions are punishable by up to one year in prison, fines, and individual or corporate probation.²⁹ If the violations of a safety standard cause death or injury to a miner, restitution to the victim or his estate may

²³ 409 F.3d at 335. The Mine Act requires mines to develop and implement mine-specific plans for handling ventilation, roof control, transportation, and other areas, and the provisions of such plans are themselves “mandatory standards” for enforcement purposes. *Wolf Run MinCo. v. Federal Mine Safety and Health Review Comm’n*, 659 F.3d 1197, 1198 (D.C. Cir. 2011).

²⁴ *Gibson*, 409 F.3d at 336.

²⁵ *Id.* at 335–36.

²⁶ 735 F.2d 785 (4th Cir. 1984).

²⁷ *Id.* at 791.

²⁸ 30 U.S.C. § 820(d).

²⁹ *Id.* If the offense did not cause death, the maximum fines are \$100,000 for individuals and \$200,000 for organizations. 18 U.S.C. § 3571(b), (c) (Alternative Fines Act). If the offense causes death, the maximum fines are \$250,000 for individuals and \$500,000 for organizations. *Id.*

be ordered for medical expenses or lost future income either by plea agreement or as a condition of corporate probation.³⁰

An “operator” is defined as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.”³¹ Under that definition, there may be multiple “operators” at a single mine site, including contractors, local management, and ultimate corporate owners.³² Potential criminal liability for multiple operators at a single mine is significant in an industry that frequently relies on contracting and subcontracting to perform specialized tasks and, increasingly, to carry on core operations.³³

Unlike section 820(c), a conviction under section 820(d) requires proof of “willfulness.”³⁴ “Willful” is a “word of many meanings’ whose construction is often dependent on the context in which it appears,”³⁵ and the recent Fourth Circuit decision in *Blankenship* provides a thorough discussion of the meaning of “willful” under section 820(d).

Donald Blankenship was the chief executive and president of Massey Energy Company, a large coal mining corporation. In 2010,

³⁰ See generally 18 U.S.C. § 3663 (authorizing restitution “in any criminal case to the extent agreed to by the parties in a plea agreement”); 18 U.S.C. § 3563(b)(2) (authorizing restitution as a discretionary condition of probation for any federal criminal offense); *United States v. Kilpatrick*, 798 F.3d 365, 391 (6th Cir. 2015).

³¹ 30 U.S.C. § 802(d); see also 30 U.S.C. § 802(f) (defining “person” to include natural individuals, partnerships, corporations, subsidiaries of a corporation, and other organizations).

³² See generally *Ames Constr., Inc. v. Federal Mine Safety and Health Review Comm’n*, 676 F.3d 1109, 1111 (D.C. Cir. 2012); see *Dickenson-Russell Coal Co., LLC v. Secretary of Labor*, 747 F.3d 251, 259 (4th Cir. 2014) (principal mine owner was not relieved of compliance duty by hiring temporary miners from a labor agency); *Speed Mining, Inc. v. Federal Mine Safety and Health Review Comm’n*, 528 F.3d 310, 315 (4th Cir. 2008).

³³ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 101–07 (Harvard Univ. Press 2014) (discussing the workplace safety implications of sub-contracting in the mining industry).

³⁴ The *Jones* decision offered several reasons why Congress may have decided to require proof of “willful” violations under section 820(d) and “knowing” violations under section 820(c). *United States v. Jones*, 735 F.2d 785, 793 (4th Cir. 1984).

³⁵ *Bryan v. United States*, 524 U.S. 184, 191 (1998).

one of the Massey mines, Upper Big Branch (UBB) in southern West Virginia, exploded, killing 29 miners.³⁶ Blankenship was indicted for *inter alia* conspiring to commit a violation of section 820(c). After intensive pre-trial discovery and motions practice and a multi-week trial, Blankenship was convicted of that offense and was sentenced to one year in prison and a \$250,000 fine.³⁷

According to the Fourth Circuit’s factual summary, the MSHA issued over 500 citations for violations found at UBB in 2009 alone, and Blankenship received daily reports of such safety violations.³⁸ Blankenship was warned about the serious safety risks posed to miners but fostered a corporate attitude of prioritizing production over compliance: “[I]f you can get the footage, we can pay the fines,” was how one senior safety official described the Massey safety culture, while Blankenship told another manager that it was “cheaper to break the safety laws and pay the fines than spend what would be necessary to follow the safety laws.”³⁹

On appeal, Blankenship claimed the jury was incorrectly instructed on the meaning of “willfulness” under section 820(c). The Fourth Circuit examined the issue at length and held that a “willful” violation occurs when a defendant “took actions that he knew would lead to violations of safety laws or failed to take actions that he knew were necessary to comply with federal mine safety laws.”⁴⁰ Put differently, Congress intended to punish as “willful” violations that result from a defendant’s reckless disregard of, or plain indifference to, the requirements of the Act.⁴¹ Blankenship met that test, and his conviction was upheld.

³⁶ United States v. Blankenship, 846 F.3d 663, 666 (4th Cir. 2017).

³⁷ *Id.* at 667. The challenges in prosecuting Blankenship were described in a prior edition of this journal by a member of the trial team.

Gabriele Wohl, *Holding Corporate Leadership Accountable for Worker Safety Crimes*, 64 U.S. ATT’YS BULL., no. 4, 2016, at 41.

³⁸ *Blankenship*, 846 F.3d at 666–67.

³⁹ *Id.* at 667 (citations omitted).

⁴⁰ *Id.* at 678.

⁴¹ *Id.* at 671–74.

III. Criminal penalties for false and misleading acts related to mine safety

As is typical for federal regulatory programs, there are far too few mine inspectors available to cover every mine, and compliance with the Mine Act largely depends on mine operators complying with training, compliance monitoring, air sampling, and reporting regulations. Title 18 offenses and the Mine Act's own false statement provision can be charged to ensure that individuals and mine operators comply with these critical safety rules.

A. False statements and false entries

Prosecutors have successfully used the false statements offense at 18 U.S.C. § 1001(a) in the Mine Act context. In *Gibson*, cited above, mine managers were convicted of a conspiracy to make false statements. The Mine Act regulations applicable to underground coal mines require mine operators to frequently check active working areas to make sure there is adequate ventilation, roof support, and no explosive methane. The observations must be recorded in written reports that are subject to MSHA review. The *Gibson* defendants, however, sought to defeat this essential safety requirement by instructing employees not to record that ventilation curtains were down in working areas. According to witnesses, hazardous conditions were “frequently observed” but “rarely included” in reports.⁴²

The Mine Act contains its own false statement provision at section 820(f), a five-year felony for “knowingly mak[ing] any false statement, representation, or certification in . . . document[s] . . . required to be maintained” under the Act.⁴³ In *United States v. Turner*, two mine owners and an outside certified mine safety instructor were convicted for conspiring to commit the section 820(f) offense when they schemed to falsify required safety training records.⁴⁴ The instructor was paid to create false training documentation, and miners signed the false records because they understood that “you either signed it, or you went hunting another job.”⁴⁵ The two mine owners were sentenced to 18 and 24 months respectively.

⁴² *United States v. Gibson*, 409 F.3d 325, 335 (6th Cir. 2005).

⁴³ 30 U.S.C. § 820(f).

⁴⁴ 102 F.3d 1350 (4th Cir. 1996).

⁴⁵ *Id.* at 1353.

For similar misconduct involving documents and recordkeeping committed with the “corrupt” intent to impede the MSHA, prosecutors could charge obstruction of justice, which may carry higher sentencing ranges under the current Guidelines.⁴⁶

B. Advance notice and other obstructive acts

The prosecutors in *Gibson* also earned convictions against defendants who provided advance notice of the MSHA’s inspections. The defendants alerted mine personnel who were working underground that inspectors had entered mine property so that hazardous conditions could be quickly repaired or concealed before the inspectors’ arrival.⁴⁷ As the Supreme Court once noted, safety or health hazards at mines may be concealed with “notorious ease . . . if advance warning of inspection is obtained,”⁴⁸ and section 820(e) of the Mine Act makes it a misdemeanor for any person to provide such unauthorized advanced notice.⁴⁹ If, however, similar conduct occurs with the requisite corrupt intent to impede the MSHA’s due administration of the Mine Act, prosecutors should consider charging one of the obstruction offenses.⁵⁰

Yet another potential Title 18 charge in a Mine Act case is the “conspiracy to defraud” the MSHA under the general conspiracy statute, also known as a “*Klein* conspiracy.”⁵¹ A *Klein* conspiracy is

⁴⁶ See 18 U.S.C. §§ 1505 (obstruction of agency proceedings); 1512(c) (document alteration and concealment and other obstructive acts); 1519 (alteration, concealment, or falsification of record in relation to or contemplation of a matter within the jurisdiction of a federal agency). The obstruction offenses have base offense levels of 14. U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 (U.S. SENTENCING COMM’N 2018).

⁴⁷ *Gibson*, 409 F.3d at 333–34.

⁴⁸ *Donovan v. Dewey*, 452 U.S. 594, 603 (1981).

⁴⁹ 30 U.S.C. § 820(e).

⁵⁰ The *Gibson* defendants were convicted of a section 1001(a)(1) charge based on advance notice, but the appellate court reversed the convictions because of perceived problems with the indictment language. See *Gibson*, 409 F.3d at 333.

⁵¹ See Gretchen C. F. Shappert & Christopher J. Costantini, *Klein Conspiracy: Conspiracy to Defraud the United States*, 61 U.S. ATT’YS BULL., no. 4, 2013, at 1 (discussing the law of *Klein* conspiracy and illustrative cases); *United States v. Maury*, 695 F.3d 227 (3d Cir. 2012) (affirming convictions for *Klein* conspiracy to defraud OSHA).

charged in a pending indictment in the Western District of Kentucky against mine managers who allegedly conspired to defeat the black lung-related regulations of the Mine Act.⁵²

Mine Act regulations require coal mine operators to take samples of the respirable coal mine dust to which miners are exposed, provide the results to the MSHA, and take corrective action. According to the publicly filed indictment, the *Barber* defendants allegedly conspired to fraudulently “make the pumps come in,” that is, to make required samples submitted to the MSHA appear to meet dust level requirements by removing sampling pumps from miners prematurely or by moving the pumps in cleaner areas.⁵³ The case is set for trial in mid-2020.

IV. Practice pointers for Mine Act prosecutors

A. Obtaining criminal law enforcement resources in Mine Act investigations

The MSHA is not a criminal law enforcement agency, and there are practical reasons why a Mine Act criminal referral may be less fully developed than referrals from criminal law enforcement agencies. To successfully pursue a Mine Act investigation, therefore, the MSHA must refer the matter to the Department of Justice with sufficient time for the issuance of necessary grand jury subpoenas, the execution of search warrants, and detailed investigation interviews. Successful prosecutions will require the involvement of criminal law enforcement agencies in Mine Act investigations.⁵⁴

That said, the MSHA’s special investigators can be invaluable during criminal investigations. Special investigators are experienced

⁵² United States v. Barber et al., 4:18-cr-15-JHM (W.D. Ky. 2018).

⁵³ *Id.*

⁵⁴ If the matter under investigation relates to conduct that threatens the integrity of the regulatory program, agents from the Department of Labor’s Office of the Inspector General (DOL-OIG) may be available. If there are potential environmental offenses—which is not uncommon in workplace safety investigations—agents from the Environmental Protection Agency’s Criminal Investigation Division (EPA-CID) may be available. If the conduct under investigation relates to multiple fatalities, the Federal Bureau of the Investigation may be available. Depending on the facts, other agencies ranging from DOT to ATF may be in a position to support an investigation.

miners with outstanding knowledge of the technical aspects of mining operations, insight into the local mining community, and familiarity with the nuances of Mine Act law. Because they are not criminal law enforcement agents, any MSHA personnel who are made part of a criminal investigation team need specific instructions about investigation expectations, including instruction on documentation and the applicable ethical rules.

B. Obtaining relevant information from MSHA

The MSHA's databases and other relevant files provide useful information in prosecutions. First, inspection-by-inspection data for each mine can be accessed online via the MSHA's "Mine Data Retrieval System."⁵⁵ Second, the MSHA's field offices and district offices maintain hard copy inspection files, mine plan files, uniform mine files, and other records that provide important information.

Third, "103(g)" or "105(c)" files related to any whistleblowing activity at mines under investigation containing relevant information may be stored separately from other mine files. In section 103(g) of the Act, Congress gave miners statutory rights in the Mine Act to make confidential safety complaints to the MSHA and to request that that MSHA inspect possible violations at mines, and in section 105(c), Congress prohibited interference with the exercise of such rights and prohibited retaliation against miners who speak up.⁵⁶

C. Parallel proceedings before the Mine Safety Review Commission

The MSHA and the Labor Department's litigators in its Office of the Solicitor will have information about any related administrative proceedings pending before the Federal Mine Safety and Health Review Commission (Commission). Mine operators may, and frequently do, challenge citations and civil penalties in administrative

⁵⁵ *Mine Data Retrieval System, Mine Safety and Health Administration (MSHA)*, U.S. DEP'T OF LABOR, <https://www.msha.gov/mine-data-retrieval-system> (last visited Dec. 10, 2019).

⁵⁶ 30 U.S.C. § 813(g); 30 U.S.C. § 815(c). For background on these statutory rights as applied to an interference violation found to have been committed by the chief executive officer of a large coal mining corporation during mandatory meetings with hundreds of miners, see *Marshall County Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 923 F.3d 192 (D.C. Cir. 2019).

proceedings before the Commission. The proceedings are adversarial (sometimes in every sense, “there’s no love lost between mine operators and their federal regulators,” Judge Posner once observed),⁵⁷ and may result in depositions and other forms of discovery.

Department of Labor attorneys have requested and received stays from the Commission during related criminal investigations at the behest of prosecutors.

V. Conclusion

Mine Act crimes range in complexity from straightforward falsifications to complex, white collar conspiracies. No matter the case, obtaining a conviction serves to uphold the regulatory program, provides a measure of justice for injured employees, and prevents future preventable injuries. Prosecutors with questions in this important area are encouraged to contact the Environmental Crimes Section.

About the Author

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⁵⁷ *Jeroski v. Federal Mine Safety and Health Review Com’n*, 697 F.3d 651, 656 (7th Cir. 2012).

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Criminally Unsafe: Prosecuting Violations of Section 112(r) of the Clean Air Act

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I. Introduction

Thousands of facilities nationwide make, use, and store extremely hazardous substances. Catastrophic incidents at those facilities—historically about 150 each year—result in fatalities, serious injuries, evacuations, and harm to the environment.¹ All too often, these impacts fall disproportionately on workers and disadvantaged communities. Section 112(r) of the Clean Air Act (CAA) seeks to reduce the frequency and severity of accidental releases by requiring companies of all sizes to manage their extremely hazardous substances safely.² The Environmental Protection Agency (EPA) has made chemical accident prevention under section 112(r) one of its highest enforcement priorities.

The EPA implements and enforces section 112(r) through two distinct sets of requirements: the Risk Management Program Rule and the General Duty Clause.³ Together, these requirements affect a vast array of facilities and industry sectors, ranging from water treatment plants using chlorine, to refrigerated warehouses using ammonia, to some of the largest refineries in the world using and/or

¹ *National Compliance Initiative: Reducing Accidental Releases at Industrial and Chemical Facilities, Enforcement*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/enforcement/national-compliance-initiative-reducing-accidental-releases-industrial-and-chemical> (last visited Dec. 13, 2019).

² 42 U.S.C. § 7412(r).

³ See 40 C.F.R. pt. 68; 42 U.S.C. § 7412(r)(1).

producing flammable substances and other hazardous substances, like hydrogen fluoride. Civil and criminal enforcement under section 112(r) can improve the ways facilities manage the risks posed by toxic and flammable substances and can, thereby, protect workers, emergency responders, and surrounding communities.

II. The Risk Management Program Rule

Under section 112(r)(7) of the CAA, the owner or operator of a stationary source that manufactures, uses, stores, or otherwise handles more than a threshold quantity of a listed regulated substance in a process must implement a risk management program.⁴ The specific regulated substances and risk management program requirements are set out in EPA regulations found at 40 C.F.R. pt. 68. Section 112(r)(7)(E) makes it unlawful to operate a stationary source in violation of the part 68 regulations, also known as the Risk Management Program Rule.

As described in part 68, a risk management program has three major components:

- A hazard assessment that details the potential effects of an accidental release, an accident history of the last five years, and an evaluation of worst-case and alternative accidental releases;
- A prevention program that includes safety precautions and maintenance, monitoring, and employee training measures; and
- An emergency response program that spells out emergency health care, employee training measures, and procedures for informing the public and response agencies (for example, the fire department) if an accident occurs.⁵

The entire risk management program must be summarized and documented in a Risk Management Plan (RMP) that must be submitted to the EPA and resubmitted at least once every five years.⁶ The information in the RMP helps local fire, police, and emergency response personnel prepare for and respond to chemical emergencies. Making the RMPs available to the public also fosters communication and awareness to improve accident prevention and emergency

⁴ 42 U.S.C. § 7412(r)(7).

⁵ See 40 C.F.R. pt. 68, subparts B–E; see also 42 U.S.C. § 7412(r)(7)(B)(ii).

⁶ 40 C.F.R. §§ 68.150, 68.190.

response practices at the local level. The EPA estimates that approximately 12,500 facilities are covered by the Risk Management Program Rule.⁷

An underlying principle of the Risk Management Program Rule is that “one size does not fit all.” The EPA classifies the processes covered by the rule into the following three program levels to ensure that individual processes are subject to requirements that match their size and the risks they pose.⁸ As a result, different facilities covered by the regulations may have different requirements, depending on their processes.

- *Program 1* applies to processes that would not affect the public in a worst-case release and have not had accidents with specified offsite consequences within the last five years. It imposes limited hazard assessment requirements and minimal accident prevention and emergency response requirements.
- *Program 2* applies to processes that are not eligible for Program 1 or subject to Program 3. It imposes streamlined accident prevention program requirements, as well as additional hazard assessment, management, and emergency response requirements.
- *Program 3* applies to processes that are not eligible for Program 1 and either subject to the Occupational Safety and Health Administration’s (OSHA’s) Process Safety Management (PSM) standard under federal or state OSHA programs or classified in one of ten specified North American Industrial Classification System (NAICS) codes. Program 3 imposes OSHA’s PSM standard as the accident prevention program, as well as additional hazard assessment, management, and emergency response requirements.⁹

III. The General Duty Clause

In addition to the risk management program requirements of section 112(r)(7), section 112(r)(1) imposes a general duty upon owners and operators of stationary sources that handle extremely hazardous substances to identify hazards that may result from releases, to

⁷ Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594, 4596 (Jan. 13, 2017) (to be codified at 40 C.F.R. pt. 68).

⁸ See 40 C.F.R. § 68.10.

⁹ See *id.*

design and maintain a safe facility, and to minimize the consequences of accidental releases that do occur.¹⁰ This “General Duty Clause” (GDC) is broader than the Risk Management Program Rule in section 112(r)(7) because it applies to all stationary sources with regulated substances or other extremely hazardous substances, regardless of the quantity of chemical involved.

The GDC, however, is a stand-alone statutory provision and is not accompanied by implementing regulations. Compliance with the GDC cannot be measured against specific regulatory requirements, although certain industries have standards of care that provide an objective framework for compliance.

A key concept behind both the Risk Management Program Rule and the GDC is that safe facilities must have overlapping layers of protection. This means that a facility using an extremely hazardous chemical should design its chemical process safely; keep it within safe operating limits through various controls (training, operating procedures, automatic shut-offs, etc.); have systems to warn of releases (alarms, vapor detectors); have systems to manage releases (dikes, ventilation); and if all else fails, have good emergency response procedures that have been coordinated with responders.

Many of the EPA’s civil enforcement cases have involved facilities that were missing many layers of protection.

IV. Criminal enforcement of section 112(r)

A. Criminal authority

Violations of section 112(r) requirements can be prosecuted criminally under section 113(c) of the CAA.¹¹ Specifically, section 113(c)(1) makes the knowing violation of any requirement or prohibition of section 112 a five-year felony. Section 113(c)(2) covers documents required to be filed or maintained under the Act and makes any knowing material false statement or knowing failure to file or maintain such documents punishable as a two-year felony. Finally, section 113(c)(4) and (5) provide misdemeanor and felony sanctions for negligent and knowing endangerment arising out of releases of hazardous air pollutants and extremely hazardous substances into the ambient air.

¹⁰ 42 U.S.C. § 7412(r)(1).

¹¹ 42 U.S.C. § 7413(c).

Taken together, the criminal provisions of section 113(c) provide express authority to prosecute a wide range of violations of section 112(r). Section 112(r)(7) criminal cases involve violations of the Risk Management Program Rule requirements set out in part 68 and associated false statements. Violations of the GDC are also criminally enforceable, but they are based on a violation of the statutory duty rather than a violation of specific regulations. Where it is difficult to establish violations of section 112(r) requirements, prosecutors should consider other environmental and Title 18 offenses.

It is important to keep in mind that harm is not an element of section 112(r) crimes. A criminal prosecution under section 113(c)(1) for violations of the Risk Management Plan program under 112(r)(7) consists of two basic elements: (1) proof that the defendant violated a requirement of section 112(r)(7) and (2) proof that the defendant acted with the necessary mental state.¹²

The government need not prove that the defendant's failure to submit a RMP and/or comply with part 68 requirements caused or contributed to any actual or threatened release or harm. Nevertheless, establishing a nexus between part 68 violations and harm or risk of harm is an important component of investigative and prosecutorial discretion, jury appeal (if admissible), and determining the appropriate sentence.

A criminal prosecution under 113(c)(1) for violations of the GDC under 112(r)(1) has been interpreted, consistent with the OSHA GDC expressly referenced in 112(r)(1), as requiring proof of the following:

The defendant was the owner or operator of a stationary source that produced, processed, handled or stored an extremely hazardous substance;

The stationary source posed a hazard of an accidental release of such substance into the ambient air;

The hazard was recognized by the defendant, or generally within the defendant's industry;

The defendant failed to: (1) identify hazards that may result from such releases using appropriate hazard techniques, (2) to design and maintain a safe facility taking such steps as are necessary to prevent releases,

¹² 42 U.S.C. § 7413(c)(1).

and (3) to minimize the consequences of accidental releases which do occur.¹³

B. Identifying violations of section 112(r)

The task of identifying a clear violation of section 112(r) can be relatively straightforward or dauntingly complex. The most straightforward violations are those in which the defendant has no risk management program at all. To establish a violation in such cases, the government need only prove that the defendant used one of the regulated substances listed in part 68, had that substance in a process above the threshold quantity, and failed to develop and submit a RMP.

Where the defendant has submitted a RMP, the task of identifying specific violations of part 68 can be more difficult. The difficulty stems in large part from the structure of the part 68 regulations, which are best viewed as an outline that companies must follow in developing and implementing risk management programs for their specific processes. Some of the part 68 requirements are general and narrative, others are more narrow and prescriptive. Companies are given substantial discretion under the regulations in tailoring these required program elements to their individual facilities and processes.

The Recognized and Generally Accepted Good Engineering Practices (RAGAGEP) requirements of part 68 provide a good example of the challenges associated with enforcing specific program requirements. Both Program 2 and Program 3 require companies to use RAGAGEP in their risk management programs.¹⁴ RAGAGEP provide the substantive foundation for much of the Risk Management Program Rule, but it is not defined in part 68 or in the OSHA's PSM standard.

Instead, the RAGAGEP for a particular process are drawn from a variety of sources, including widely adopted codes, consensus documents, non-consensus documents, and company internal standards.¹⁵ In developing risk management programs, facilities select

¹³ See *United States v. Margiotta*, No. CR 17-143-BLG-SPW-2, 2019 WL 4394338 (D. Mont. Sept. 13, 2019) (Slip Op.) (order denying motion to dismiss GDC count); Jury Instructions, *United States v. Margiotta*, No. 1:17-cr-143 (D. Mont. Sept. 30, 2019), ECF No. 127.

¹⁴ See 40 C.F.R. §§ 68.48(b), 68.56(d), 68.65(d)(2)–(3), 68.73(d)(2)–(3).

¹⁵ See *Standard Interpretations No. 1910.19, Recognized and Generally Accepted Good Engineering Practices in Process Safety Management Enforcement, Occupational Safety and Health Administration*, U.S. DEPT OF

and identify the RAGAGEP they will apply. Multiple, non-identical RAGAGEP may apply to a single process, and facilities do not need to consider or comply with a RAGAGEP provision that is not applicable to their specific worksite conditions, situations, or applications.

Not surprisingly, the identification of RAGAGEP applicable to a particular facility or adopted in a facility's Risk Management Plan must be carefully considered when determining whether there is a sufficient basis for a criminal prosecution. The discretion given under the regulations to companies to interpret and adapt RAGAGEP to their processes can make RAGAGEP criminal enforcement all but impossible in some cases.

On the other hand, RAGAGEP are well established for certain chemicals and processes, and violations in those cases are relatively easy to detect and enforce. In order to better understand RAGAGEP issues in a particular case, the criminal case team should enlist the help of an expert who is familiar with the regulated substance and the specific process in which it is being used. Similarly, GDC violations require proof of an accidental release hazard recognized by the defendant or generally within the defendant's industry, so the same considerations should apply in determining whether to charge a GDC offense.

C. Proving the defendant's mental state

The criminal provisions of section 113(c)(1) and (2) apply to "any person,"¹⁶ but not all people are persons under the CAA, and not all persons are held to the same standards. As set forth in section 113(h), for purposes of section 113(c)(1) and (2), the term "person" does not include an employee who is carrying out his normal activities and who is acting under orders from the employer, unless that person is acting knowingly and willfully.¹⁷

With this language, the Act imposes two different mental states for the same crimes, depending upon the defendant's place in the organizational hierarchy. The situation is further complicated by the fact that section 112(r) applies only to the "owner or operator" of a

LABOR, <https://www.osha.gov/laws-regs/standardinterpretations/2016-05-11-0> (last visited Dec. 16, 2019).

¹⁶ 42 U.S.C. § 7413(c)(1)–(2).

¹⁷ 42 U.S.C. § 7413(h).

stationary source.¹⁸ Therefore, some owners or operators who violate section 112(r) may be prosecuted if they did so knowingly (employers), and others may be prosecuted only if they acted knowingly and willfully (employees conducting normal duties under orders).

Persons who are neither owners nor operators may escape criminal prosecution entirely, unless they are chargeable as aiders and abettors under 18 U.S.C. § 2. Corporations are persons and owners or operators. They may be prosecuted for knowingly violating section 112(r).

Under the CAA and other environmental statutes, the term “knowingly” requires proof that the defendant had knowledge of the facts constituting the offense. The government need not prove that the defendant knew the applicable law.¹⁹ For example, to establish a knowing failure to submit a RMP, the government need only prove that the owner or operator knew that it used a substance, knew how much of that substance was used in an applicable process, and knew that it had not submitted a RMP.

Although the government must prove that a process involved a threshold amount of a part 68 substance, it need not prove that the defendant knew that the substance was regulated under that part or that the defendant knew the threshold had been exceeded. The defendant’s good faith mistake of fact, however, could negate knowing conduct (for example, there was evidence that the defendant believed the threshold amount was not exceeded and the government could not show otherwise). A defendant acts “willfully” if he acts with knowledge that his conduct is unlawful. The government is not required to prove that the defendant had knowledge of the specific law that makes the conduct unlawful.²⁰

D. Section 112(r) criminal investigations

Most section 112(r) criminal investigations fall into two categories: “incident cases” in which the failure to comply with part 68 or General Duty requirements were a contributing or compounding factor and “prevention cases” in which violations of part 68 or General Duty requirements caused or contributed to an imminent risk of release

¹⁸ See 42 U.S.C. § 7412(r)(1), (7); 40 C.F.R. pt. 68.

¹⁹ See, e.g., *Bryan v. United States*, 524 U.S. 184, 191–96 (1998); *United States v. Weintraub*, 273 F.3d 139, 147, 151 (2d Cir. 2001).

²⁰ *Bryan*, 524 U.S. at 193–96.

and/or harm that did not mature into an incident. Each type of case poses different questions and challenges for the prosecutor.

1. Incident cases

A criminal investigation may be warranted where there has been an incident involving extremely hazardous substances that resulted in injuries and/or fatalities. In such instances, prosecutors may participate in the investigation from the beginning, and there may be substantial media coverage. Multiple federal, state, and local emergency response, law enforcement, and regulatory entities may be involved, with or without an overarching incident command structure.

As with other environmental crimes, the prosecutor's first priority in an incident case should be the protection of human health and the environment, along with at-risk property. The criminal investigation should not complicate or delay response and remediation efforts.

Although criminal investigators may not have immediate access to the site of an incident, some aspects of the criminal investigation can begin right away. In particular, the case team should identify and establish working relationships with emergency responders and other investigators, including the Chemical Safety Board and OSHA. The case team should also identify the other important stakeholders, including federal and state regulators, company representatives, worker/union representatives, and community groups.

In order to secure as much evidence as possible in the immediate aftermath of an incident, the prosecutor should evaluate chain of custody procedures and the need for preservation letters. One of the case team's first steps should be to obtain a copy of the facility's RMP, as well as the underlying documents that comprise the facility's risk management program (for example, process hazard analyses and compliance audits).

Once the criminal investigation is underway, investigators usually work backward, first attempting to determine the sequence of events that led to the incident and, then, assessing whether violations of section 112(r) might have been causal or contributing factors; although, as discussed above, harm due to section 112(r) violations is not an element of a section 112(r) crime. Establishing a causal connection almost always requires the assistance of experts.

In some cases, the Chemical Safety Board or OSHA may take the lead in determining factual causation. Criminal investigators will then determine whether those factors were the product of knowing violations of section 112(r). From the outset of the criminal

investigation, prosecutors and agents should remain mindful of the obligations imposed on the government by the Victims' Rights and Restitution Act²¹ and the Crime Victims' Rights Act.²²

The first and, for many years, the only federal "incident case" conviction relates to the March 2005 explosion at a British Petroleum (BP) refinery in Texas City, Texas. In that case, hydrocarbon vapor and liquid were released from a stack and ignited during the operation of a process that increases octane levels in unleaded gasoline. Investigators learned that operators regularly failed to follow written standard operating procedures for ensuring mechanical integrity of safety equipment. The stack where the release occurred had been in poor operating condition since at least April 2003. Alarms failed to function or were ignored. Fifteen workers were killed and 170 more injured.

BP, the refinery owner, pleaded guilty to a felony violation of section 112(r)(7) and was sentenced to pay a \$50 million criminal fine and serve three years of probation. BP was also required to complete a facility-wide study of its safety valves and renovate its flare system to prevent excess emissions at an estimated cost of \$265 million. In related civil enforcement actions, OSHA conducted 17 inspections and issued hundreds of citations that led to a series of agreements between OSHA and BP to abate hazards and protect refinery workers.²³

Other more recent, high-profile industrial incidents were resolved without the filing of federal criminal charges. In 2010, an explosion and fire led to the deaths of seven employees when a nearly 40-year-old heat exchanger catastrophically failed during a maintenance operation at a refinery in Anacortes, Washington.²⁴ In 2012, a release of flammable vapor led to a fire at a refinery in

²¹ 34 U.S.C. § 20141.

²² 18 U.S.C. § 3771.

²³ See Plea Agreement, *United States v. BP Products N. Am. Inc.*, No. 4:07-CR-434 (S.D. Tex. 2007), ECF No. 126; Judgment, *United States v. BP Products N. Am. Inc.*, No. 4:07-CR-434-001 (S.D. Tex. 2009), ECF No. 127.

²⁴ U.S. CHEM. SAFETY AND HAZARD INVESTIGATION BD., REP. 2010-08-I-WA, INVESTIGATION REPORT: CATASTROPHIC RUPTURE OF HEAT EXCHANGER (SEVEN FATALITIES) (May 2014).

Richmond, California, resulting in a shelter-in-place order for upwards of 15,000 local residents.²⁵

Investigations into incidents like these involve a lengthy initial response; an interaction with the Chemical Safety Board, worker unions, and state workplace regulatory organizations; a review of complex industry records and interviews; the hiring of non-governmental experts with expertise in root cause analysis, engineering, and metallurgy; ongoing coordination with civil enforcement authorities conducting parallel proceedings; and engagement with victim families and the local community. Nevertheless, federal prosecutors may ultimately conclude that there is insufficient evidence to support bringing criminal charges for violating federal environmental and worker safety laws and regulations, and in both Washington and California, no criminal charges were filed.

Recently, the government obtained a conviction in a second “incident case” related to an explosion and fire at a waste oil processing facility in Wibaux, Montana. The defendant, Peter Margiotta, the company president and director of Custom Carbon Processing, Inc.,²⁶ was convicted of one count of knowingly violating the GDC, one count of CAA knowing endangerment, and one count of conspiracy to violate the CAA.²⁷

The evidence at trial showed that, under Margiotta’s direction, the facility was constructed in a manner that allowed extremely hazardous and flammable vapors to be released into the air and without proper safety measures and equipment to prevent explosions. Margiotta was directly warned before and during construction of the facility that the facility would release flammable hydrocarbons, requiring explosion-proof wiring and lighting and adequate

²⁵ U.S. CHEM. SAFETY AND HAZARD INVESTIGATION BD., REP. 2012-03-I-CA, FINAL INVESTIGATION REPORT: CHEVRON RICHMOND REFINERY PIPE RUPTURE AND FIRE 2 (January 2015).

²⁶ The corporation was originally charged in the indictment, but the counts against it were dismissed without prejudice after its registration to conduct business in Montana was revoked, and the corporation was administratively dissolved. It remained a named coconspirator in the Indictment. *See* United States Trial Brief at 13, *United States v. Margiotta*, No. 1:17-cr-143 (D. Mont. Sept. 16, 2019), ECF No. 103.

²⁷ Redacted Jury Verdict, *United States v. Margiotta*, No. 1:17-cr-143 (D. Mont. Sept. 30, 2019), ECF No. 124.

ventilation. He, instead, directed the facility to operate with temporary non-explosion proof wiring and lighting and inadequate ventilation.

Margiotta also ignored repeated warnings from his assigned manager and the facility foreman about hazardous conditions at the facility before an explosion in December 2012.²⁸ Margiotta has filed post-trial motions to set aside his conviction, but he is currently scheduled for sentencing in January 2020.²⁹

2. Prevention cases

Prevention cases usually arise out of an EPA risk management program inspection or an OSHA PSM inspection. When civil inspectors identify part 68 violations that pose an imminent threat of a serious release, they should notify the EPA's Criminal Investigation Division (EPA-CID) promptly, in addition to making other notifications and taking action to avoid a dangerous incident. Where the threat poses an imminent and substantial endangerment to public health or the environment, the EPA may rely on its civil authority under sections 112(r)(9) and 303 of the CAA to abate the threat, including requiring the removal of chemicals and/or the shutdown of processes.³⁰

Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act provides similar authority, but it only applies to imminent and substantial endangerment arising out of the handling of hazardous substances, as defined in 40 C.F.R. part 302.³¹ Where the EPA has not made an imminent and substantial endangerment determination, it may, nevertheless, use its civil

²⁸ Press Release, United States Attorney's Office (D. Mont.), U.S. Dep't of Justice, Jury Convicts Former Custom Carbon Processing President of Clean Air Act Violations Stemming from Explosion of Wibaux Oil Processing Plant (Sept. 27, 2019).

²⁹ Motion to Set Aside Verdict on Count 1, *United States v. Margiotta*, No. 1:17-cr-143 (D. Mont. Oct. 8, 2019), ECF No. 146; Motion to Set Aside Verdict on Count 2, *United States v. Margiotta*, No. 1:17-cr-143 (D. Mont. Oct. 8, 2019), ECF No. 147; Motion to Set Aside Verdict on Count 3, *Margiotta*, No. 1:17-cr-143 (D. Mont. Oct. 8, 2019), ECF No. 148; Order Setting Sentencing, *United States v. Margiotta*, No. 1:17-cr-143 (D. Mont. Sept. 30, 2019), ECF No. 131.

³⁰ See 42 U.S.C. §§ 7412(r)(9), 7603.

³¹ See 42 U.S.C. § 9606.

authority under section 113(a) of the CAA to issue orders requiring compliance and remedial action.³² Prosecutors should expect these parallel civil enforcement actions in section 112(r) criminal investigations, and such actions should be documented according to EPA and Department of Justice (Department) parallel proceedings policies.³³

In prevention cases, section 112(r) violations will usually be identified before the case reaches the prosecutor. The criminal case team will determine whether the violations were committed knowingly (or knowingly and willfully for subordinate employees) and whether those violations created a threat sufficient to warrant criminal prosecution. In assessing the seriousness of the violations, the prosecutor should consider the defendant's culpability and the hazard posed by the conduct. It is important that the prosecutor consider the overall context in which the violations occurred, including the size of the company, the relationship between the regulated substance and the type of business, the company's compliance and release history, the level of industry noncompliance, and the handling of comparable cases.

In 2008, the Department and the EPA obtained the first criminal conviction in a section 112(r) prevention case. Hershey Creamery Company, an ice cream maker not affiliated with the Hershey Company that produces chocolate, pleaded guilty to failing to develop and implement a RMP for its storage of anhydrous ammonia at two Pennsylvania facilities, despite having certified to the EPA in 1999 and 2004 that it had done so. The downtown Harrisburg facility where Hershey kept approximately 42,000 pounds of anhydrous ammonia was less than a mile from the state capitol. Hershey was sentenced to pay a \$100,000 fine and complete a one-year term of probation.³⁴

In 2014, Roberts Chemical Company, a chemical re-packer in Pawtucket, Rhode Island, pleaded guilty to storing more than 27,000 pounds of ethyl ether without developing and implementing a RMP.

³² See 42 U.S.C. § 7413(a).

³³ Memorandum from Granta Y. Nakayama to Regional Administrators, Regional Counsel, Regional Enforcement Directors, and OECA Officer Directors on Transmittal of Final OECA Parallel Proceedings Policy (Sept. 24, 2007), <https://www.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf>; JUSTICE MANUAL § 1-12.000.

³⁴ See *United States v. Hershey Creamery Co.*, No. 1:08-CR-00353 (M.D. Pa. 2008).

Ethyl ether poses an explosion and fire hazard, and the area surrounding the facility was a densely populated, disadvantaged community. The EPA inspectors and the City of Pawtucket identified 51 separate fire code violations, including a non-functional fire suppression system and electrical violations. The fire department ordered that the premises be vacated immediately, and Roberts subsequently moved to a new facility in Attleboro, Massachusetts. The company was sentenced to pay a \$200,000 fine and complete five years of probation. Roberts was also required to publish a public apology.³⁵

Most recently, in 2015, Mann Distribution, LLC, a chemical repackager in Warwick, Rhode Island, pleaded guilty to storing 32,000 pounds of hydrofluoric acid without developing or implementing a RMP. Hydrofluoric acid is a potentially deadly contact poison, and Mann is located in a densely populated community. When inspected by the EPA, the company was found to be storing the acid with other incompatible chemicals and without proper spacing. Mann had no fire suppression or alarm system. Mann was sentenced to pay a \$200,000 fine and complete a three-year term of probation. The company was also required to publish a public apology. In order to address on-going section 112(r) compliance issues, the EPA issued an Administrative Order on Consent, which included, among other things, detailed third-party auditing requirements.³⁶

V. Trends in section 112(r) enforcement

Prosecutors should expect to see an increasing number of section 112(r) cases. Through the end of fiscal year 2023, reducing risks of accidental releases at industrial and chemical facilities will be one of the EPA's National Compliance Initiatives (NCIs). NCIs are intended to focus resources on national environmental problems where there is significant non-compliance with laws and federal enforcement efforts can make a difference.

The EPA has analyzed which industrial processes are responsible for the greatest number of incidents and repeat incidents. Based on this analysis, the NCIs focus on five processes: ammonia-based refrigeration, petroleum refining, chemical manufacturing, fertilizer distribution, and gas production.

³⁵ See *United States v. Roberts Chem. Co.*, No. 1:14-CR-00094 (D.R.I. 2014).

³⁶ See *United States v. Mann Distrib., LLC*, No. 1:15-CR-00029 (D.R.I. 2015).

The EPA will also identify federal facilities that should be addressed as part of the NCIs. In pursuing these NCIs, the EPA expects to coordinate closely with the Department and other federal agencies that have a presence in the five priority industrial processes.

The EPA-CID will continue to investigate incident and prevention cases and refer appropriate cases to the Department. Criminal investigations will be largely reactive, triggered by incidents, referrals from civil inspectors, and worker or community complaints. In exercising its investigative discretion, the EPA-CID will continue to emphasize the importance of articulating clear and predictable distinctions between civil and criminal violations.

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Worker Exposure to Asbestos: Recent Trends Observed in NESHAP Prosecutions

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I. Introduction

Starting in the late 1990s, the Environmental Protection Agency (EPA) and various state agencies learned that a significant number of construction, renovation, and asbestos removal companies in the northeastern United States were regularly handling, removing, and disposing of asbestos-containing materials (ACM) illegally—dry, without proper containment, and often without having workers wear respirators and other protective equipment. A series of prosecutions resulted, most notably in the Northern District of New York.¹

Unfortunately, as certain industrial facilities have fallen into disrepair over the past decades and were purchased by unscrupulous investors, knowing violations of the asbestos regulations have become more widespread. This article addresses recent trends arising in prosecutions related to dilapidated industrial facilities purchased, renovated, and demolished for redevelopment purposes.

II. The problem

A. Genesis

Due to its excellent fire resistance and insulation capacity, beginning in the late 1800s, asbestos fibers were incorporated into a wide variety of building materials, including pipe and boiler insulation; siding, roofing, floor, and ceiling tiles; and building insulation. Despite its widespread use and success in reducing fire

¹ See, e.g., *United States v. Mancuso*, 428 F. App'x 73 (2d Cir. 2010) (not precedent); *United States v. Salvagno*, Crim. No. 5:02-CR-0051 (N.D.N.Y. July 21, 2006); *United States v. Thorn*, 317 F.3d 107 (2d Cir. 2003).

risks in structures, doubts regarding its safety began to surface in the early 1900s when large numbers of lung-related health problems and deaths were reported near asbestos-mining towns.

The first diagnosis of asbestosis occurred in 1924. After decades of subsequent studies, most developed countries banned the use of ACM in most building materials. ACM continued to be used widely in the United States well into the 1970s—notably, and most relevant here, in facilities requiring extensive thermal system insulation (TSI). This included industrial and manufacturing facilities that generated their own power and heat, textile-manufacturing plants, and other industry facilities.

When disturbed by demolition or renovation of such facilities, ACM may break up and release fine, microscopic fibers that can remain airborne for long periods.² Occupational exposure is commonplace and poses a serious health risk when workers take part in salvage, renovation, or demolition activities in facilities containing ACM.³

B. Health impacts associated with asbestos

When workers deliberately or inadvertently disturb ACM, they release asbestos fibers into the air, where the fibers are inhaled or released more widely into the environment—for example, into the surrounding communities or carried home on workers' clothing. Inhalation of asbestos can cause changes to the membrane surrounding the lungs and has the potential to cause a number of diseases of the lungs, including asbestosis, mesothelioma, lung cancer, lymphatic cancer, and other cancers.

Taking each of these occupational diseases in turn, the World Health Organization has concluded, “Asbestos is a proven human carcinogen No safe level can be proposed for asbestos because a threshold is not known to exist.”⁴ The EPA and the International Agency for Research on Cancer have also determined that asbestos is a human carcinogen.⁵ The likelihood of developing these health effects

² See DEP'T OF HEALTH & HUMAN SERVS., AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, PUBLIC HEALTH STATEMENT ASBESTOS 2 (2001) [hereinafter PUBLIC HEALTH STATEMENT].

³ *Id.*

⁴ WORLD HEALTH ORG. REG'L OFFICE FOR EUR. COPENHAGEN, AIR QUALITY GUIDELINES FOR EUROPE 133 (2d ed. 2000).

⁵ PUBLIC HEALTH STATEMENT, *supra* note 2, at 5.

depends, among other things, on the amount of asbestos in the air, the duration of exposure, and the size of the fibers inhaled.⁶

Asbestosis is a slow buildup of scar-like tissue in the lungs and in the membrane that surrounds the lungs. The scarred tissue loses its flexibility, which makes breathing difficult. The scarring may also reduce blood flow to the lungs, which in turn, can cause enlargement of the heart. The outward symptoms of asbestosis include shortness of breath, cough, abnormal breathing sounds, and decreased lung capacity. Asbestosis can eventually lead to disability, and in severe cases, death.⁷ Asbestosis can take as long as 10–20 years to develop and may progress “long after exposure has ceased.”⁸

Similarly, mesothelioma is a form of cancer that affects the membrane surrounding the lungs. It is rare in the general population and is associated specifically with asbestos exposures.⁹ Symptoms generally develop 30–50 years after exposure and may include shortness of breath, pain in the chest, weight loss, abdominal pain and swelling, and blood clotting abnormalities. As the cancer spreads, it may cause trouble swallowing and swelling of the neck and face.¹⁰

C. Troubling trends

In the last few decades, some textile mills and other manufacturing plants in some areas of the country have gone out of business or moved operations overseas, leaving some facilities in a state of disrepair. These properties have drawn the attention of entrepreneurs interested in salvaging the valuable materials—primarily the piping and other metal scrap—as well as those interested in renovating or demolishing and redeveloping the properties for other uses. Such efforts, if done lawfully, require that the owners and operators involved in such salvage and redevelopment efforts “thoroughly

⁶ See U.S. DEP’T OF HEALTH & HUMAN SERVS., AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, TOXICOLOGICAL PROFILE FOR ASBESTOS 1 (2001) [hereinafter TOXICOLOGICAL PROFILE]; PUBLIC HEALTH STATEMENT, *supra* note 2, at 4.

⁷ PUBLIC HEALTH STATEMENT, *supra* note 2, at 4; TOXICOLOGICAL PROFILE, *supra* note 6, at 39.

⁸ TOXICOLOGICAL PROFILE, *supra* note 6, at 41.

⁹ *Id.* at 52–53.

¹⁰ *Fact Sheet: Mesothelioma: Questions and Answers*, NAT’L CANCER INST. (updated May 13, 2002), http://www.courts.state.ny.us/reporter/webdocs/nci_mesothelioma.htm.

inspect” the facility for the presence of ACM and have ACM properly removed prior to salvage, renovation, or demolition.

This expense can reduce profit margins significantly. In some cases, these entrepreneurs are willing to cut corners and expose workers to significant health risks to maximize profit.

III. The enforcement of regulations relevant to asbestos

A. Regulatory history

The Clean Air Act’s (CAA) provision regarding “hazardous air pollutants” was passed in 1970 and mandated that the EPA identify all airborne pollutants causing or suspected of causing cancer, developmental effects, birth defects, or other serious health problems.¹¹ Asbestos was one of the first substances the EPA designated as a hazardous air pollutant, and it was one of only three pollutants Congress specifically designated as hazardous when it enacted the CAA.¹² Accordingly, asbestos is a “listed” hazardous substance and hazardous air pollutant.¹³

B. Asbestos regulation: generally

Because of its inherent danger, activities related to asbestos are highly regulated at both the federal and state levels. The EPA regulates the emissions of asbestos through the imposition of “work-practice,” rather than “emission” standards. Put another way, because medical science has not been able to demonstrate a safe exposure level to asbestos, the EPA chose to “promulgate . . . design, equipment, work practice, [and] operational standard[s]” to protect the public from exposure to asbestos rather than establish acceptable background “ambient” levels of airborne asbestos.¹⁴

The EPA has determined that demolition and renovation activities at commercial structures (or residential structures with four or more living units) are major sources of asbestos emissions and are within the EPA’s jurisdiction to regulate if the facility contains a sufficient

¹¹ See 42 U.S.C. § 7412.

¹² See Air Pollution Prevention and Control, 36 Fed. Reg. 5931 (March 31, 1971) (codified as amended at 42 U.S.C. § 7412(b)).

¹³ See 40 C.F.R. § 302.4 (2016); 42 U.S.C. § 7412(b)(1).

¹⁴ 42 U.S.C. § 7412(e), (h).

quantity of friable (able to be reduced to powder with hand pressure) asbestos (>1% as determined by polarized light microscopy).

Accordingly, the EPA promulgated an asbestos-specific “National Emission Standard” (NESHAP) at 40 C.F.R. part 61, subpart M. The focus of this article will be on those portions of the NESHAP relevant to renovation, demolition, and disposal activities at facilities containing asbestos.¹⁵

The specific regulations governing work practice standards for asbestos renovation and demolition projects, including notice, removal, and disposal requirements, are found at 40 C.F.R. §§ 61.145, 61.150, and 61.154. Distilled, the regulations require that the facility must be “thoroughly inspected” before renovation, abatement, or demolition commences, and a specified notice must be provided to the EPA at least 10 days prior to the commencement of these activities.¹⁶

Once such activities begin, ACM must be (a) thoroughly wetted throughout the process; (b) handled in a way so as to prevent visible emissions; (c) containerized, marked, and properly disposed of at a solid waste facility certified to handle ACM in a reasonably practicable time period; and (d) removed from a facility before other renovation and/or demolition activities proceed.¹⁷

In addition to the EPA regulations promulgated under the CAA, asbestos abatement activities are also subject to regulation by the Occupational Safety and Health Administration (OSHA). OSHA regulations require that individuals conducting the removal of regulated asbestos-containing material (RACM) must wear protective gear during abatement activities, including properly fitted respirators and protective suits.¹⁸

The EPA has delegated its authority to some states to enforce the NESHAP either partially or completely. Occasionally, state agencies will further delegate NESHAP implementation and enforcement to local governments. Regardless, the EPA maintains, at a minimum, concurrent authority to criminally enforce violations of 42 U.S.C. § 7413 as they relate to the asbestos NESHAP.

¹⁵ See, e.g., 40 C.F.R. §§ 61.140, 61.141, 61.145, 61.150.

¹⁶ 40 C.F.R. § 61.145.

¹⁷ 40 C.F.R. § 61.145(c).

¹⁸ See, e.g., 29 C.F.R. § 1926.1101.

C. Criminal provisions and enforcement

The CAA creates criminal penalties for any “owner or operator” who knowingly violates, among other provisions, work practice standards governing asbestos renovation and demolition projects.¹⁹ Such NESHAP offenses are punishable by five years’ incarceration for a first offense, as well as a criminal fine, restitution, and supervised release.

In order to establish a substantive criminal violation of the CAA relating to asbestos, a federal prosecutor must establish the following: (1) the defendant was an owner or operator of a renovation or demolition activity (or aided and abetted such owner or operator) involving at least 260 linear feet of RACM on pipes or 160 square feet or one cubic meter of RACM on any other facility components; (2) the defendant knew the renovation or demolition involved asbestos; and (3) the defendant knowingly failed or knowingly caused another person to fail to comply with an applicable work practice standard.²⁰ Notably, proof of exposure or environmental harm is not required to establish a NESHAP violation.²¹

D. Example criminal enforcement actions

Two recent cases in the Eastern District of Tennessee, *United States v. Mathis*²² and *United States v. Sawyer*,²³ aptly demonstrate how owners and operators have violated the NESHAP, the types of facilities involved, how the crimes are often committed, and the harm to worker–victims involved.

Both of these cases involved insolvent and dilapidated textile manufacturing facilities, each containing vast quantities of RACM—18,000 to an excess of 100,000 linear feet of TSI containing

¹⁹ 42 U.S.C. § 7413(c)(1); *see* 42 U.S.C. § 7412(b), (h).

²⁰ *See* *United States v. Weintraub*, 273 F.3d 139, 145–48 (2d Cir. 2001) (discussing regulatory framework and holding that asbestos violations require only proof of knowledge of the presence of asbestos, not knowledge of law, nor of the type or amount of asbestos); *United States v. Shurelds*, No. 97-6265, 1999 WL 137636, at *1 (6th Cir. 1999) (*per curiam*); *United States v. Buckley*, 934 F.2d 84, 88 (6th Cir. 1991); 42 U.S.C. § 7413(c)(1); 40 C.F.R. § 61.145(b), (c)(3), (c)(6).

²¹ *See, e.g., Knox v. U.S. Dep’t of Labor*, 434 F.3d 721, 724 n.3 (4th Cir. 2006).

²² 738 F.3d 719 (6th Cir. 2013).

²³ 825 F.3d 287 (6th Cir. 2016).

ACM. Both cases involved owners who purchased the facilities with the plan of salvaging and selling all metals (for example, piping) and other valuable materials, demolishing the remaining buildings, and redeveloping the property.

When the owners learned of the expense involved in properly abating the asbestos from these facilities, they chose to hire unqualified and largely unwitting day-laborers to dry-strip TSI by hand with inadequate respiratory protection. They then hired demolition and renovation contractors willing to look the other way or participate in the unlawful activities. In order to gain access to salvageable materials, the owners and operators demolished the structures with vast quantities of ACM still clinging to pipes, boilers, and other facility components. Workers were then directed to remove the asbestos from the valuable metals by hand, which typically involved sawing through TSI, knocking TSI off pipes, piling it up, and throwing it into dumpsters or burying it on site. To accomplish these unlawful acts, the owners and operators, acting in concert, misled regulators through false paperwork and partial asbestos removals and concealed illegal activities from the inspectors.²⁴ The results speak for themselves:



Example of unlawful asbestos demolition

²⁴ See *Sawyer*, 825 F.3d at 289–90; *Mathis*, 738 F.3d at 726–29.

The people working on these projects included local homeless people and individuals with undocumented immigration status. Both groups are generally eager for work, willing to work at night and on weekends for low wages paid in cash, and unlikely to complain about unsafe working conditions. To the advantage of owners and operators, these groups can be difficult for government investigators to locate.

The *Mathis* case went to trial, and the *Sawyer* case was resolved by guilty pleas. Both cases involved heavily contested, multi-day sentencing hearings and ultimately resulted in the defendants receiving jail sentences ranging between 6 and 60 months. Generally, first-tier supervisors received the lighter sentences, and the project managers who owned the salvage operations and directed the overall scope of the projects received the longer prison sentences.

IV. Potential hurdles investigating an asbestos NESHAP case

A. Establishing the requisite “jurisdictional amount” of RACM

To establish a criminal asbestos NESHAP violation, one of the critical preliminary determinations that must be made is whether the aforementioned regulatory threshold of ACM was present at the site in question. Under 40 C.F.R. § 61.145(a)(1) and (a)(4), a facility must contain at least 260 linear feet, 160 square feet, or 35 cubic feet (where the length or area could not be measured) of RACM to trigger the asbestos NESHAP.

While seemingly simple at first blush, this can be a potential stumbling block, particularly if the case involves a bulk asbestos disposal, an asbestos demolition or renovation project that was carried out in stages, or if the facility is demolished by the time regulators learn of the potential violations.

Historical information, such as asbestos inspections or surveys, financial or real estate documents, regulatory inspections, or 10-day notices filed with regulatory agencies may be one source for establishing the presence of the threshold amount of asbestos. Criminal investigators should seek waste transportation records, including asbestos manifests, for valuable information concerning the amount of asbestos that was present before the demolition or renovation began.

Additionally, search warrants can be used to establish that the threshold amount of asbestos remains at the site where the demolition or renovation activity occurred. Determining the scope of the project is critical in calculating the amount of asbestos present for jurisdictional purposes. For demolition activities, the calculus is straightforward—that is, measure all of the RACM contained in the entire facility as demolition, by its very nature, will have the potential to disturb the entire building and all RACM contained therein. For renovation and abatement activities, however, a more conservative approach may be warranted as there is no case law interpreting whether the jurisdictional amounts of asbestos should include all asbestos in the entire facility or only that reasonably affected by a project.

Section 60.145(a)(4)(iii) of the Code of Federal Regulations states that the applicability of the asbestos NESHAP is, in part, defined by the “combined additive amount of RACM to be removed or stripped during a calendar year.”²⁵ Moreover, as part of their 10-day notice, owners and operators must include a number of project and work-specific estimates, including the following: “the approximate amount of RACM to be removed from the facility in terms of length of pipe . . . , surface area . . . , or volume in cubic meters”;²⁶ “the work area affected;”²⁷ start and end dates;²⁸ the methods of removal;²⁹ work practices and engineering controls to be used;³⁰ and the disposal plan.³¹

All of these jurisdictional determinations and notice requirements suggest that the applicability of the NESHAP is defined by a particular work area or scope of work. Prosecutors are therefore urged to make the jurisdictional amount determination based on the scope of the project. That said, owners and operators may not “segment” their project—that is, piecemeal a project to get below a jurisdictional amount by, for example, noticing 10 separate projects to remove 27 linear feet of asbestos rather than the whole 270 linear feet they intend to remove “in a calendar year.”

²⁵ 40 C.F.R. § 60.145(a)(4)(iii).

²⁶ 40 C.F.R. § 61.145(b)(4)(vi).

²⁷ 40 C.F.R. § 61.145(b)(4)(vii).

²⁸ 40 C.F.R. § 61.145(b)(4)(viii), (ix).

²⁹ 40 C.F.R. § 61.145(b)(4)(x).

³⁰ 40 C.F.R. § 61.145(b)(4)(xi).

³¹ 40 C.F.R. § 61.145(b)(4)(xii).

B. Witness-related problems

Another investigative hurdle may be the lack of available witnesses who can establish that the owners or operators directed the work practice standard violations. Oftentimes, asbestos “rip and run” operators will use untrained and unsophisticated day laborers to perform the work. Interviewing workers should be an investigative priority; such workers may be difficult to locate, and undue delay may result in witnesses leaving the area prior to being interviewed. Bilingual criminal investigators can be vital to locating and communicating with undocumented immigrants who have been involved with the project, but such witnesses may nonetheless be reluctant to speak with law enforcement due to fear of deportation.

C. Issues involving federal, state, and local regulators

The involvement of regulatory personnel during the demolition or renovation can present some issues as well. The regulators may not witness any of the actual asbestos removal, as the improper abatement work is commonly done after hours and on weekends when regulators are generally not conducting inspections. If the improperly abated asbestos is cleaned up after the weekend or night shift, the regulators may come in to a clean project and not be aware that the asbestos was improperly removed.

This practice can have the effect of deceiving the regulators into believing that the operators are good corporate citizens, which may be reflected in inspection reports. Regulators’ unjustified high opinions of these types of operators can also lead to regulators failing to cite minor violations they may encounter during an inspection, such as a small pile of uncontained asbestos. Regulators who have been deceived into believing that operators are playing by the rules may also be called as witnesses by the defense team to testify that the regulators did not encounter problems at the site. It is important to be prepared to temper any such glowing testimony by establishing that regulators may not have witnessed the illegal activity, nor are they privy to witness interview reports or grand jury testimony that gives a more complete picture of the operators’ activities on the site.

Early in the investigation, the prosecution team should gather all regulatory files pertaining to the site, including samples, sampling analyses, photographs, inspection reports, and correspondence to ensure that there are no potential *Brady* or other issues that may

undercut the prosecution's theory of the case. By way of example, in many cases, local or state authorities with concurrent authority—for example, a local air control bureau—may be reviewing applications, issuing permits, or visiting the work area before or during a given project. Prosecutors are urged to determine what, if any, representations or statements may have been made to defendants by such regulators that could be construed as tacit authorization for illegal asbestos-related activities. Prosecutors can enlist agency counsel to ensure that all regulatory files are compiled and provided to the prosecution team.

D. Sampling, quantification, and expert-related issues

As discussed above, by the time an investigation has been initiated into potential criminal asbestos NESHAP violations, there often will have been prior intervention by regulatory authorities or emergency response personnel. These authorities may have already sampled material on site suspected of being ACM. Prosecutors, however, should be cautious of relying upon such sampling and analyses as a basis for a criminal prosecution. The sampling may not have been conducted properly, such as samples being taken without appropriate respiratory protection or samples without documented chain-of-custody.

Also, the lab may not have been accredited to perform the analyses for bulk asbestos.³² Unaccredited lab personnel may not be experienced in testifying, may fail to follow appropriate ACM testing procedures, or may be otherwise unqualified to perform the analyses. These potential shortcomings in regulatory- or emergency response-based sampling can be fodder for an argument at trial that the sample results are unreliable or that the government itself has failed to use measures intended to protect human health when taking or handling potential ACM.

Therefore, prosecutors should consider obtaining samples and having the samples analyzed as part of the criminal investigation. Assistance with obtaining such sample analyses and expert trial testimony on ACM analyses can be obtained through coordination

³² The National Institute of Standards and Technology maintains a searchable online directory of accredited labs at <https://www-s.nist.gov/niws/index.cfm?event=directory.search#no-back>.

with the EPA's Criminal Investigation Division and the EPA's National Enforcement Investigation Center in Denver, Colorado.

Of course, as in any other federal criminal investigation, grand jury subpoenas for documents and witness testimony can be instrumental in establishing criminal NESHAP violations. Among other things, as mentioned above, prior owners of the facility, lenders, and financiers may have useful records pertaining to asbestos sampling, concentrations, and amounts that were present in the facility before the demolition or renovation began, which can be instrumental in establishing the presence of the regulatory threshold amount of asbestos.

Similarly, prosecutors can use search warrants to obtain critical information. Physical and digital records, such as documentation of worker identities, can serve as investigatory leads. For trial purposes, documents such as timesheets can serve to document the length of worker exposure. Media samples can and should be obtained in order to confirm the presence of RACM and help establish the presence of the regulatory threshold amounts of asbestos present at the facility. The search warrant team can document asbestos buried underground or intermingled in piles with other demolition debris.



Buried asbestos intermingled with other demolition debris

V. Common issues in charging and prosecuting a NESHAP case

A. Multi-prong conspiracy, including *Klein*

As discussed above, asbestos-related crimes are often complex and require the involvement of numerous individuals—for example, owners and investors to purchase and finance the infrastructure; operators and workers to conduct the work; and project managers and supervisors to oversee operations and, oftentimes, fill out paperwork, permits, etc. It is rare that only one individual can carry out all these activities alone, legally or illegally. Accordingly, asbestos-crimes are often conspiracies, and prosecutors should strongly consider charging multi-prong conspiracies to capture the full scope of the conduct. More specifically, a series of recent NESHAP prosecutions featured conspiracies with both substantive NESHAP and *Klein* prongs.³³

Alleging a *Klein* conspiracy is appropriate, and advisable, where there is evidence that the conspirators took steps to impede and impair the EPA’s ability to enforce the NESHAP. For instance, falsifying the requisite 10-day notice, lying to inspectors, doing partial abatements, or complying with only some of the regulations (for example, outer containment to give the appearance of lawful asbestos work) all belie efforts to mislead the agencies responsible for enforcing the asbestos NESHAP.

A *Klein* conspiracy also allows prosecutors to capture violations of OSHA regulations intended to protect workers. More specifically, owners and operators conducting specified types of asbestos abatement work must undertake air-monitoring analysis and employ other worker protection measures, such as personal air sampling (also known as “OSHA personals”).³⁴ When an owner or operator fails to conduct such air monitoring or provide for these worker-protection measures, they impair and impede OSHA’s ability to enforce its asbestos worker protection requirements (for example, respirators, personal protective equipment, decontamination units). Charging OSHA violations as part of a *Klein* conspiracy also allows prosecutors

³³ See, e.g., *United States v. Mathis*, 738 F.3d 719, 735–37; *United States v. Yi*, 704 F.3d 800 (9th Cir. 2011); *United States v. Knapp*, Case No. 4:10-CR-00025-JEG (S.D. Iowa 2010); *United States v. Loder*, 8:08-cr-59-T-30TBM (M.D. Fla. 2008).

³⁴ See 29 C.F.R. § 1926.1101(f).

to present evidence of worker endangerment during its case-in-chief, which has substantial jury appeal.

B. Mens rea for proving a criminal NESHAP violation

Commonly, a defense may be based upon the defendant's alleged ignorance of the presence of asbestos or the amounts or types of asbestos present in the facility. The defendant may also say that he did not understand the "burdensome" regulations that go with conducting asbestos-related activities. These defenses are not supported by case law.

Bryan v. United States makes it clear that a knowing mental state standard "merely requires proof of knowledge of the facts that constitute the offense."³⁵ Thus, specific knowledge that one's conduct is illegal is not required for an asbestos NESHAP violation. The government need only prove that the defendant knew that the substance involved in the demolition or renovation was asbestos.³⁶

The government is not required to prove that the defendant knew the asbestos was of the kind and quantity sufficient to trigger the asbestos work practice standard.³⁷ Therefore, assuming the other elements of the violation are satisfied, only a defendant who, in good faith, did not know the demolition or renovation involved asbestos

³⁵ 524 U.S. 184, 193 (1998).

³⁶ *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001) ("because no one can reasonably claim surprise that asbestos is regulated and that some form of liability is possible for violating those regulations," to sustain a conviction for violation of asbestos work-practice standards, the government need only prove that a defendant knew that the material being removed was asbestos).

³⁷ *See id.*; *see also* *United States v. Alghazouli*, 517 F.3d 1179, 1192–93 (9th Cir. 2008) (section 7413(c)(1) requires only that the defendant have knowledge of the facts that constitute the offense, and not that the defendant knew his acts were unlawful); *United States v. Ho*, 311 F.3d 589, 605–06 (5th Cir. 2002) (defendant who knows of presence of asbestos may be convicted of knowingly failing to comply with CAA requirements, even if he or she is unaware of such requirements, because the term "knowingly" refers to knowledge of facts, not law); *United States v. Buckley*, 934 F.2d 84, 88 (6th Cir. 1991) ("[T]he statute requires knowledge only of the emissions themselves, not knowledge of the statute or of the hazards that emissions pose.").

would not be guilty of the offense.³⁸ The regulations impose a duty to thoroughly inspect the affected facility prior to demolition or renovation, however, which makes it difficult for defendants to argue that they did not know there was asbestos present.³⁹

The United States can also establish knowledge by showing the defendant “closed his eyes to obvious facts or failed to investigate when aware of facts which demanded investigation.”⁴⁰ Prosecutors have been successful in proving knowledge through evidence of “willful blindness” or “deliberate ignorance” in a variety of environmental contexts. In *United States v. Williams*, the Sixth Circuit upheld a jury instruction that permitted the jury to find that the defendant had the requisite state of mind if “he was aware of a high probability that waste with the potential to be harmful to others or to the environment was stored or disposed at [the facility], and that the defendant deliberately closed his eyes to what was obvious.”⁴¹

C. CAA knowing endangerment

The CAA also contains a “knowing endangerment” charge.⁴² That provision provides for a 15-year felony where a person “knowingly releases . . . a hazardous air pollutant,” to include RACM, “and knows at the time that he thereby places another person in imminent danger of death or serious bodily injury.”⁴³ While this may seem a viable charging option in a case where there is evidence of human exposure to a carcinogen, prosecutors should be cautious before choosing that route.

Unlike violations charged under section 7413(c)(1), the knowing endangerment charge requires prosecutors to present proof of exposure, human health impacts, and the likelihood of that release causing death or serious bodily injury. Even when one can prove visible emissions, proving an increased likelihood of death or serious

³⁸ See *Weintraub*, 273 F.3d at 151.

³⁹ 40 C.F.R. § 61.145(a); *Fried v. Sungard Recovery Servs., Inc.*, 925 F. Supp. 364, 372 (1996) (“Defendant had a duty to inspect its facility regardless of the amount of asbestos it was aware of before the inspection.”).

⁴⁰ *Buckley*, 934 F.2d at 88.

⁴¹ 195 F.3d 823, 825–26 (6th Cir. 1999); see also *United States v. Lee*, 991 F.2d 343, 349 (6th Cir. 1993) (“No one can avoid responsibility for a crime by deliberately ignoring the obvious.”).

⁴² 42 U.S.C. § 7413(c)(5).

⁴³ *Id.*

bodily injury can be an onerous task, requiring substantial expert testing and testimony.

Prosecutors are urged to consider charging the simple NESHAP violation even where visible emissions and exposure can be proven. Bear in mind that “visible emissions,” by themselves, constitute a “work-practice standard violation” and are, therefore, a chargeable felony offense under 42 U.S.C. § 7413(c)(1).⁴⁴

Furthermore, as discussed below in the sentencing section, even at the sentencing phase under a preponderance of the evidence standard, establishing a substantial likelihood of death or serious bodily injury is a daunting challenge. Also, there may, ultimately, be no advantage to charging knowing endangerment over a straight NESHAP charge in terms of sentencing, due to the applicability of significant enhancements under section 2Q1.2 of the Sentencing Guidelines.

D. Other charging options

Prosecutors should consider charging options in addition to 42 U.S.C. § 7413 when investigating and charging asbestos-related offenses. Notably, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁴⁵ provides a three-year felony for failing to report a release of more than one pound of asbestos to the National Response Center. This charge should be considered when there is evidence that the defendant was illegally disposing of RACM at locations other than authorized solid waste disposal facilities.

For instance, in *United States v. Mancuso*,⁴⁶ the defendants engaged in a multi-year conspiracy to illegally remove asbestos from numerous facilities. To cut costs, the defendants, oftentimes, dumped the illegally-removed waste on vacant lots or in the woods. The defendants were charged with, among other things, a conspiracy to violate 42 U.S.C. § 9603(b) and ordered to pay restitution to the agencies who remediated the contaminated property.

⁴⁴ See, e.g., 40 C.F.R. § 61.145(c)(4)(ii).

⁴⁵ 42 U.S.C. § 9603(a)–(b).

⁴⁶ No. 5:08-CR-611 (FJS), 2010 WL 11530536 (N.D.N.Y. June 8, 2010).



Illegally disposed asbestos at location other than authorized solid waste disposal facility.

There are often other viable Title 18 charges, such as conspiracy,⁴⁷ mail or wire fraud,⁴⁸ false statements,⁴⁹ and obstruction of justice.⁵⁰ Mail and wire fraud charges are often associated with OSHA violations or violations of state and municipal asbestos regulations. Asbestos-abatement, renovation, and demolition operators oftentimes submit bids and execute contracts representing that they will follow all federal, state, and local requirements regarding the permitting, identification, removal, and disposal of asbestos in the facility, which are material requirements to the customer hiring them.

Despite making such representations, such operators may proceed with abatement, renovation, or demolition activities in knowing violation of the NESHAP and other associated state and local laws. Provided such transactions (even subsequent billings) involve the mail or interstate wires (for example, emails, faxes, wire transfers of funds), there are potential mail or wire fraud charges. Such

⁴⁷ See 18 U.S.C. § 371.

⁴⁸ See 18 U.S.C. §§ 1341, 1343.

⁴⁹ See 18 U.S.C. § 1001.

⁵⁰ See 18 U.S.C. § 1519.

prosecution strategies have been successful in a number of cases in the Northern District of New York.⁵¹

False statement counts are also viable Title 18 charges in many asbestos-related crimes. For instance, falsifying the requisite 10-day notice required under 40 C.F.R. § 61.145(b) can form a basis for a violation of 18 U.S.C. § 1001.⁵² Likewise, lying to investigators in connection with asbestos investigations is not uncommon. In a similar vein, there are instances where defendants have altered documents—for example, asbestos “surveys” that document the amounts and types of asbestos present—in an effort to mislead investigators into thinking that the facility did not contain a sufficient quantity of asbestos.⁵³ In such instances, 18 U.S.C. § 1519 is a viable charge.

Finally, there are limited charging options under the Asbestos Hazard Emergency Response Act (AHERA),⁵⁴ and its regulations.⁵⁵ The AHERA was implemented under the Toxic Substances Control Act (TSCA)⁵⁶ and, among other things, establishes protocols and procedures to deal with asbestos in school buildings. The AHERA requires schools to perform original and periodic inspections to identify the presence, amount, and condition of asbestos in schools and develop management and notice plans to deal with asbestos found in schools. Most relevant here, the AHERA imposes requirements for worker and supervisor training, lab accreditation and training, sampling, and air monitoring in schools. This is relevant to workers insofar as these regulations set standards for air sampling inside containment and training standards for both the workers and their supervisors.

Violations of some of these standards can be prosecuted under 15 U.S.C. § 2615(b) (a misdemeanor punishable by one-year imprisonment and/or a \$25,000 fine). While there are no substantive felonies provided for in the TSCA or the AHERA, violations of the standards provided for by these statutes and regulations can become useful overt acts to incorporate into a section 371 conspiracy and can also be used as the basis for substantive mail and wire fraud counts.

⁵¹ See, e.g., *United States v. Thorn*, 317 F.3d 107 (2d Cir. 2003); *United States v. Salvagno*, Crim. No. 5:02-CR-0051 (N.D.N.Y. July 21, 2006).

⁵² See, e.g., *United States v. Mathis*, 738 F.3d 719, 737–38 (6th Cir. 2013).

⁵³ *Id.*

⁵⁴ 15 U.S.C. §§ 2641–56.

⁵⁵ 40 C.F.R. pt. 763, subpt. E.

⁵⁶ 15 U.S.C. §§ 2601–29.

VI. Sentencing issues in asbestos prosecutions

A. Applicable guidelines sections and commonly-applied enhancements

Generally, section 2Q1.2 of the U.S. Sentencing Guidelines applies to asbestos NESHAP prosecutions. Several specific offense characteristics commonly apply to asbestos NESHAP cases, and their applicability can be vigorously contested at sentencing. These characteristics include a six-level enhancement for ongoing or repetitive releases into the environment,⁵⁷ a nine-level enhancement for offenses resulting in a substantial likelihood of death or serious bodily injury,⁵⁸ and a four-level enhancement for offenses causing a disruption of public utilities or an evacuation or a clean-up requiring a substantial expenditure.⁵⁹

Significantly, these sentencing enhancements result in a higher total offense level than the level 24 available under section 2Q1.1 upon conviction of the knowing endangerment provision in the CAA.⁶⁰ These enhancements should be considered when deciding how to charge a NESHAP case involving worker victims.

Regarding the sentencing enhancement for cases in which the offense resulted in substantial likelihood of death or serious bodily injury, it is “beyond peradventure that asbestos-related diseases, such as mesothelioma, asbestosis, and lung cancer, constitute a serious bodily injury under the Guidelines.”⁶¹ The Sentencing Guidelines do not define “substantial likelihood.” Several circuits, however, have addressed the issue and adopted different standards for when this enhancement applies.

The Ninth Circuit has determined that the enhancement applies when the asbestos NESHAP work practice standards were violated such that asbestos was not stored or removed properly.⁶² The Second and Sixth Circuits, on the other hand, have explained that this

⁵⁷ U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2Q1.2(b)(1)(A) (U.S. SENTENCING COMM’N 2019)

⁵⁸ U.S.S.G. § 2Q1.2(b)(2).

⁵⁹ U.S.S.G. § 2Q1.2(b)(3).

⁶⁰ U.S.S.G. § 2Q1.1; 42 U.S.C. § 7413(c)(5).

⁶¹ *United States v. Thorn*, 317 F.3d 107, 118 n.7 (2d Cir. 2003).

⁶² *United States v. Pearson*, 274 F.3d 1225, 1235 (9th Cir. 2001).

enhancement applies if the defendant's offense made it considerably more likely that a person would die or develop a serious bodily injury.⁶³ As such, outside of the Ninth Circuit, a prosecutor must establish a nexus between the NESHAP violation and worker exposure and also demonstrate that such exposure was of sufficient duration and intensity to render the worker considerably more likely to fall ill or die than someone who was not exposed.

This standard can be established through testimony by the asbestos workers that describes the degree to which they were exposed to the RACM, including whether workers were involved in the asbestos removal over a long period of time, working in confined spaces, working without respiratory protection, cutting pipes containing asbestos insulation with power tools, manually removing asbestos insulation from facility components, or sweeping asbestos debris from the floor. The enhancement may also be applied based upon not only the failure of the operators to follow the work practice standard under the NESHAP, but also the operators' failure to implement OSHA personals for respiratory protection discussed above.

Worker testimony, coupled with expert witness testimony at the sentencing hearing, may lead the court to conclude that the defendant's conduct significantly increased the likelihood that the workers would develop asbestos-related illnesses. Appropriate experts for this type of testimony include toxicologists, industrial hygienists, and medical professionals with experience in asbestos exposure and asbestos-related illnesses. The experts can review witness interview reports, sampling data, and other documentary evidence concerning the amounts, concentrations, and types of asbestos involved in the illegal operation. It is also advisable, if possible, for the expert to interview some of the workers involved in the operation in order for the expert to get as much detail as possible about the exposures.⁶⁴

A. Restitution issues

Because asbestos crimes often expose workers to asbestos and result in expensive clean-ups, restitution can be an important and contested

⁶³ *United States v. Mathis*, 738 F.3d 719, 739 (6th Cir. 2013); *Thorn*, 317 F.3d 107, *aff'd*, 446 F.3d 378, 383 (2d Cir. 2006).

⁶⁴ *See, e.g., Thorn*, 317 F.3d at 115, 117–18 (discussing the expert's opinions being based in part on information the expert obtained from interviewing the workers regarding their levels of asbestos exposure).

sentencing issue. Prosecutors have several options when approaching restitution for both the victims exposed to the hazardous materials and the agencies tasked with stabilizing and remediating contamination to the environment.

Addressing the potential health effects imposed on worker victims of NESHAP crimes is problematic, particularly due to the latency associated with asbestos-related illnesses (often 10 years or more) and the “direct and proximate” causal nexus required for restitution.⁶⁵ One option is to seek restitution and a special condition of supervised release that imposes long-term medical monitoring costs on defendants.

In such circumstances, the court may order a lump sum payment to potential victims to fund their own medical monitoring.⁶⁶ The court may also impose the formulation, implementation, and funding of a medical monitoring plan as part of a restitution order.⁶⁷

Due to the environmental contamination and health threats that often accompany an asbestos demolition project, regulatory agencies often undertake significant remediation efforts to address the contamination. In *Mancuso*, the cleanup was relatively modest—approximately \$18,000—whereas the *Sawyer* cleanup exceeded \$16 million.⁶⁸ Depending on the threat posed by the defendant’s actions, the EPA may undertake cleanup efforts and seek to recover costs through a separate civil action under the CERCLA.⁶⁹

Pursuing restitution for cleanup costs, however, may have a number of tactical advantages. The EPA (or other responding agencies) may be a “victim” for the purposes of the Mandatory Victim Restitution Act of 1996⁷⁰ and seek to have direct cleanup costs awarded as restitution, as

⁶⁵ See 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2).

⁶⁶ See, e.g., *United States v. Yi*, 704 F.3d 800 (9th Cir. 2011) (ordering restitution for three workers who were exposed to friable asbestos during illegal renovation work).

⁶⁷ See, e.g., *United States v. Mauck*, Nos. 3:02-CR-00024-WCB, 3:02-CR-0051-WCB (N.D. W.Va. Mar. 4, 2005), ECF Nos. 183, 53 (ordering the defendants to fund a medical monitoring program for nine workers exposed to asbestos as a consequence of asbestos-related crimes).

⁶⁸ Mem. Decision and Order at 5, *United States v. Mancuso*, No. 5:08-cr-00611-FJS, (N.D.N.Y. Dec. 27, 2010), ECF No. 166; *United States v. Sawyer*, 825 F.3d 287, 289 (6th Cir. 2016).

⁶⁹ 42 U.S.C. §§ 9607, 9613.

⁷⁰ 18 U.S.C. § 3663A.

in *Sawyer*, where the Sixth Circuit affirmed the \$10,388,576.71 in restitution awarded to the EPA for Superfund response costs incurred cleaning up and stabilizing the ACM left behind after an illegally-conducted demolition operation.⁷¹

VII. Conclusion

As “entrepreneurs” continue to eye shuttered industrial facilities as potential revenue sources, criminal prosecution of egregious asbestos NESHAP violations will foster deterrence of other would-be violators. The Environmental Crimes Section is prepared to assist Assistant U.S. Attorneys in evaluating and bringing these important cases to deter those who would contemplate promoting profit over worker safety.

About the Authors

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⁷¹ *Sawyer*, 825 F.3d 287.

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Effective Use of Federal Criminal Statutes to Achieve Justice in Worker Protection Cases

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I. Why use Title 18 statutes in worker protection cases?

The Occupational Safety and Health Act (OSH Act) contains a significantly limited criminal enforcement mechanism for conduct that harms workers: a misdemeanor with a six-month maximum penalty that applies only to willful violations and only when the violation results in a worker's death.¹ The Act provides no enforcement mechanism whatsoever for willful violations of laws or regulations, including intentional misconduct, that cause either a serious bodily injury to a worker or a fatal illness that does not manifest within the five-year statute of limitations.² The Act also limits the prosecution of individuals to a narrow group who can themselves be defined as "employers."³ Moreover, the Sentencing Guidelines (Guidelines) do not apply to the OSH Act's Class B misdemeanors.⁴ On the facts of many cases, a conviction solely on the OSH Act appears to fall short of fully satisfying the goals of criminal prosecution.⁵

Additionally, as provided in the OSH Act, over half the states have their own delegated occupational safety and health program and, thus, have exclusive authority over standard setting, inspections, and

¹ 29 U.S.C. § 666(e).

² 29 U.S.C. § 651, *et seq.*

³ 29 U.S.C. § 666.

⁴ U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 1B1.2(a) (U.S. SENTENCING COMM'N 2019) ("The guidelines do not apply to any count of conviction that is a Class B or Class C misdemeanor").

⁵ See JUSTICE MANUAL § 9-27.320; 18 U.S.C. § 3553(a).

enforcement.⁶ Once a state implements an approved occupational safety and health program, federal enforcement falls away; that is, the federal government may no longer criminally enforce OSH Act crimes in that state.⁷

By contrast, a variety of Title 18 offenses apply in instances of serious knowing or willful misconduct that imperils the lives of workers or members of the public. These offenses often occur in worker protection cases because the motivations that lead to violations of the OSH Act are the same motivations that underlie most crimes. Offenders are motivated by the possibility of monetary gains through cost savings or obtaining money that they would not otherwise be entitled to, a desire to avoid detection, and a lack of respect for the rule of law.

Incorporating Title 18 offenses into worker safety prosecutions can help ensure that justice is appropriately achieved. While the OSH Act provides a crucial avenue for restitution to families of victims, Title 18 offenses add many advantages. They allow prosecutors to address a broader range of criminal conduct, bring charges against a wider range of individuals, reach conduct that leads to grievous injury or latent health effects, present evidence that demonstrates the full scope of the defendant's crimes, and seek appropriately enhanced punishment, none of which would be possible if only OSH Act offenses were charged. This article explores the benefits and limits of charging Title 18 offenses through the lens of past worker protection cases in which prosecutors charged Title 18 offenses in addition to, or in lieu of, OSH Act misdemeanors.⁸

⁶ Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming have plans that cover all employers within the state. 29 C.F.R. pt. 1952, subpt. A. The Connecticut, Illinois, Maine, New Jersey, New York, and U.S. Virgin Islands plans cover state and local government employers only. 29 C.F.R. pt. 1952, subpt. B; *see also* 29 U.S.C. § 667.

⁷ 29 U.S.C. § 667(e).

⁸ While this article focuses on Title 18 crimes, prosecution under criminal provisions of environmental laws can also address worker safety violations. *See* Deborah Harris, *Achieving Worker Safety Through Environmental Crimes Prosecutions*, 59 U.S. ATT'YS BULL., no. 4, 2011, at 58–64.

II. Overview of Title 18 offenses that may enhance worker protection prosecutions

A. *Klein* conspiracy: conspiring to fraudulently defeat a lawful government function

Where a defendant's conduct was intended to conceal criminal activities from the Occupational Safety and Health Administration (OSHA) or the Environmental Protection Agency (EPA) to keep those agencies from assessing or ensuring compliance with the laws they administer, a "*Klein* conspiracy" is a practical way to focus the jury's attention on this aspect of criminal conduct.

Brought under the "defraud" prong of 18 U.S.C. § 371, a *Klein* conspiracy alleges that defendants conspired to impair, obstruct, or defeat the lawful function of any department of the government.⁹ Unlike the "offense" prong of 18 U.S.C. § 371, alleging a conspiracy to commit a specifically named crime, prosecutors do not need to point to the violation of a separate statute in a *Klein* conspiracy.¹⁰

Nonetheless, both the defraud prong and the offense prong, if available, can and should be charged in a single count.¹¹ Prosecutors also do not need to establish that the government suffered a monetary or pecuniary loss.¹² As explained in *United States v. Klein*, which gave "defraud" prong conspiracies their colloquial name, interfering with or obstructing a lawful governmental function by dishonest means is

⁹ *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957).

¹⁰ *United States v. Douglas*, 398 F.3d 407, 412 (6th Cir. 2005); *United States v. Khalife*, 106 F.3d 1300, 1303–04 (6th Cir. 1997); *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988).

¹¹ *United States v. Hauck*, 980 F.2d 611, 615 (10th Cir. 1992); *United States v. Smith*, 891 F.2d 703, 711–13 (9th Cir. 1989); *United States v. Treadwell*, 760 F.2d 327, 336 (D.C. Cir. 1985); *United States v. Williams*, 705 F.2d 603, 623–24 (2d Cir. 1983); *United States v. Maury*, 695 F.3d 227, 267 (3d Cir. 2012) (rejecting the argument that joining the offense and defraud prongs into a single conspiracy constituted a "fatal duplicity").

¹² *See, e.g., United States v. Puerto*, 730 F.2d 627, 630 (11th Cir. 1984); *United States v. Goldberg*, 105 F.3d 770, 772–73 (1st Cir. 1997).

sufficient for a conviction.¹³

While many facts that would support a conviction for a *Klein* conspiracy could also support a conviction for conspiracy to obstruct justice, including the “defraud” prong as an object of a conspiracy—even where a conspiracy to violate 18 U.S.C. §§ 1505, 1512, or 1519 has also been charged—may allow prosecutors to include conduct that would not otherwise be admissible if the “offense” prong was charged alone.

For instance, while a conspiracy to violate section 1505 does not require an agency proceeding at the outset of a conspiracy, an agency proceeding—or at least the foreseeability of one—must arise at some point during the conspiracy in order to prove a charge of conspiracy to violate 18 U.S.C. § 1505. Section 1519, while seemingly broad on its face, is limited to the destruction, concealment, or alteration of documents or objects that can record information.¹⁴ When brought in conjunction with substantive OSH Act or environmental crimes charges, a *Klein* conspiracy often results in an obstruction enhancement under the Guidelines.¹⁵

B. Fraud charges

Fraud frequently occurs in conjunction with worker protection and environmental crimes, which are often motivated by greed and require some degree of deception to maintain. For example, when environmental remediation, transportation, and disposal companies are selected to engage in activities involving dangerous chemicals or substances, they execute contracts in which they represent that the work will be performed in compliance with all applicable federal, state, and local laws.

That is, they agree to comply with the range of agency-created laws and regulations meant to ensure the safe and efficacious removal, transportation, and/or disposal of the otherwise potentially deadly

¹³ *Klein*, 247 F.2d at 916 (citing *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)); *see also* *United States v. Overholt*, 307 F.3d 1231, 1247 (10th Cir. 2002).

¹⁴ In *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015), a plurality of the Supreme Court concluded that, given the legislative history and context of 18 U.S.C. § 1519, “[t]angible object’ in § 1519 . . . is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.”

¹⁵ U.S.S.G. § 3C1.1.

substance. Invariably, all or portions of documents related to the transactions (bids, contracts, invoices, and checks) are sent through the U.S. mail or via interstate wires. The most frequently used fraud statutes include mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, but other, lesser-used fraud statutes may be relevant in more limited circumstances. When a defendant has made a claim, by submitting an invoice or bill, to a federal agency for work that was performed in violation of worker protection standards, rather than a larger pattern of such claims, prosecutors may also consider charging a false claim, 18 U.S.C. § 287,¹⁶ or conspiracy to defraud the government with respect to claims, 18 U.S.C. § 286.

Mail or wire fraud charges may also allow federal prosecutors to incorporate a defendant's violation of related state law in cases that otherwise merit federal prosecution, maximizing efficient use of prosecutorial resources and resulting in a stronger overall case. Where violators knowingly commit serious state law violations during the work, especially as part of a pattern of business conduct arising over a significant period of time, the federal indictment can readily describe those violations as part of a fraud scheme.

Such indictments typically explain a defendant's promise to comply with an applicable state law at a time when she had no intention to do so, and the indictments set forth each part of the statutory or regulatory scheme that the defendant violated. As demonstrated in the cases described below, providing the judge and jury with evidence of the full range of criminal conduct greatly enhances their understanding of the scope of the crimes. They see the many steps the defendant took to repeatedly circumvent lawful requirements to save time and improperly profit. And they see how a defendant puts her workers and members of the public in danger of death or injury.

C. Other federal statutes

Other federal statutes that have been useful in worker protection prosecutions include false statements, 18 U.S.C. § 1001, and the various forms of obstruction of justice.¹⁷ These statutes are useful in capturing conduct associated with efforts to conceal the unlawful treatment of workers, especially where a prosecutor may not be able to establish a *Klein* or offense-prong conspiracy because of a lack of

¹⁶ See, e.g., *United States v. Brightwell*, No. 1:13-cr-315 (D.D.C. 2014).

¹⁷ 18 U.S.C. §§ 1505, 1512, 1519.

evidence of an agreement.

In a similar, but perhaps less obvious, vein is the potential use of the federal perjury statute to prosecute certain false statements to OSHA.¹⁸ The OSH Act authorizes OSHA to subpoena and take testimony from witnesses under oath as part of the administrative investigation and enforcement process.¹⁹ False statements made by individuals during such administrative depositions would meet the requirement of a false statement willfully made after “having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered.”²⁰

More rarely, for particularly egregious and long-running patterns of conduct, it may be possible to bring money laundering²¹ or Racketeer Influenced and Corrupt Organization (RICO)²² charges. Money laundering and RICO charges can be particularly useful in conjunction with mail or wire fraud charges, as fraud charges can satisfy the specified unlawful activities and predicate crimes requirements for money laundering and RICO charges respectively.²³

Additionally, prosecutions under the negligent and knowing endangerment provisions of the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act (RCRA) speak directly to potential and actual harm to workers, as well as members of the surrounding community.²⁴ The requirement to prove “imminent

¹⁸ 18 U.S.C. § 1621.

¹⁹ 29 U.S.C. § 657(b).

²⁰ 18 U.S.C. § 1621; *see also* *Boehm v. United States*, 123 F.2d 791, 801 (8th Cir. 1941) (holding that where the Securities and Exchange Commission (SEC) acting pursuant to its authority under the Securities Act of 1933 ordered an investigation of an electric company and designated an SEC attorney to administer oaths and to take evidence, the federal perjury statute, then found at 18 U.S.C. § 231, was applicable to material false statements by witnesses in that investigation).

²¹ 18 U.S.C. §§ 1956, 1957.

²² 18 U.S.C. §§ 1962, 1963.

²³ Also, in the rare cases where a RICO charge is appropriate, obstruction is a predicate act. For example, *see United States v. Salvagno*, 306 F. Supp. 2d 258 (N.D.N.Y. 2004) discussed below. *Infra* Part III B.

²⁴ 42 U.S.C. § 7413(c)(4)–(5); 33 U.S.C. § 1319(c)(3); 42 U.S.C. § 6928(e) (RCRA does not contain a negligent endangerment provision); *see also* Deborah Harris, *Achieving Worker Safety Through Environmental Crimes Prosecutions*, 59 U.S. ATT'YS BULL., no. 4, 2011, at 58–64.

danger of death or serious bodily injury”²⁵ can be challenging, depending on the specific facts and circumstances of a given case.²⁶

III. Case studies

A. *Klein conspiracy, obstruction, and false statements: United States v. Atlantic States Cast Iron Pipe Company*

Atlantic States Cast Iron Pipe Company (Atlantic States) was a cast iron pipe foundry in Phillipsburg, New Jersey, that produced municipal water pipes. To make the pipes, employees melted scrap iron and steel at extremely high temperatures in a multi-story furnace called a cupola. The metal was poured into one of six pipe-casting machines and then passed through an oven. From there, the pipes were cut and grinded, lined with cement, and coated with asphalt-based paint.²⁷

Given the processes and machinery involved, it was not surprising that work at the foundry could be dangerous. The conduct of managers and supervisors did nothing to ameliorate that danger, however, and in fact, increased the risk of injuries. In order to maximize productivity and profits at the plant, the defendants repeatedly violated OSH Act regulations and, then, covered up those violations so that regulators would not have reason to inspect the

²⁵ 42 U.S.C. § 7413(c)(4)–(5); 33 U.S.C. § 1319(c)(3); 42 U.S.C. § 6928(e).

²⁶ Michael R. Fisher, *When Pollution Threatens the Workplace: Occupational Safety & Environmental Endangerment Crimes*, DOJ J. FED. L. & PRAC., no. 2, 2020, at 147.

²⁷ The foundry was also subject to environmental regulation. The process of manufacturing large water pipes required large amounts of water for rinsing and cooling, much of which was polluted by petroleum-based hydraulic fluid and other impurities. In violation of the Clean Water Act, employees routinely discharged the polluted wastewater into storm drains leading to the Delaware River. Additionally, because the manufacturing process involved metal smelting, the plant was subject to a Clean Air Act permit limiting the types of material that could be burned and its emissions, particularly carbon monoxide and carbon dioxide. Employees took measures to conceal from inspectors that they were impermissibly burning paint waste in the cupola and tampered with both monitoring equipment and emissions tests in order to conceal frequent Clean Air Act permit violations. *See United States v. Maury*, 695 F.3d 227, 234–40 (3d Cir. 2012).

facility. At times, workers were hired and tasked with operating dangerous heavy machinery with no safety training at all.²⁸ Injuries to workers at the plant were serious and frequent, resulting in maiming and death in some cases.

The investigation revealed Atlantic States's protracted history of lying to and obstructing regulatory inspectors, which included the following:

- In December 2002, an employee had three fingers amputated when he was cleaning a cement mixer and a co-worker activated the mixer without alerting him. Before the incident, the Plant Manager directed the installation of a bypass around the safety mechanism, called an interlock switch. After the incident and before the OSHA compliance officer visited the facility to investigate the amputation, the Plant Manager instructed an employee to remove the bypass and make it "look as though no interlock switch ever existed."²⁹ During the compliance officer's visit, the Plant Manager and two other employees falsely told her that the mixer never had an interlock switch, but that they would attempt to install one themselves. After the visit, the original interlock switch was then reinstalled "to make it look like the Plant had taken steps to improve the safety of the mixer."³⁰
- In May 2000, an employee suffered third-degree burns to his leg after stepping into an improperly covered pit of superheated water. In order to conceal the injury from OSHA, the Human Resources Manager did not report the injury on the work place injury logs, and the employee was directed not to seek medical treatment outside of the facility. Ultimately, the lack of appropriate medical treatment led to the employee's hospitalization.³¹
- In March 2000, an employee was run over and killed by a forklift operated without brakes, headlights, a horn, or warning lights by an untrained co-worker. Brake failure was a known, recurring,

²⁸ *See id.* at 240.

²⁹ *Id.* at 243.

³⁰ *Id.*

³¹ Superseding Indictment, Overt Acts 60–63, *United States v. Atlantic States Cast Iron Pipe Co.*, No. 03-852 (D.N.J. Sept. 14, 2004), ECF No. 95.

and unaddressed problem with the facility's forklifts.³² Immediately after the accident and before an OSHA inspection, the forklift was moved and repaired. Managerial employees then lied to OSHA about the condition of the forklift at the time of the accident and threatened to fire another employee unless he falsely told OSHA that "the forklift was fully operational, it was safe, and [the employee driving the forklift] was driving recklessly."³³

- In April 1999, an employee was struck by a forklift operated by the same untrained co-worker who would later be involved in the March 2000 death. The employee suffered a broken leg. In an effort to conceal the injury from OSHA, the injury was not reported by the company on work place injury logs. When OSHA finally learned of the injury after the March 2000 death, the injured employee initially told the compliance officer that "he had only sustained a scratch and a bruise" because the Human Resources Manager threatened to fire him unless he lied about the extent of his injury.³⁴
- In June 1999, an employee lost an eye "when a piece of a rotating blade from the cut saw he was using broke off from the blade and struck him in the face."³⁵ A few days after the injury, but before OSHA could visit the facility to investigate, a carpenter at the plant built a sliding plexiglass shield for the saw. When the OSHA compliance officer investigating the accident asked about the apparent newness of the shield, the Human Resources Manager falsely told him that the shield had been in place in the same condition for 16 years. The Plant Manager also instructed another employee to falsely tell OSHA that "the shield 'was always there.'"³⁶
- In February 1996, an employee fell off of a rope ladder while performing maintenance on the cupola, breaking bones in his back, pelvis, and ankle. An OSHA inspector who was on site on the day of the accident was told, falsely, that the plant was closed

³² *Maury*, 695 F.3d at 241.

³³ *Id.*

³⁴ *Id.* at 241–42.

³⁵ *Id.* at 242.

³⁶ *Id.* at 243.

and that no work activities were taking place. After the incident, the Human Resources Manager further falsely told an OSHA inspector that the rope ladder used during the incident had been torn after it was discarded.³⁷

The company and four of its supervisory employees, including the plant manager, maintenance supervisor, and human resources manager, were charged in a 35-count superseding indictment on September 14, 2003. The charges included conspiracy, 18 U.S.C. § 371; false statements, 18 U.S.C. § 1001; two forms of obstruction of justice, 18 U.S.C. §§ 1505, 1519; Clean Water Act crimes, 33 U.S.C. §§ 1311(a), 1319(c)(2)(A); and Clean Air Act crimes, 42 U.S.C. § 7413(c).³⁸ The charges addressed the regular discharges of oil into the Delaware River; the concealment of serious worker injuries from health and safety inspectors, including by systematically altering accident scenes; the repeated violations of the facility's Clean Air Act permits by burning tires and excessive amounts of hazardous waste paint; and the routine lying to federal, state, and local officials investigating both environmental and worker protection violations.³⁹

The indictment did not include a substantive OSH Act charge, which ultimately had significant consequences for the sentences in the case, as discussed below. The Title 18 charges, however, enabled the government to prosecute managerial personnel who were not “employers” under the OSH Act,⁴⁰ to reach conduct arising out of non-fatal, but serious, employee injuries such as burns, amputations, broken bones, and loss of an eye; and to expose dangerous workplace conditions without litigating a specific (and somewhat technical) OSHA regulation or standard. Following a trial and conviction, the individual defendants were sentenced to terms of imprisonment ranging from 6 to 70 months, varying with their roles and counts of

³⁷ Superseding Indictment, Overt Acts 50–52, *United States v. Atlantic States Cast Iron Pipe Co.*, No. 03-852 (D.N.J. Sept. 14, 2004), ECF No. 95.

³⁸ *Id.*

³⁹ *Maury*, 695 F.3d at 234–44.

⁴⁰ 29 U.S.C. § 666(e) punishes only “an employer,” which is further defined as a person or entity “engaged in a business affecting commerce who has employees,” 29 U.S.C. § 652(5), and does not include persons who are themselves employees of another person or entity. See the accompanying article, Deborah Harris, *Criminal Prosecutions Under the OSH Act*, 68 DOJ J. FED. L. & PRAC., no. 2, 2020, at 5 for further discussion of this issue.

conviction. The company was sentenced to pay an \$8 million fine and complete a four-year term of probation subject to oversight by a court-appointed monitor.⁴¹

1. Conspiracy: generally

Prosecutors charged Atlantic States, the plant manager, the maintenance superintendent, the human resources manager, the fishing manager, and another individual with one conspiracy count alleging a single purpose: to enrich themselves and their co-conspirators “by maximizing the production of cast iron pipe at the Phillipsburg facility, without concern to environmental pollution and worker safety risks.” Prosecutors charged multiple criminal objects:

- (1) to knowingly violate the Clean Water Act (33 U.S.C. §§ 1311(a), 1319(c)(2)(A));
- (2) to knowingly violate the Clean Air Act (42 U.S.C. § 7413(c));
- (3) to knowingly and willfully make material false statements and use false documents in matters within the jurisdiction of OSHA, the EPA, and the Federal Bureau of Investigation (18 U.S.C. § 1001);
- (4) to corruptly obstruct pending proceedings before OSHA (18 U.S.C. § 1505); and
- (5) to defraud the United States by “hamper[ing], hinder[ing], imped[ing], impair[ing] and obstruct[ing] by craft, trickery, deceit, and dishonest means, the lawful and legitimate functions” of the Department of Labor and OSHA (18 U.S.C. § 371).⁴²

The company, the plant manager, the maintenance superintendent, the human resources manager, and the fishing superintendent were all found guilty of this count, while the other individual was acquitted.

The first four objects charged are violations of the “offense prong” of 18 U.S.C. § 371, which prohibits “two or more persons” from conspiring “to commit any offense against the United States.” The fifth object was the *Klein* object—defrauding the government—discussed in more detail below.

⁴¹ *Maury*, 695 F.3d at 246.

⁴² Superseding Indictment at ¶¶ 48–49, *United States v. Atlantic States Cast Iron Pipe Co.*, No. 03-852 (D.N.J. Sept. 14, 2004), ECF No. 95.

The evidentiary benefits of including conspiracy charges in criminal indictments—based on the “offense prong,” the *Klein* theory, or both—are well known to prosecutors, and as the *Atlantic States* case demonstrates, worker endangerment cases are no exception. As a practical matter, when charging a conspiracy,

statements by one conspirator are admissible evidence against all. Conspiracies are considered continuing offenses for purposes of the statute of limitations and venue. They are also considered separate offenses for purposes of sentencing and of challenges under the Constitution’s ex post facto and double jeopardy clauses.⁴³

Less legalistically, conspiracy charges allow prosecutors to present evidence to the jury that tells the full story of broad, long-term, and wide-ranging illegal conduct in a way that individual substantive charges often do not.

Notwithstanding the benefits of charging a conspiracy, a conspiracy count that is too complex or unwieldy poses risks, such as confusing the jury or inviting a court to exercise its discretion to sever charges. The *Atlantic States* defendants tried to use such concerns to their advantage in motions practice, unsuccessfully arguing both pre- and post-trial that the conspiracy charge was too complex and should have been dismissed or severed and the convictions overturned.⁴⁴

The jury verdict on the conspiracy count lent some fuel to the defendants’ post-conviction arguments. The *Atlantic States* jurors filled out special verdict forms, on which they found all defendants—except the sole acquitted defendant—guilty of a conspiracy to violate the 18 U.S.C. § 1001 object; for each of the other objects, the jury found at least two of the defendants guilty.⁴⁵

⁴³ CHARLES DOYLE, CONG. RESEARCH SERV., R41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 2–3 (2016) (citing *Toussie v. United States*, 397 U.S. 112, 122 (1970), *Whitfield v. United States*, 543 U.S. 209, 218 (2005), *Salinas v. United States*, 522 U.S. 52, 63 (1997), *United States v. Felix*, 503 U.S. 378, 390 (1992), and *United States v. Munoz-Franco*, 487 F.3d 25, 55 (1st Cir. 2007)).

⁴⁴ See Mot. to Dismiss Count 1 for Fatal Duplicitly, *Atlantic States*, ECF No. 131; Order Denying Motion to Dismiss Count One of the Superseding Indictment, *Atlantic States*, ECF No. 204.

⁴⁵ *Id.* at n.64.

The defense pointed to the fractured finding of guilt across the objects of the conspiracy to suggest lack of unanimity, arguing, “it is impossible . . . to determine how many conspiracies the jury found existed, let alone which evidence proved which conspiracy, and which overt act they unanimously found proved each conspiracy.”⁴⁶

The district court rejected this argument, noting that it is “well-established that, in a multiple-object conspiracy, the verdict will stand, over Fifth Amendment due process objections, if the evidence was sufficient as to any of the alleged objects.”⁴⁷ The court explained further, “The jury was properly instructed in this case that it was not necessary for the government to prove that the alleged conspiracy had all of the five objectives,” so long as “the proof showed a conspiracy of having one of the alleged objectives.”⁴⁸ The jury’s special verdict forms clearly demonstrated that the jury at least found that the conspiracy had the shared object of making false statements in violation of 18 U.S.C. § 1001.

The jury’s ability to parse liability among the defendants for each object of the conspiracy, as opposed to giving up and finding no one guilty, demonstrates the high degree of thought and preparation the *Atlantic States* prosecutors gave to presenting the evidence against all co-conspirators as to each object of the conspiracy in a clear and logical manner. It also demonstrates the potential utility of special verdict forms for the prosecution in cases involving complex conspiracies.

2. Conspiracy to defraud: *Klein* conspiracy

In *Atlantic States*, prosecutors included a *Klein* prong in the conspiracy count.⁴⁹ This inclusion was necessary to capture the entirety of the defendants’ wrongdoing, as some of the defendants’ obstructive conduct arguably occurred before any proceedings, such as OSHA inspections, were pending.⁵⁰ This proactive criminal conduct

⁴⁶ Mem. Op. at 128, *Atlantic States*, ECF No. 721, *aff’d sub nom.* United States v. Maury, 695 F.3d 227 (3d Cir. 2012).

⁴⁷ *Id.* at 129.

⁴⁸ *Id.*

⁴⁹ United States v. Douglas, 398 F.3d 407, 412 (6th Cir. 2005); United States v. Khalife, 106 F.3d 1300, 1303–04 (6th Cir. 1997); United States v. Rosengarten, 857 F.2d 76, 78 (2d Cir. 1988).

⁵⁰ Even the relatively broad obstruction language under 18 U.S.C. § 1512(c)(2) requires proof that a particular “official proceeding,” as defined

was still designed to obstruct “the lawful and legitimate functions” of OSHA—that is, to hide from OSHA the conditions at the foundry that endangered worker safety and prevented OSHA from learning of injuries that might have triggered an inspection.

As a highly regulated “manufacturing facility that had long been subject to ongoing inspection and regulation by federal agencies,” the district court found that “the jury would have been justified in finding that an OSHA investigation into worker safety violations was foreseeable by the conspirators . . . even before the first of many employee injuries.”⁵¹

3. Obstruction of OSHA proceedings

The OSH Act criminalizes one type of obstructive conduct—giving advance notice of an OSHA inspection.⁵² Giving advance notice of an OSHA inspection clearly obstructs OSHA’s goal of protecting worker safety; an employer on notice that OSHA is coming to inspect their facility can take steps to ensure that the facility is “on its best behavior” during the inspection, hiding normal working conditions and potential violations from OSHA. The sentence for this obstructive conduct under section 666(f), however, is six months of imprisonment⁵³ and a \$5,000 fine for an individual⁵⁴ or \$10,000 fine for a corporation,⁵⁵ which is orders of magnitude lower than the penalties for Title 18 obstruction statutes. Moreover, advance notice of an inspection is not the only type of conduct that “hides the ball” from OSHA inspectors.

In *Atlantic States*, prosecutors charged three counts of obstructing OSHA proceedings under 18 U.S.C. § 1505: instructing an employee to lie to OSHA inspectors about the safety shield installed on the saw in

by 18 U.S.C. § 1515(a), was foreseeable to the defendant at the time of the conduct. *See United States v. Petruk*, 781 F.3d 438, 445 (8th Cir. 2015) (gathering cases from other circuits).

⁵¹ Mem. Op. at 118–19, *Atlantic States*, ECF No. 721. One defendant in *Atlantic States* argued on appeal that joining the offense and defraud prongs into a single conspiracy constituted a “fatal duplicity,” but that argument was dismissed as meritless without discussion by the Third Circuit. *United States v. Maury*, 695 F.3d 227, 247 (3d Cir. 2012).

⁵² 29 U.S.C. § 666(f).

⁵³ 29 U.S.C. § 666(f).

⁵⁴ 18 U.S.C. § 3571(b)(7).

⁵⁵ 18 U.S.C. § 3571(c)(6).

the June 1999 incident; taking steps to conceal from OSHA inspectors information about the March 2000 forklift fatality; and instructing the employee who broke his leg in the April 1999 forklift incident to tell OSHA inspectors he had not in fact broken his leg.⁵⁶ None of this conduct was chargeable under the OSH Act, but it clearly impeded OSHA inspections and demonstrated contempt for the law.

One of the elements that the government must prove in a prosecution under section 1505 is that the defendant was obstructing or endeavoring to obstruct a “pending proceeding.” The term “pending proceeding” has been defined broadly,⁵⁷ and courts have routinely held that investigations performed by agencies that have adjudicative, rule-making, and investigative powers are pending proceedings. OSHA has such powers and, in *Atlantic States*, it was undisputed that the inspections at issue were conducted pursuant to the investigatory authorities that the OSH Act confers upon OSHA.⁵⁸ Although the defendants filed a motion to dismiss the obstruction counts, arguing that OSHA inspections were not “pending proceedings,” the court easily dispensed with that assertion.⁵⁹ The jury found at least one defendant guilty of each section 1505 count.⁶⁰

4. Obstruction by destruction of evidence

Using a legal theory that is no longer viable, due to the subsequent Supreme Court decision in *United States v. Yates*,⁶¹ prosecutors in *Atlantic States* also charged the company and the plant manager with one count of violating 18 U.S.C. § 1519, that is, that they “knowingly alter[ed] . . . conceal[ed], [and] cover[ed] up . . . [a] tangible object with the intent to impede, obstruct, [and] influence the investigation [and] proper administration of [a] matter within” OSHA’s jurisdiction by

⁵⁶ Superseding Indictment at Counts 8–10, *United States v. Atlantic States Cast Iron Pipe Co.*, No. 03-852 (D.N.J. Sept. 14, 2004), ECF No. 95.

⁵⁷ *United States v. Senffner*, 280 F.3d 755, 761 (7th Cir. 2002); *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991).

⁵⁸ First Omnibus Mot. in Resp. to Defendants’ Joint Pre-Trial Mots at 50, *Atlantic States*, ECF No. 146.

⁵⁹ Order Denying Mot. to Dismiss Counts 1 and Counts 8–10 on Grounds of Failure to State an Offense, *Atlantic States*, ECF No. 207; Transcript of Proceedings held 9/6/05 at 61:16-23, *Atlantic States*, ECF No. 213.

⁶⁰ Post-trial, the defendants convicted of these charges did not re-raise the argument that OSHA investigations did not qualify as “pending proceedings.”

⁶¹ 135 S. Ct. 1074, 1081 (2015).

altering the cement mixer as described in section III A, namely hiding from OSHA that they “bypassed a safety device designed to shut down the cement mixer when its doors were opened, which led to the amputation of three of an employee’s fingers.”⁶² Both defendants charged with this count were found guilty.

While prosecutors can no longer use section 1519 to charge tampering with non-data associated physical objects (as opposed to records, documents, and objects used to record information), they still have other charging options to reach conduct factually similar to concealing alterations made to disable machinery safety mechanisms. Prosecutors should consider charging such conduct under 18 U.S.C. § 1512(c)(1), which establishes that it is a felony to, among other things, “corruptly [alter], [destroy], [mutilate], or [conceal] a record, document, or other object, or [attempt] to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding.”⁶³ Additionally, such conduct could be an overt act in furtherance of a *Klein* conspiracy charge, if two or more persons are involved.

5. False statements

The OSH Act only provides criminal penalties for one type of false statement: those made in documents filed or required to be kept by the OSH Act.⁶⁴ The *Atlantic States* prosecutors captured the many false statements the *Atlantic States* defendants made in other contexts by charging three counts of knowingly and willfully making material false statements in matters within the jurisdiction of OSHA, in violation of 18 U.S.C. § 1001. Each count charged the individual defendant who made a false statement about the cause and circumstances of an employee injury along with the company.⁶⁵ The charged false statements were not prosecutable under 29 U.S.C. § 666(g) because they were made verbally or in writing to OSHA inspectors as part of an inspection, not as part of an “application, record, report, plan or other document filed or required to be

⁶² Superseding Indictment at Count 11, *Atlantic States*, ECF No. 95.

⁶³ 18 U.S.C. § 1512(c)(1) (emphasis added). The *Yates* Court’s reasoning implied that section 1512(c)(1)’s reference to an “other object” has a broader scope than section 1519’s reference to a “tangible object.” *Yates*, 135 S. Ct. at 1084.

⁶⁴ 29 U.S.C. § 666(g).

⁶⁵ Superseding Indictment at Counts 2, 5, 7, *Atlantic States*, ECF No. 95.

maintained.”⁶⁶

In order to establish a violation of 18 U.S.C. § 1001, false statements do not need to be made to the United States so long as they are made in a matter within the jurisdiction of the United States. Though not specific to the worker protection aspects of the case, the jury found both the company and an individual guilty of making a materially false statement to a New Jersey Department of Law and Public Safety special investigator and a New Jersey Department of Environmental Protection emergency responder regarding the discharge of petroleum-contaminated wastewater from a cement pit, through a hose and storm drain, into the Delaware River, causing an 8.5 mile oily sheen on the Delaware River.⁶⁷

The false statement—that the discharge was the result of a hole in a sump pump hose—was made to New Jersey officials, not an EPA or other U.S. government official, but the matter of the discharge of was within the EPA’s Clean Water Act jurisdiction, and the New Jersey Department of Environmental Protection had delegated authority from the EPA to issue and enforce discharge permits under the National Pollution Discharge Elimination System of the Clean Water Act.⁶⁸ Hence, the materially false statements to the New Jersey officials constituted violations of 18 U.S.C. § 1001.

Another, less frequently charged provision of 18 U.S.C. § 1001 also should be considered in worker endangerment cases—knowingly and willfully “falsif[ying], conceal[ing], or cover[ing] up by any trick, scheme, or device a material fact” in a matter within the jurisdiction of the United States.⁶⁹ This provision can be used when the statements made are technically true but misleading. While the *Atlantic States* indictment did not incorporate this theory, it has been used in other cases where the safety of workers was at risk.

⁶⁶ 29 U.S.C. § 666(g).

⁶⁷ Superseding Indictment at Count 4 and ¶ 59.i., *Atlantic States*, ECF No. 95; Jury Verdict as to Atlantic States Cast Iron Pipe Co., *Atlantic States*, ECF No. 609; Jury Verdict as to Craig Davidson, *Atlantic State*, ECF No. 614.

⁶⁸ The EPA may authorize the issuance and enforcement of discharge permits by state environmental agencies whose programs meet requirements specified by the Clean Water Act. 33 U.S.C. § 1342(b)–(c). EPA delegated authority to New Jersey to administer its own discharge permit program in 1982. Approval of New Jersey’s NPDES Program, 47 Fed. Reg. 17,331 (Apr. 22, 1982); see also *United States v. Maury*, 695 F.3d 227, 234 (3d Cir. 2012).

⁶⁹ 18 U.S.C. § 1001(a)(1).

One example, *United States v. Geisen*, was not a worker endangerment case *per se*, but the conduct charged in that case created significant safety risks to employees of the Davis-Besse Nuclear Power Station (Davis-Besse).⁷⁰ The *Geisen* case involved false and misleading statements made to the Nuclear Regulatory Commission (NRC) in its attempts to determine if conditions within Davis-Besse’s nuclear reactor head posed a safety risk that required immediate inspection.

The NRC discovered that the type of reactor operated by Davis-Besse—a pressurized water reactor—could be susceptible to nozzle cracking problems that “posed a risk that the nozzle would blow out of the vessel head and cause significant loss of coolant and structural threats, including possible plant safety failure.”⁷¹ Accordingly, the NRC sent questions to a number of nuclear facilities, including Davis-Besse, that were designed to determine if the reactors needed to be shut down and inspected immediately for potential nozzle cracking, or if the reactors could continue operating until planned shut downs were scheduled to occur months later, allowing the inspections to take place at that time.⁷² Unplanned shut downs of nuclear reactors are extremely disruptive and expensive for nuclear power plants and, accordingly, Davis-Besse wanted to wait until a planned shut down in early 2002 to conduct the inspection.⁷³

As alleged in the indictment, three individuals employed by Davis-Besse provided written responses to the NRC’s questions that “were part of a scheme to persuade the NRC to agree that Davis-Besse could operate safely after” the December 31, 2001 deadline.⁷⁴ While the indictment alleged that the defendants made false and fictitious statements in their responses to the NRC’s questions, it also alleged that the defendants “omitted critical facts” responsive to the questions, sometimes deleting truthful information from drafts of the responses before submitting them to the NRC.⁷⁵ The responses also included significant understatements, including dramatically minimizing conditions indicative of nozzle cracking observed in prior

⁷⁰ *United States v. Geisen*, 612 F.3d 471 (6th Cir. 2010).

⁷¹ *Id.* at 477.

⁷² *Id.* at 475.

⁷³ *Id.* at 478.

⁷⁴ Indictment, Introduction ¶ 11, *United States v. Geisen*, No. 3:06-CR-712, 2006 WL 4742050 (N.D. Ohio Jan. 19, 2006).

⁷⁵ *Id.* at Count 1 ¶¶ 2, 8.

inspections.⁷⁶

When the successfully delayed inspection finally occurred, “Davis-Besse found five cracked nozzle heads and a football-sized cavity caused by boric acid erosion at the head of the reactor.”⁷⁷ Two of the three individual defendants were found guilty of concealing material information in violation of 18 U.S.C. § 1001(a)(1) based on the false and misleading written responses to the NRC’s inquiries that omitted material information in order to mislead, as well as making affirmative false statements.⁷⁸

B. Fraud-related criminal statutes: illegal asbestos abatement prosecutions

Asbestos is a mineral substance that was historically mined and milled for use as, among other things, insulation on pipes and boilers and in ceiling coating materials. It is now known to be hazardous, and it presents an obstacle to renovation or demolition of a building. As a result, property owners often wish to have asbestos-containing materials removed, and its removal is highly regulated at the federal and state level, including under the OSH Act⁷⁹ and the Clean Air Act.⁸⁰ Companies offering asbestos removal and related air-monitoring services exist across the United States.

In the asbestos removal industry, to save time and costs and to maximize profits, dishonest asbestos abatement service owners and supervisors direct their workers to remove asbestos-containing materials from homes and buildings of nearly every sort without following environmental and safety requirements imposed by the Clean Air Act’s asbestos regulations,⁸¹ OSHA regulations,⁸² and various state laws. The latency period between asbestos exposure and

⁷⁶ United States v. Siemaszko, 612 F.3d 450, 463 (6th Cir. 2010).

⁷⁷ *Id.* at 453.

⁷⁸ Jury Verdict as to Rodney Cook, *Geisen*, ECF No. 244; Jury Verdict as to David Geisen, *Geisen*, ECF No. 243; Jury Verdict as to Andrew Siemaszko, *Geisen*, ECF No. 326.

⁷⁹ 29 C.F.R. § 1926.1101.

⁸⁰ See the accompanying article, Todd Gleason & Matt Morris, *Worker Exposure to Asbestos: Recent Trends Observed in NESHAPs Prosecutions*, 68 DOJ J. FED. L. & PRAC., no. 2, 2020, at 69 discussing these regulations in detail.

⁸¹ 40 C.F.R. §§ 61.141–61.157.

⁸² 29 C.F.R. §§ 1910.1001, 1926.1101.

the onset of potentially fatal asbestos-related diseases is much longer than the OSH Act statute of limitations of five years. Accordingly, an employer whose willful violation of OSHA-promulgated regulations eventually results in the death of an employee cannot be charged under section 666(e). Prosecutors have to look to other offenses to prosecute the worker-endangering conduct of “rip and run” asbestos removal companies.

Over the course of 17 years, from 1998 to 2014, in the Northern District of New York, the United States obtained more than 100 individual felony convictions in response to widespread illegal asbestos removal practices that seriously endangered workers and members of the public.⁸³ The theories and strategies in those prosecutions have been widely emulated. The cases discussed below used charges from Title 18 in ways that might seem unexpected in a worker protection or environmental context but helped more fully capture both the conduct and the motivation at the heart of the cases and provided for sentences that appropriately reflect the seriousness and pervasiveness of the criminal conduct. Mail fraud, wire fraud, money laundering, and—in the most egregious, large-scale cases—even RICO charges should be considered where companies promise services to their customers that comply with worker protection and other applicable regulations but, instead, provide substandard and non-compliant services that put their employees and others at risk.

1. RICO: *United States v. Salvagno*

For 10 years, Alexander Salvagno, his father Raul Salvagno, and up to 500 of their workers conducted illegal asbestos removals throughout New York and adjacent states. The Salvagnos company, AAR Contractor, Inc. (AAR), was one of the largest asbestos removal companies in New York State.⁸⁴ To conceal their crimes and allow their illegal removals to continue, Alexander Salvagno secretly and illegally co-owned an asbestos air-monitoring laboratory, Analytical Laboratories of Albany (ALA), whose workers were ordered to sample

⁸³ Most of these cases, including the *United States v. Salvagno* and *United States v. Thorn* cases discussed below, were prosecuted by former Assistant United States Attorney (AUSA) Craig A. Benedict, who pioneered many of the strategies for prosecuting illegal asbestos removal cases and generously shared his knowledge and experience in this area with prosecutors across the country.

⁸⁴ *United States v. Salvagno*, 306 F. Supp. 2d 258, 263 (N.D.N.Y. 2004).

and falsify air monitoring test results for AAR projects.⁸⁵ As established during the investigation and prosecution, the scope of the proven misconduct was staggering.

AAR conducted 1,555 illegal asbestos projects in, among other places, elementary schools, churches, hospitals, cafeterias, theatres, gymnasiums, health facilities, government buildings, private residences, and industrial and commercial facilities.⁸⁶ ALA falsified up to 75,000 air samples and other laboratory results.⁸⁷ Up to 100 asbestos abatement workers and an unknown (but potentially large) number of client employees and members of the public were exposed to asbestos fibers at concentrations and durations that medical experts testified were substantially likely to result in death or serious bodily injury.⁸⁸

At the direction of the Salvagnos, workers stripped asbestos from buildings without first wetting it adequately, often without respiratory protection. Studies introduced during a week-long sentencing hearing showed that methods used by workers, including sweeping the dry asbestos with brooms, likely resulted in their exposure at levels up to 500,000 times greater than that allowed by law for clearance results.⁸⁹ Further, the Salvagnos' crews routinely failed to properly contain the work area in a plastic enclosure, allowing asbestos fibers and asbestos-containing debris to spread to other areas throughout the buildings. AAR and the Salvagnos did not provide required decontamination units so workers could properly clean themselves before they left the work areas.⁹⁰

Despite asbestos containing debris remaining in buildings after the removal work, the defendants, using ALA, presented fraudulent laboratory reports to building owners that purported to demonstrate the abatements had been fully successful. Thus, the building occupants found out well after the fact that they had been exposed for

⁸⁵ *Id.*

⁸⁶ Sentencing Mem. of the U.S. at 3, *United States v. Salvagno (Salvagno Trial) et al.*, No. 02-CR-51 (N.D.N.Y. Dec. 14, 2004), ECF No. 394.

⁸⁷ *Id.*

⁸⁸ *Id.* at 3, 6.

⁸⁹ *Id.* at 33.

⁹⁰ *See, e.g.*, Tr. Test., Test. of Eric Beeche at 1901–02, *Salvagno Trial*, ECF No. 466; Trial Transcript, Testimony of Anthony Mongato at 2047–48, *Salvagno Trial*, ECF No. 467; Trial Trans., Test. of Robert O'Brey at 2291–92, *Salvagno Trial*, ECF No. 469.

lengthy periods to asbestos. Meanwhile, owners collectively paid millions of dollars for the work that created the very problem they had sought to avoid.⁹¹

Ultimately, the prosecutor charged 16 defendants, including the Salvagnos and multiple high-level supervisors of AAR and ALA, with crimes. Only the Salvagnos and their company, AAR, did not plead guilty.⁹²

Alexander and Raul Salvagno and AAR were charged in a 14-count second superseding Indictment with the following:

- a RICO conspiracy (18 U.S.C. § 1962(d)) with predicate acts of obstruction of justice, money laundering (with underlying specified unlawful acts of mail and wire fraud), bid rigging, and RICO forfeiture;⁹³
- a conspiracy (18 U.S.C. § 371) with Clean Air Act and Toxic Substances Control Act (TSCA) objects; and
- nine substantive Clean Air Act violations (42 U.S.C. § 7413(c)(1)).⁹⁴

The defendants were convicted on all counts. Alexander Salvagno's prison sentence was 25 years. He was also ordered to pay a forfeiture of \$23 million and a fine of \$2 million. Raul Salvagno was sentenced to 19.5 years in prison, a forfeiture of nearly \$23 million, and a fine of \$1.7 million. The court ordered AAR to forfeit \$23 million and pay a fine of \$2 million.

The prosecutor in this case could have elected to proceed solely on the conspiracy under 18 U.S.C. § 371, with environmental crime objects, and numerous substantive Clean Air Act violations. Unless, however, the court imposed maximum terms of imprisonment for each count and ordered them to be served consecutively, it is less likely that the defendants would have received the same lengthy terms of incarceration. Nor would the full scope of the Salvagno's wrongdoing have been reflected in the charges or evidence presented at trial.

⁹¹ See *United States v. Salvagno*, 306 F. Supp. 2d 258, 263 (N.D.N.Y. 2004).

⁹² *Id.* at 262.

⁹³ *Id.* at 261–62.

⁹⁴ Second Superseding Indictment, *Salvagno Trial.*, ECF No. 112. Alexander Salvagno was also charged with submitting fraudulent tax returns, in violation of 26 U.S.C. § 7206, in Counts 13 and 14.

The Clean Air Act regulates *some* of the important safety components of an asbestos project, such as the requirement to conduct inspections for the presence of asbestos before starting the removal work and the obligation to thoroughly wet the material before its stripping, bagging, and disposal.⁹⁵ The OSH Act, New York State Code Rule 56 (Code Rule 56), and similar laws in other states, however, include a significant number of safety requirements not addressed by the Clean Air Act, such as laboratory testing with sampling via air agitation to verify a proper cleanup, the testing of worker exposure levels during the abatement, worker respiratory and other personal protective equipment, negative air machines and work area containment to prevent fiber migration, and decontamination units for workers to clean themselves when leaving the work area.⁹⁶

As is standard, the Salvagnos executed contracts for each project promising to comply with all federal, state, and local laws governing the asbestos removal. These contracts allowed the use of Title 18 statutes to address not just EPA and OSHA-administered laws, but also Code Rule 56.

Prosecutors seldom use RICO, but it is highly effective in the right case.⁹⁷ It “proscribes no conduct that is not otherwise prohibited” by state or federal law.⁹⁸ Rather, it elevates the potential sentence for those with a commercial interest in an enterprise that affects or engages in interstate commerce through *patterned* criminal conduct.⁹⁹ A RICO charge was both merited and useful in fully presenting the case against the Salvagnos and their company to the jury.

The RICO charge provided evidentiary advantages at trial. Unlike the Clean Air Act offenses standing alone, RICO permitted the presentation of proof of predicate acts involving a wide array of deception and criminality, including mail fraud and money laundering. Without the RICO conspiracy, or another federal charge such as mail fraud that could incorporate the related state law violations, it is unclear whether the prosecution could have gotten such proof before the jury.

⁹⁵ 42 U.S.C. § 7412(b), (h); 40 C.F.R. §§ 61.141, 61.145, 61.150.

⁹⁶ *See, e.g.*, 29 C.F.R. § 1926.1101.

⁹⁷ Note that prosecutors must seek approval from the Criminal Division to pursue RICO charges. *See* JUSTICE MANUAL § 9-110.101.

⁹⁸ CHARLES DOYLE, CONG. RESEARCH SERV., 96-950, RICO: A BRIEF SKETCH 1 (2016).

⁹⁹ *See id.*

While the Federal Rules of Evidence might have opened the door for some of the proof under Rule 404(b), the prosecution would have faced the potential need to litigate the admission of each and every piece of evidence relating to non-charged conduct. Instead, because of the RICO charge, the evidence was directly relevant to the case.

RICO and fraud statutes typically involve a specific intent mental state requirement that is a higher burden to prove than the general intent associated with most environmental statutes. With respect to asbestos prosecutions, however, many states require training in asbestos-related laws and regulations to obtain a license or certification, annual training, or both to engage in asbestos removal work. The heightened intent requirement was readily met by a showing of the training defendants took and ignored. The *Salvagno* prosecutor called training providers as witnesses in the government's case-in-chief to explain the numerous times the defendants and co-conspirators were taught the asbestos requirements that they subsequently violated.

The *Salvagno* prosecutor also proved a separate Clean Air Act and TSCA conspiracy and related substantive charges. The prosecution could not directly include the defendants' Clean Air Act and TSCA violations in the RICO section 1962 conspiracy because the Clean Air Act and TSCA are not listed in 18 U.S.C. § 1961(1) as predicate crimes for a RICO conspiracy or in 18 U.S.C. § 1956(c)(7) as specified unlawful activity underlying money laundering.¹⁰⁰

2. Money laundering: *United States v. Thorn*

Joseph (Jay) Thorn, owner of A+ Environmental Services, Inc. (A+ Environmental), was both a competitor and a friend of Alexander Salvagno¹⁰¹ and ran a similar asbestos removal operation. Thorn had his workers conduct "rip and run" removals, often without respiratory protection and functioning decontamination units.¹⁰² While Thorn did not secretly own a laboratory, he recruited multiple laboratory officials who prepared reports on Thorn's behalf to dupe client victims

¹⁰⁰ Prosecutors should be aware that despite the failure to include the Clean Air Act and TSCA, 18 U.S.C. § 1956(c)(7) does include other environmental crimes as specified unlawful activity, including the Clean Water Act, the Act to Prevent Pollution from Ships, the Resources Conservation and Recovery Act, and the Endangered Species Act.

¹⁰¹ Sentencing Mem. of the U.S. at 8, *Salvagno Trial*, ECF No. 394.

¹⁰² *Id.*

by providing false documentation claiming that asbestos removal had been successfully and safely completed.¹⁰³

While Thorn committed his crimes during the same 10-year time frame as the Salvagnos, his approximately 1,100 rip and runs were, on balance, far smaller in overall scope than the removals the Salvagnos directed. Of Thorn's approximately 1,100 illegal projects, his company performed roughly 1,000 in private homes rather than within much larger facilities.¹⁰⁴

That is not to say that some of Thorn's rip and run projects did not involve extreme levels of exposure. One employee testified to driving to a removal project at a large commercial facility during the middle of a snowstorm. As he explained to the jury, when he entered the building, it was "snowing" harder inside than outside due to all the asbestos-containing debris falling to the ground as workers conducted the removal.¹⁰⁵

For years, the company and its employees who occupied the facility after Thorn's work were unaware of the nature of the remaining asbestos debris. A supervisor for the company testified that he and his 30 to 40 co-workers were regularly showered with an unknown white substance that fell from the pipes whenever their forklifts nudged them.¹⁰⁶ Ultimately, the property owner decided to have the entire building demolished. The greatly enhanced cost to re-clean the whole building after the asbestos contamination had spread was many times the expense of the original abatement and more than the property was worth. Additionally, more than two million dollars of contaminated product had to be destroyed.¹⁰⁷

Beyond the rip and run activities to which Thorn regularly exposed his large work force, the defendant hired two teenaged brothers—14 and 16 years old—to work after school at A+ Environmental's own facility. Nearly all day every day over the course of nine months for one brother and more than two years for the other, Thorn had them rip open bags of friable asbestos brought back by workers from various projects, turn the bags inside-out to hide the asbestos warning labels, and then dispose of the waste as normal trash. The process of

¹⁰³ United States v. Thorn, 317 F.3d 107, 112 (2d Cir. 2003).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 113.

¹⁰⁶ See Sentencing Mem. of the U.S. at n.23, United States v. Thorn (Thorn Trial), No. 00-CR-88 (N.D.N.Y. Aug. 1, 2001), ECF No. 123.

¹⁰⁷ Affs. of Thomas Wood and Scott C. Smith, *Thorn Trial*, ECF No. 195-3.

breaking open and dumping the bags resulted in the teenagers being covered head to toe in asbestos dust. Thorn refused their requests for respirators.¹⁰⁸ A medical expert testified that it was “a virtual certainty” the teenagers would develop asbestos-related disease.¹⁰⁹

As with Salvagno, Thorn entered into contracts with customers promising to comply with all federal, state, and local laws. He also personally met from time to time with homeowners, giving them false assurances about the precautions he and his employees would take to protect their safety and that of their families.¹¹⁰ The prosecutor charged Thorn with a money laundering conspiracy, which included mail fraud as the specified unlawful activity; a Clean Air Act conspiracy; and related substantive Clean Air Act counts. He was convicted on all counts and sentenced to 12 years in jail; \$299,593 in restitution; and forfeiture of \$937,000.

Money laundering makes it a crime to conduct or attempt to conduct a financial transaction “which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity” when the defendant knows “that the property involved in [the] transaction represents the proceeds of some form of unlawful activity.”¹¹¹ In Thorn’s case, the prosecutor had to prove that Thorn “intended to promote mail fraud through his financial transactions.”¹¹² In order to do so, the prosecutor needed to present evidence that when Thorn received money from his fraudulent scheme, promising customers proper asbestos abatement but delivering rip and run removals, he deposited it into his company’s “operating accounts with the intent to promote the continuation of the scheme.”¹¹³ The Second Circuit found that the government satisfied its burden through the testimony of the office manager that “the funds [received from customers by fraud] were used, in part, to ‘finance the next project’” and the testimony of other employees that it was “standard operating” procedure to mail contracts that falsely claimed that work would be conducted in compliance with applicable law, to mail falsified test results to clients, and to violate the law while

¹⁰⁸ *Thorn*, 317 F.3d at 113–14.

¹⁰⁹ *Id.* at 115.

¹¹⁰ *See, e.g.*, Aff. of Terri Pandolfi, *Thorn Trial*, ECF No. 151-9 at 34–36.

¹¹¹ 18 U.S.C. § 1956(a)(1)(A)(i).

¹¹² *Thorn*, 317 F.3d at 132 (citing *United States v. Pierce*, 224 F.3d 158, 162 (2d Cir. 2000)).

¹¹³ *Id.* at 133.

actually performing the work in order “to save money and time.”¹¹⁴

3. Wire fraud: *United States v. Robl*

In a more recent prosecution of an asbestos abatement contractor with a long history of violations, a prosecutor in the Western District of Wisconsin successfully used wire fraud charges, 18 U.S.C. § 1343, along with a knowing endangerment charge under the Clean Air Act, 42 U.S.C. § 7413(c)(5), to obtain a 144-month prison sentence for the defendant, Lloyd Robl.¹¹⁵

Robl first obtained a certification and a license to perform asbestos abatements in Minnesota in 1993.¹¹⁶ Following multiple violations of rules for asbestos abatement projects, the Minnesota Department of Health Services revoked Robl’s license in 2001.¹¹⁷ In 2004, the Ramsey County, Minnesota, district court issued a permanent injunction banning Robl from performing asbestos abatement work in Minnesota and from advertising that he had a license, certification, or was otherwise approved to perform asbestos abatement work.¹¹⁸ Robl never obtained a license or certification for asbestos abatement work in Wisconsin.¹¹⁹

Despite the Minnesota injunction and not obtaining a license for asbestos abatement work in Wisconsin, Robl continued to engage in asbestos abatement work in both Minnesota and Wisconsin, operating from his home in Wisconsin under the new business name AAS Incorporated (AAS).¹²⁰ He advertised AAS’s services on multiple websites; communicated with customers via email, telephone, text message, fax, and U.S. mail; and deposited and cashed checks from customers at both regional and national banks.¹²¹ In his

¹¹⁴ *Id.*

¹¹⁵ J. in a Crim. Case, *United States v. Robl*, No. 3:18-CR-136 (W.D. Wis. Sep. 16, 2019), ECF No. 47. Robl has noticed an appeal of the judgment. Notice of Appeal, *Robl*, ECF No. 49.

¹¹⁶ Indictment at 2, *Robl*, ECF No. 5.

¹¹⁷ *Id.*; Government Sentencing Memo. at 2, *Robl*, ECF No. 43.

¹¹⁸ Indictment at 2–3, *Robl*, ECF No. 5; Order, *State of MN, by Dianne Mandernach, Commissioner of Health v. Robl et al.*, No. 62-C8-03-009740 (Ramsey County, MN, Civil District Court Jan. 9, 2004).

¹¹⁹ Indictment at 3, *Robl*, ECF No. 5.

¹²⁰ Indictment at 1, *Robl*, ECF No. 5; Government Sentencing Memo. at 2, *Robl*, ECF No. 43.

¹²¹ Indictment at 2, *Robl*, ECF No. 5.

advertisements and communications with customers, he falsely claimed to be licensed to perform asbestos abatement in Wisconsin and Minnesota and, when asked, provided customers with falsified documents to support his claims.¹²²

Robl promised customers, in both oral statements and written estimates, that his work would be carried out in accordance with state and federal laws and that asbestos-containing waste would be properly disposed of.¹²³ Instead, Robl and workers under his direction routinely violated the work practice and disposal standards for asbestos during removal projects.

Many of the workers used by Robl on removal projects were addicted to methamphetamine, and he paid them in methamphetamine, making it highly unlikely that any of his workforce would complain or report him to the authorities.¹²⁴ Robl compounded the violations committed at the work sites by personally transporting asbestos-contaminated waste from job sites either to his home, where he would burn the materials in piles or in 55-gallon barrels—releasing asbestos fibers into the open air, or to various remote but publicly accessible locations around St. Croix County, Wisconsin.¹²⁵

On occasion, when Robl lost control of his waste burns, the fire department responded to extinguish them. Robl did not inform the firefighters that the waste contained asbestos.¹²⁶

The wire transmissions for the 14 wire fraud charges in the indictment against Robl included checks from customers Robl deposited at bank branches in Wisconsin that were electronically cleared through the Federal Reserve Bank in Atlanta, Georgia; emails from Robl's personal email account forwarding fraudulent estimates and invoices to customers in Minnesota; and text messages from Robl transmitting pictures of falsified documents to a customer in Minnesota.¹²⁷ Importantly, each of the specified transmissions were clearly interstate and central to Robl's scheme of defrauding customers seeking safe, legal asbestos abatement.

¹²² Government Sentencing Memo. at 3–4, *Robl*, ECF No. 43.

¹²³ Indictment at 6, *Robl*, ECF No. 5.

¹²⁴ Government Sentencing Memo. at 3, *Robl*, ECF No. 43.

¹²⁵ Indictment at 5–6, *Robl*, ECF No. 5; Government Sentencing Memo. at 4, 9, *Robl*, ECF No. 43.

¹²⁶ Government Sentencing Memo. at 9–10, *Robl*, ECF No. 43.

¹²⁷ Indictment at 7–8, *Robl*, ECF No. 5.

Robl pleaded guilty to one wire fraud count and one count of knowing endangerment under the Clean Air Act.¹²⁸ The court sentenced Robl to “72 months [of imprisonment] on each count, to be served consecutively to one another” for a total of 12 years of imprisonment.¹²⁹ The wire fraud count, however, has a sentencing advantage that the knowing endangerment charge does not—mandatory restitution for Robl’s victimized customers.¹³⁰

The fact that wire fraud is a crime involving a scheme means that all victim customers, not just those whose checks, estimates, and other electronic transmissions with Robl formed the basis of specific counts, may be found eligible for restitution under 18 U.S.C. § 663A.¹³¹ Robl has filed a notice of appeal, and thus, a separate hearing to determine the amount of restitution owed, if any, has been continued pending the appeal.¹³²

¹²⁸ J. in a Crim. Case at 1, *United States v. Robl*, No. 3:18-CR-136 (W.D. Wis. Sep. 16, 2019), ECF No. 47.

¹²⁹ *Id.* at 2. Robl was in state prison as a result of two state matters at the time of his sentencing: a probation revocation and a bail-jumping conviction. *Wisconsin v. Robl*, No. 2017CF000059 (Cir. Court St. Croix, Wis. Nov. 17, 2017); *Wisconsin v. Robl*, No. 1013CF000252 (Cir. Court St. Croix, Wis. Nov. 17, 2017).

¹³⁰ J. at 6, *Robl*, ECF No. 47; 18 U.S.C. § 3663A. Victims of Robl’s knowing endangerment can only obtain restitution as a condition of supervised release. 18 U.S.C. § 3663(a)(1)(A) (not including Title 42 crimes in the list of offenses for which restitution may be ordered); 18 U.S.C. § 3583(d) (incorporating discretionary conditions of probation under 18 U.S.C. § 3563 as discretionary conditions of supervised release); 18 U.S.C. § 3563(b)(2).

¹³¹ *See, e.g.*, *United States v. Dickerson*, 370 F.3d 1330, 1342–43 (11th Cir. 2004); *United States v. Kones*, 77 F.3d 66, 70 (3d Cir. 1996); *United States v. Brothers*, 955 F.2d 493, 497 (7th Cir. 1992); *United States v. Turino*, 978 F.2d 315, 318 (7th Cir. 1992).

¹³² J. at 6, *Robl*, ECF No. 47; Notice of Appeal, *Robl*, ECF No. 49; Mot. to Continue Restitution Hearing, *Robl*, ECF No. 61; Order Granting Mot. to Continue, *Robl*, ECF No. 62 (text only).

IV. Charging substantive OSH Act counts is important for vindicating the rights of victims

When a worker endangerment case involves a fatality, and Title 18 felonies can be proven, charging a misdemeanor violation of section 666(e) for the willful violation of a specific OSHA-promulgated regulation that causes an employee's death may seem to be unnecessary extra work, but including section 666(e) counts where the facts support them can be of critical importance for obtaining restitution for the survivors of deceased workers.

While OSH Act crimes are not included in the enumerated lists of crimes specified in the federal restitution statutes,¹³³ statutory provisions for probation¹³⁴ and supervised release¹³⁵ give courts discretion to order restitution in accordance with the federal restitution statute as a condition of probation or a condition of supervised release respectively.¹³⁶

The federal restitution statute, however, instructs courts to consider “the amount of the loss sustained by each victim as a result of the offense”¹³⁷ and defines a victim as “a person directly and proximately harmed” as a result of the offense.¹³⁸

In *United States v. Hughey*, the Supreme Court clarified that only losses stemming from the specific offense(s) proven or pled to can be compensated through restitution.¹³⁹ In *Hughey*, a defendant was charged with three counts of credit card theft and unauthorized use of a credit card, but the government alleged he had stolen the credit cards of approximately 30 people.¹⁴⁰ The defendant pleaded guilty to one count of theft and use of *one credit card*.¹⁴¹

¹³³ 18 U.S.C. §§ 3663(a), 3663A(c)(1)(A).

¹³⁴ 18 U.S.C. § 3563(b)(2).

¹³⁵ 18 U.S.C. § 3583(d).

¹³⁶ See also the accompanying article, Deborah Harris, *Criminal Prosecutions Under the Occupational Safety and Health Act*, 68 DOJ J. FED. L. & PRAC., no. 2, 2020, at 5 for additional discussion of restitution in worker endangerment cases.

¹³⁷ 18 U.S.C. § 3663(a)(1)(B)(i)(I).

¹³⁸ 18 U.S.C. § 3663(a)(2).

¹³⁹ 495 U.S. 411 (1990).

¹⁴⁰ *Id.* at 414–15.

¹⁴¹ *Id.* at 413–14.

The Supreme Court held that a restitution order seeking losses for charges made to *other credit cards*—that is, cards that were not the subject of the one count the defendant pled guilty to—could not stand, as restitution is “only for losses caused by *the conduct underlying the offense of conviction*.”¹⁴²

This limitation on restitution can thwart efforts in the worker protection context to make victims whole or, at least, mitigate their losses. In *United States v. Elias*, Allen Elias, owner of a fertilizer company, ordered two employees to clean out a tank that he knew contained cyanide-laced sludge, ignoring their repeated requests for safety equipment and their complaints of sore throats and nasal passages after only 15 minutes of being in the tank.¹⁴³

On Elias’s orders, the two employees returned to the tank without safety equipment and, after 45 minutes, one employee collapsed in severe respiratory distress. At the hospital, the employee’s treating physician suspected that the employee’s condition was caused by cyanide poisoning, but when asked if there had been cyanide in the tank, Elias said no.¹⁴⁴ The treating physician, nonetheless, sent for a cyanide antidote kit and administered it to the employee, who survived but suffered a grievous and lasting brain injury. Blood work indicated that the employee had had “extremely toxic levels of cyanide in his body.”¹⁴⁵

Elias later made false statements to make it appear that he had had a valid confined space entry permit to cover the work he ordered his employee to do. He was convicted of making material misstatements regarding the confined space entry permit, in violation of 18 U.S.C. § 1001, in addition to charges related to the improper storage and disposal of hazardous waste. Despite Elias’s false statements being related to the conduct causing his employee’s injury, the Ninth Circuit Court of Appeals overturned the district court’s \$6.3 million restitution order to the employee to compensate for the effects of his cyanide poisoning.

The Ninth Circuit reasoned that the employee was “not a victim of that particular crime. [The employer] did not harm [the employee] by

¹⁴² *Id.* at 416 (emphasis added).

¹⁴³ 269 F.3d 1003, 1007 (9th Cir. 2001).

¹⁴⁴ *Id.* at 1008.

¹⁴⁵ *Id.*

lying.”¹⁴⁶ Under the particular facts of the Elias case, prosecutors did not have any available charges to add that could establish the employee as a victim because section 666(e) is not applicable when the employee survives. The case, however, is instructive for crimes that the employee does not survive—in those cases, adding a section 666(e) charge may result in restitution being available to the victim’s family or estate that would not be available if only Title 18 offenses are charged.

The *Atlantic States* case, discussed above, is also instructive in this regard. There, an employee did die as a result of the company’s widespread, long-running OSH Act violations. The facts leading up to and following his death were included as overt acts in the conspiracy.¹⁴⁷ The objects of the conspiracy, however, did not include violating section 666(e), only defrauding, making false statements to, and obstructing a proceeding before OSHA.¹⁴⁸

The prosecutors sought vindication of the rights under the Crime Victims’ Rights Act (CVRA) for six workers harmed by the defendants’ conduct.¹⁴⁹ The CVRA guarantees certain rights in the federal criminal justice process to persons who are “directly and proximately harmed as a result of the commission of a Federal offense.”¹⁵⁰ Those rights include “[t]he right to be reasonably heard at any public proceeding in the District Court involving release, plea, sentencing, or any parole proceeding” and “[t]he right to full and timely restitution as provided in law.”¹⁵¹

After an exhaustive review of cases in which courts of appeal across the country considered the issue of statutory victim status under the CVRA and the restitution-specific statutes that preceded it,¹⁵² the district court concluded that the six workers were not “crime victims” under the CVRA because they had not been directly harmed by the obstruction and false statements but by the substantive OSH Act

¹⁴⁶ *Id.* at 1021.

¹⁴⁷ Superseding Indictment, Overt Acts 29–40, *United States v. Atlantic States Cast Iron Pipe Co.*, No. 03-852 (D.N.J. Sept. 14, 2004), ECF No. 95.

¹⁴⁸ *Id.* at Count 1, ¶ 48.

¹⁴⁹ *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 457 (D.N.J. 2009); 18 U.S.C. § 3771.

¹⁵⁰ 18 U.S.C. § 3771(e)(2) (defining “crime victim”).

¹⁵¹ 18 U.S.C. § 3771(a).

¹⁵² The Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, and the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A.

workplace standard violations, which had not been charged.¹⁵³ Consequently, the workers had neither a right to restitution nor a statutory right to be heard at the sentencing of the defendants.

The district court noted, however, that it still retained the discretionary authority “to receive information from a wider range of affected individuals under 18 U.S.C. § 3661.”¹⁵⁴ Where prosecutors are prevented from charging section 666(e) by the absence of a worker death, and other chargeable crimes do not allow injured workers to be designated “crime victims” under the CVRA, prosecutors may point to this discretionary authority of the court to urge that injured workers be heard at sentencing to help ensure that a defendant’s sentence adequately reflects the nature and seriousness of the crimes committed.

V. Conclusion

Due to its limited scope and light penalties, the OSH Act criminal statute alone is often insufficient to reflect the seriousness of employer misconduct and to obtain the general deterrence necessary to protect workers from knowing or intentional criminal misconduct by employers. Obviously, prosecutors should not stretch Title 18 or other statutes beyond their natural and appropriate application and should be mindful not to overcharge cases.

When presented with a case in which workers have been injured, killed, or placed at serious risk of injury or death, however, prosecutors can examine the facts and consider whether Title 18 charges are provable and will enable the government to secure a sentence that is more appropriate to the criminal conduct than those available under the OSH Act.

Prosecutors who have engaged in this fact-specific process have chosen a range of different Title 18 statutes, as discussed above. In the process, these prosecutors have presented juries and presiding judges with the full story of the events that endangered or killed workers. By doing so, prosecutors have succeeded in meeting their obligation under the principles of federal prosecution to seek charges that “adequately . . . reflect the nature and full extent of the criminal conduct involved . . . provide the basis for an appropriate sentence,”

¹⁵³ *Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d at 473–81, 545.

¹⁵⁴ *Id.* at 494, 545–46.

and present the strongest case.¹⁵⁵ Still, OSH Act charges pursuant to 29 U.S.C. § 666(e) allow for needed restitution to victims' families that might be otherwise precluded and remain an important part of achieving justice in worker protection cases.

About the Author

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¹⁵⁵ JUSTICE MANUAL § 9-27.320.

Protecting Workers: Enforcement of Hazardous Materials Laws

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I. Introduction

The transportation of commodities is a critical element of the American economy. More than 4 million miles of roads; 19,000 public and private use airports; 140,000 miles of freight and passenger railroads; 25,000 miles of navigable waterways; and 2 million miles of oil and gas pipelines connect the nation's people and businesses.¹ In 2012, 2.5 billion tons of hazardous materials moved through the U.S. transportation system.² There has been a notable increase in the total amount of crude oil moved by rail, up from 23.7 million barrels in 2010 to 139.8 million barrels in 2017.³

Shipments of hazardous materials come in many shapes and sizes, present various types and degrees of hazards, and move through the United States on all modes of transportation. To protect transportation workers and the public from the inherent dangers associated with the transportation of hazardous materials, we must enforce laws enacted to ensure the safe transportation of these materials, and when appropriate, seek criminal sanctions for violations.

II. Safety risks inherent in the transportation of hazardous materials

The U.S. Department of Transportation (DOT) is the primary agency responsible for regulating the transportation of hazardous

¹ See U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STAT., TRANSPORTATION STATISTICS ANNUAL REPORT (2018).

² See U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STAT., HAZARDOUS MATERIALS: 2012 ECONOMIC CENSUS TRANSPORTATION, 2012 COMMODITY FLOW SURVEY (2015) [hereinafter HAZARDOUS MATERIALS: 2012 ECONOMIC CENSUS TRANSPORTATION].

³ See TRANSPORTATION STATISTICS ANNUAL REPORT, *supra* note 1.

materials (hazmat) in commerce. Hazmat is material the DOT has designated as “capable of posing an unreasonable risk to health, safety, and property when transported in commerce.”⁴ Flammable and combustible liquids represent the bulk of hazmat transported in commerce.⁵

About half of all hazmat is transported by truck; transportation by pipeline is the second most common mode.⁶ Toxic inhalation chemicals, such as chlorine gas, are often transported over long distances by rail.⁷ Until quite recently, bulk shipments of lithium batteries were commonly transported by cargo aircraft.⁸ New warnings raised after recent battery fire testing conducted by the Federal Aviation Administration (FAA), however, emphasized the potential risks of a catastrophic aircraft loss caused by a lithium battery fire or explosion.⁹ The risk of harm is so significant that passenger planes have banned certain products containing lithium batteries.¹⁰

Between 2009 and 2018, the DOT’s Pipeline and Hazardous Materials Safety Administration (PHMSA) reported a total of 103 fatalities and 1,927 injuries related to the transportation of hazmat by air, highway, railway, and water.¹¹ The majority of fatalities and injuries are associated with the transportation of hazmat by highway.¹² During the same period, the PHMSA reported 119 fatalities and 661 injuries related to the transportation of natural gas or hazardous liquid by pipeline.¹³

⁴ 49 C.F.R. § 171.8.

⁵ See HAZARDOUS MATERIALS: 2012 ECONOMIC CENSUS TRANSPORTATION, *supra* note 2, at 2 Table 2a.

⁶ *Id.* at 1 Table 1a.

⁷ See Lewis M. Branscomb et al., *Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality*, HARVARD KENNEDY SCHOOL 3–4 (Feb. 2010).

⁸ See U.S. DEP’T OF TRANSP., FED. AVIATION ADMIN., SAFETY ALERT FOR OPERATORS 16001 (2016).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See U.S. DEP’T OF TRANSP., 10 YEAR INCIDENT SUMMARY REPORT (2019).

¹² *Id.*

¹³ See U.S. DEP’T OF TRANSP., PIPELINE SIGNIFICANT INCIDENT 20 YEAR TREND (2019).

Because of the hazardous characteristics of the materials, the personal, environmental, and economic consequences of any one incident can be catastrophic. The first of several tragic examples of the destruction that can occur during the transportation of hazmat is the May 1996 crash of a Douglas DC-9-32 aircraft.¹⁴ The airplane, operated as ValuJet flight 592, crashed into the Florida Everglades 10 minutes after takeoff from Miami International Airport. All 110 people on board were killed.¹⁵ An investigation by the National Transportation Safety Board (NTSB) concluded that the accident was the result of a fire initiated by chemical oxygen generators—a hazardous material—improperly placed in the aircraft cargo hold.¹⁶

Another example occurred in 1999. A pipeline owned by the Olympic Pipeline Company, Inc. (Olympic) ruptured, causing over 200,000 gallons of unleaded gasoline to enter nearby creeks in Whatcom Falls Park in Bellingham, Washington.¹⁷ An hour and a half after the spill, the gasoline ignited, resulting in a fireball that traveled approximately one and a half miles downstream, killing two 10-year-old boys and an 18-year-old man and injuring eight other people.¹⁸ The release of gasoline caused substantial environmental damage to the waterways along the park with significant property damage to a home and to the city's water treatment plant.¹⁹

In the early morning of January 6, 2005, a Norfolk Southern Railway (NSR) freight train traveling through Graniteville, South

¹⁴ One of the deadliest industrial accidents in U.S. history occurred in Texas City, Texas, in 1947. A fire aboard a freighter ignited ammonium nitrate and other explosive materials in the ship's hold, causing a massive explosion and killing almost 600 people, wounding more than 3,000, and destroying much of the city. *Texas City Explosion of 1947*, BRITANNICA <https://www.britannica.com/event/Texas-City-explosion-of-1947> (last visited Nov. 25, 2019).

¹⁵ See NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT: IN-FLIGHT FIRE AND IMPACT WITH TERRAIN VALUJET AIRLINES FLIGHT 592 DC-9-32, N904VJ EVERGLADES, NEAR MIAMI, FLORIDA, MAY 11, 1996 x (1997) [hereinafter AIRCRAFT ACCIDENT REPORT: IN-FLIGHT FIRE AND IMPACT WITH TERRAIN VALUJET AIRLINES].

¹⁶ *Id.* at 137.

¹⁷ See NAT'L TRANSP. SAFETY BD., PIPELINE ACCIDENT REPORT: PIPELINE RUPTURE AND SUBSEQUENT FIRE IN BELLINGHAM, WASHINGTON JUNE 10, 1999 1 (2002) [hereinafter PIPELINE ACCIDENT REPORT: PIPELINE RUPTURE AND SUBSEQUENT FIRE IN BELLINGHAM, WASHINGTON].

¹⁸ *Id.*

¹⁹ *Id.* at 1, 54.

Carolina, diverted from a main track onto an industry track and struck an unoccupied, parked train.²⁰ The collision derailed the locomotives and several freight cars of both trains.²¹ Three of the derailed NSR cars were pressurized 90-ton tankers filled with liquid chlorine—hazardous material.²² Chlorine gushed out of a breached tank car, mixed with the air, and turned into a lethal gas.²³ The train engineer and eight other people died from inhaling the chlorine gas.²⁴ At least “554 people complaining of respiratory difficulties were taken to local hospitals.”²⁵ Over 5,000 people “within a [one]-mile radius of the derailment were evacuated for several days.”²⁶

A final and more recent example of the massive devastation that can occur during the movement of hazmat is the September 2010 Pacific Gas and Electric Company (PG&E) gas pipeline explosion.²⁷ A 30-inch diameter segment of a natural gas transmission pipeline owned and operated by PG&E ruptured in a residential area in San Bruno, California.²⁸ The explosion and resulting fire caused by the released natural gas killed eight people and injured several others.²⁹ It also destroyed 38 homes and damaged many more.³⁰

To protect transportation workers, the public, and the environment from the dangers associated with the transportation of hazmat, those who produce and transport these shipments must provide a safe operating environment, both in containment and in movement. Shippers and carriers who transport hazardous materials must ensure

²⁰ See NAT'L TRANSP. SAFETY BD., RAILROAD ACCIDENT REPORT: COLLISION OF NORFOLK SOUTHERN FREIGHT TRAIN 192 WITH STANDING NORFOLK SOUTHERN LOCAL TRAIN P22 WITH SUBSEQUENT HAZARDOUS MATERIALS RELEASE AT GRANITEVILLE, SOUTH CAROLINA JANUARY 6, 2005 1 (2005).

²¹ *Id.*

²² *Id.* at 1, 11, 28.

²³ *Id.* at 1, 28.

²⁴ *Id.* at 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See NAT'L TRANSP. SAFETY BD., PIPELINE ACCIDENT REPORT: PACIFIC GAS AND ELECTRIC COMPANY NATURAL GAS TRANSMISSION PIPELINE RUPTURE AND FIRE SAN BRUNO, CALIFORNIA SEPTEMBER 9, 2010 ACCIDENT REPORT x (2011) [hereinafter PIPELINE ACCIDENT REPORT: PACIFIC GAS AND ELECTRIC COMPANY NATURAL GAS TRANSMISSION PIPELINE RUPTURE AND FIRE].

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

that the workers—both employees and contractors—responsible for handling hazmat are properly trained and that all shipments are properly packaged and labeled. Additionally, shipments must include accurate information as to contents, quantity, and emergency contacts. Pipelines that transport hazardous liquids and natural gas should be checked for corrosion and leaks and properly maintained. The federal government plays an important role in ensuring that all responsible parties uniformly apply and follow secure practices. Egregious and knowing failures merit criminal prosecution.

III. Hazardous materials transportation laws

The predominant federal laws that regulate the transportation of hazmat, including hazardous liquids and natural gas, are the Hazardous Materials Transportation Act of 1975 (HMTA)³¹ and the Pipeline Safety Act (PSA).³²

A. Hazardous Materials Transportation Act (HMTA)

The purpose of the HMTA is to “protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce.”³³ Regulations implemented pursuant to the HMTA list materials designated as hazardous when transported in a particular amount or form.³⁴

The DOT, through the PHMSA’s Office of Hazardous Materials Safety, is responsible for enforcing the HMTA and promulgating safety regulations for the transportation of hazmat by air, rail, highway, and water (except for bulk transportation of hazmat by vessel).³⁵ Regulations promulgated pursuant to the HMTA include 49 C.F.R. §§ 171–177.³⁶ The PHMSA’s Office of Pipeline Safety regulates the transportation of hazmat by pipeline separately.

Hazmat regulations focus on four major areas: (1) procedure and policies; (2) material designation and hazard communication;

³¹ 49 U.S.C. §§ 5101–5128.

³² 49 U.S.C. §§ 60101–60301.

³³ 49 U.S.C. § 5101.

³⁴ 49 C.F.R. § 172.101.

³⁵ See 49 C.F.R. § 171.1(c)(1)1.

³⁶ See 49 C.F.R. §§ 171–177.

(3) packaging requirements; and (4) operational rules.³⁷ The PHMSA’s Office of Hazardous Materials Safety issues regulations and shares authority to administer and enforce the regulations with several other government agencies.

The FAA enforces regulations applicable to the transportation or shipment of hazmat by air.³⁸ The Federal Motor Carrier Safety Administration enforces regulations applicable to the transportation of hazmat by highway.³⁹ The Federal Railroad Administration enforces all regulations applicable to the transportation or shipment of hazmat by railroad.⁴⁰ The U.S. Coast Guard enforces all regulations involving hazmat transportation by water, and the bulk transportation of hazmat loaded or carried on board a vessel.⁴¹ The Transportation Security Administration has authority to prohibit explosives or incendiaries from the cabin of an aircraft—including hazmat such as fireworks and lighters—but it does not have authority to enforce the HMTA.⁴²

Employers with employees who handle hazmat are responsible for ensuring their employees have been trained in accordance with regulations implemented pursuant to the HMTA.⁴³ HMTA regulations also impose a duty on each person offering a hazmat for transportation to provide shipping papers that identify the “physical” hazardous properties (for example, explosive, radioactive, flammable) associated with the materials being transported.⁴⁴ The regulations also require anyone who offers, accepts, transfers, or otherwise handles hazmat during transportation to have emergency response information immediately available for use at all times hazmat is present.⁴⁵ Emergency response information must also include the “health” hazard (for example, skin or eye irritation, carcinogen, aspiration hazard) associated with the material.⁴⁶

³⁷ See 49 C.F.R. §§ 105–107, 172–180.

³⁸ 49 C.F.R. § 1.83(d).

³⁹ 49 C.F.R. § 1.87(d).

⁴⁰ 49 C.F.R. § 1.89(j).

⁴¹ See Ex. 37, Renewed Mot. Summ. J., Angelex, Ltd. v. United States, 272 F. Supp. 3d 64 (D.D.C 2017) (No. 1:15-CV-00056-RC), ECF No. 38.

⁴² See 49 C.F.R. § 1540.111(a).

⁴³ See 49 C.F.R. §§ 173.1, 172.704, 175.20, 177.800, 177.816.

⁴⁴ See 49 C.F.R. §§ 172.200, 172.202.

⁴⁵ 49 C.F.R. § 172.600.

⁴⁶ See 49 C.F.R. § 172.602(a)(2).

This information is critical, both for workers who handle hazardous materials and for emergency responders who rely on the information to address a spill or release. It is particularly significant given the fact that human error or package failure during loading or unloading is the cause of most hazmat incidents.⁴⁷

Violators are subject to civil and criminal penalties. A person who “knowingly” violates the HMTA “or a regulation, order, special permit, or approval issued” pursuant to the HMTA is liable for a civil penalty up to \$75,000 for each violation.⁴⁸ If a violation results in death, serious illness, severe injury, or substantial destruction of property, the maximum civil penalty that regulators can impose is \$175,000, with a separate penalty imposed for each day the violation continues.⁴⁹ The definition of “person” includes corporations, companies, and Indian tribes, as well as individuals.⁵⁰ The HMTA specifically excludes from the definition of person the U.S. Postal Service and any department, agency, or instrumentality of the federal government.⁵¹ Government contractors, however, are subject to all provisions of the HMTA.⁵²

Criminal penalties fall into two categories: (1) offenses involving “knowingly” tampering with markings, documents, or packaging; and (2) offenses involving the “reckless” or “willful” violation of the HMTA or a regulation, order, special permit, or approval issued under the HMTA.⁵³ Criminal penalties include a maximum five-year term of imprisonment, a fine, or both.⁵⁴ If, however, the violation involves the release of a hazmat that results in death or bodily injury, the maximum term of imprisonment is ten years.⁵⁵

B. Pipeline Safety Act (PSA)

The PSA regulates the nation’s 2.6 million miles of natural gas and hazardous liquid pipelines and pipeline facilities. It “prescribe[s]

⁴⁷ See U.S. DEP’T OF TRANSP., BUREAU OF TRANSP. STAT., TRANSPORTATION STATISTICS ANNUAL REPORT 145–47 (2015).

⁴⁸ 49 U.S.C. § 5123(a)(1).

⁴⁹ 49 U.S.C. § 5123(a)(2)–(4).

⁵⁰ See 49 U.S.C. § 5102(9)(A); 49 C.F.R. § 171.8.

⁵¹ 49 U.S.C. § 5102(9)(B).

⁵² 49 U.S.C. § 5126(a).

⁵³ 49 U.S.C. §§ 5104(b), 5124.

⁵⁴ 49 U.S.C. § 5124.

⁵⁵ *Id.*

minimum safety standards for pipeline transportation and for pipeline facilities.”⁵⁶ Materials regulated under the PSA include the following: flammable, toxic, or corrosive gas; petroleum or petroleum product; nonpetroleum fuel; and any substance DOT determines poses an unreasonable risk to life or property when transported by a hazardous liquid pipeline facility in a liquid state.⁵⁷ The PHMSA’s Office of Pipeline Safety issues and enforces regulations promulgated pursuant to the PSA, which establishes, among other things, reporting requirements and minimum safety standards for pipeline owners and operators. PSA regulations appear at 49 C.F.R. §§ 190–199.⁵⁸

An owner or operator of a pipeline that violates a provision of the PSA is subject to civil and criminal penalties. The maximum civil penalty is \$200,000 for each violation.⁵⁹ To enforce its regulations, the PHMSA can issue the following: (1) a corrective action order, if it determines a pipeline represents a serious hazard to life, property, or the environment;⁶⁰ (2) a notice of proposed safety order to notify an operator that a particular pipeline facility has a condition(s) that poses a pipeline integrity risk to public safety, property, or the environment;⁶¹ or (3) a compliance order directing compliance with the PSA or an order or regulation issued pursuant to the PSA.⁶²

A state cannot regulate “interstate” pipeline transportation, but it may establish and maintain a PHMSA-certified “intrastate” pipeline safety program.⁶³ The state can enforce safety standards under the law of that state through injunctive relief and civil penalties.⁶⁴ The PHMSA cannot “prescribe or enforce safety standards and practices for an . . . intrastate pipeline transportation” in states that have a PHMSA-certified pipeline safety program.⁶⁵

A criminal penalty can be imposed for “knowingly and willfully” violating certain provisions of the PSA or a regulation prescribed or

⁵⁶ 49 U.S.C. § 60102(a)(2).

⁵⁷ See 49 U.S.C. §§ 60101(a)(2), 60102.

⁵⁸ See 49 C.F.R. §§ 190–199.

⁵⁹ See 49 U.S.C. § 60122(a)(1)–(3).

⁶⁰ See 49 U.S.C. § 60112.

⁶¹ See 49 U.S.C. § 60117.

⁶² See 49 U.S.C. § 60118(b).

⁶³ See 49 U.S.C. §§ 60104(c), 60105(a).

⁶⁴ See 49 U.S.C. § 60105(b)(7).

⁶⁵ 49 U.S.C. § 60105(a).

order issued under the Act.⁶⁶ Violators can be fined and/or imprisoned for up to five years.⁶⁷ Violators may also face a 20-year prison term for damaging or destroying a pipeline facility.⁶⁸ Damaging or destroying a pipeline sign can result in a fine and/or imprisonment for a maximum of one year.⁶⁹

IV. Criminal enforcement

A. Criminal violations of HMTA and PSA

Criminal enforcement of the HMTA and the PSA plays a critical role in the government's overall effort to protect both workers who handle hazmat and the public at large. By prosecuting those who knowingly, recklessly, or willfully fail to comply with hazmat transportation laws, prosecutors enhance overall deterrence. The imposition of a criminal penalty that includes a fine, imprisonment, or both is reserved for the most serious violations. Special agents for the DOT's Office of Inspector General are responsible for conducting investigations of criminal violations. Summarized below are a few examples of criminal enforcement cases.

1. *United States v. SabreTech, Inc.* (S.D. Fla. 1999)

In the ValuJet incident referenced previously, during the course of overhauling several airplanes, employees of SabreTech removed and replaced over 100 expired or near-expired oxygen generators.⁷⁰ Oxygen generators chemically produce oxygen to supply the drop-down masks in airline cabins if depressurization occurs.⁷¹ After noting the generators did not have shipping caps, the employees wrapped lanyards around the firing pins of the generators to prevent the release of the trigger mechanism.⁷² Employees tagged the generators with green "repairable" tags and, labeling the generators as out-of-date, designating them for removal.⁷³ A shipping clerk

⁶⁶ 49 U.S.C. § 60123.

⁶⁷ *Id.*

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *See* AIRCRAFT ACCIDENT REPORT: IN-FLIGHT FIRE AND IMPACT WITH TERRAIN VALUJET AIRLINES, *supra* note 15.

⁷¹ *See id.* at 6–7.

⁷² *Id.* at 16.

⁷³ *Id.* at 13.

subsequently repacked the generators and labeled them as “COMAT,” indicating that the boxes contained company-owned materials.⁷⁴ The shipping ticket identified the contents of the boxes as “Oxy Canisters—Empty.”⁷⁵ Workers took the boxes to the ValuJet ramp and placed them in the compartment area of the aircraft.⁷⁶ A fire erupted shortly after the plane took off.⁷⁷ FAA regulations forbid the transportation of hazardous materials in aircraft cargo holds.⁷⁸

An investigation of the accident by the NTSB determined that a probable cause of the accident was that SabreTech did not train its employees on how to recognize or ship hazardous materials.⁷⁹

SabreTech and three of its employees were charged with conspiracy to make a false statement on aircraft maintenance records, recklessly causing the transportation in air commerce of oxygen generators in violation of FAA regulations, and various false statements related to aircraft maintenance records.⁸⁰ Prosecutors also charged SabreTech with willfully causing the transportation in air commerce of hazardous materials in violation of the HMTA, willfully causing the transportation in air commerce of oxygen generators in violation of FAA regulations, and willfully failing to train its employees in accordance with the HMTA.⁸¹

The company was acquitted of some counts at trial, and other counts were overturned on appeal, but SabreTech’s conviction for improper training was upheld.⁸² SabreTech was sentenced to serve three years of probation and pay a \$500,000 fine.⁸³

⁷⁴ *Id.* at 19, 69.

⁷⁵ *Id.* at 19.

⁷⁶ *Id.* at 19–20.

⁷⁷ *Id.* at x.

⁷⁸ 14 C.F.R. § 25.857.

⁷⁹ See AIRCRAFT ACCIDENT REPORT: IN-FLIGHT FIRE AND IMPACT WITH TERRAIN VALUJET AIRLINES, *supra* note 15, at 137.

⁸⁰ Indictment, United States v. SabreTech, Inc., No. 99-00491-CR-JLK (S.D. Fla. Nov. 19, 1999), ECF No. 1.

⁸¹ *Id.*

⁸² United States v. SabreTech, Inc., 271 F.3d 1018, 1024–25 (11th Cir. 2001).

⁸³ Minutes of Sentencing, *SabreTech, Inc.*, ECF No. 338.

2. *United States v. Olympic Pipeline Co.* (W.D. Wash. 2003)

Investigators concluded that the probable cause of a rupture in the Olympic Pipeline was, among other things, damage done to the pipe by a construction company during the modification of a nearby water treatment plant, coupled with Olympic's inadequate oversight and inspection of the construction company's work.⁸⁴ Olympic's personnel did not establish a regular and documented schedule for visiting the site to observe excavation in the area of the pipeline.⁸⁵

In addition, Olympic failed to correct a problem with the overpressure safety valves in a new product storage facility and pump station added to the pipeline system.⁸⁶ The valves had incorrect pressure settings, subjecting the pipeline to high pressure for a six-month period.⁸⁷ If the pipe had not been weakened by external damage, it likely would have been less susceptible to failure during pressure increases.⁸⁸

Olympic, Equilon Pipeline Company (the operator of the pipeline), and three individuals were charged with various violations of the Clean Water Act and the Hazardous Liquid Pipeline Safety Act (HLPSA), a precursor of the PSA.⁸⁹ The Clean Water Act violations were for negligent discharges of petroleum into two nearby creeks.⁹⁰ The HLPSA charges alleged safety violations related to the operation of the pipeline and failure to conduct a continuing training program.⁹¹

The operator of a pipeline must instruct personnel how to carry out operations and maintenance and how to implement emergency procedures that relate to their assignments.⁹² In addition, the operator must train personnel to "[r]ecognize conditions that are likely to cause emergencies, predict the consequences of facility

⁸⁴ See PIPELINE ACCIDENT REPORT: PIPELINE RUPTURE AND SUBSEQUENT FIRE IN BELLINGHAM, WASHINGTON, *supra* note 17, at 1.

⁸⁵ *Id.* at 20–21, 58–59.

⁸⁶ *Id.* at 67–68.

⁸⁷ *See id.*

⁸⁸ *Id.* at 56–57.

⁸⁹ Indictment, *United States v. Olympic Pipeline Co.*, No. 2:01-CR-00338 (W.D. Wash. Sept. 13, 2001), ECF No. 1.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 49 C.F.R. §§ 195.402–403(a).

malfunctions or failures and hazardous liquids or carbon dioxide spills, and take appropriate corrective action.”⁹³

Olympic, Equilon, and three Olympic employees pleaded guilty to various violations of the CWA and the HLPESA.⁹⁴ In particular, both companies pleaded guilty to failure to conduct a training program, in violation of the HLPESA.⁹⁵ The combined criminal and civil penalties paid by both companies was \$36 million.⁹⁶ The court sentenced both companies to a five-year term of probation, a condition of which was compliance with a civil consent order requiring them to undertake specific inspection and damage prevention measures.⁹⁷ Two of the employees pleaded guilty to a HLPESA violation related to training.⁹⁸ A third employee pleaded guilty to a CWA violation for the negligent discharge of gasoline into a nearby creek.⁹⁹

3. *United States v. Emery Worldwide Airlines (S.D. Ohio 2003)*

In 2001, an investigation into shipping practices of Emery Worldwide Airlines (Emery) uncovered evidence that the company was shipping hazardous materials without providing notification to the pilot, as required by HMTA regulations.¹⁰⁰ The owner or operator of an aircraft is required to give written notice to the pilot in command of the aircraft of the kind and the location of hazardous materials placed onboard the aircraft.¹⁰¹ This notice serves to protect the crew by ensuring that hazardous materials are properly packaged and stored and that the crew is capable of handling any emergency or incident that may arise onboard the aircraft.

Emery and its affiliate, Emery Air Freight Corporation, specialized in land and air transportation services for business-to-business

⁹³ 49 C.F.R. § 195.403(a)(3).

⁹⁴ Minutes of Revision of Plea, *United States v. Olympic Pipeline Co., Inc.*, No. 2:01-CR-00338 (W.D. Wash. Apr. 11, 2003), ECF Nos. 201, 203–06.

⁹⁵ *Id.* at 203, 206.

⁹⁶ Judgment in a Criminal Case, *Olympic Pipeline Co.*, ECF Nos. 233–34.

⁹⁷ *Id.*

⁹⁸ Minutes of Revision of Plea, *Olympic Pipeline Co.*, ECF Nos. 201, 204.

⁹⁹ *Id.* at ECF No. 205.

¹⁰⁰ Plea Agreement, *United States v. Emery Worldwide Airlines*, No. 3:03-CR-00113 (S.D. Ohio Sept. 30, 2003), ECF No. 5.

¹⁰¹ 49 C.F.R. § 175.33.

shippers of heavy cargo.¹⁰² Some of the cargo transported by Emery was classified as hazardous materials.¹⁰³ Company officials were aware of the problem but waited over a year and a half before remedying the situation.¹⁰⁴ Emery pleaded guilty to twelve violations of the HMTA and was sentenced to pay a \$6 million fine and serve a three-year term of probation.¹⁰⁵ As a condition of probation, Emery was ordered to implement a compliance program to prevent future violations.¹⁰⁶

4. *United States v. Kelly Steen* (D. Mont. 2015)

Kelly Steen, a truck driver for a waste-hauling company, pleaded guilty to illegally transporting natural gas condensate from the North Dakota Bakken Shale oil fields without the required placarding in violation of the HMTA.¹⁰⁷ Placarding plays a critical part in relaying information about the presence of hazardous materials.¹⁰⁸ In the event of an incident, placarding on the outside of the truck allows first responders to detect the presence of a hazardous material from a safe distance. The gas condensate, a hazardous material, was transported to a recycling center with a bill of lading that identified it as nonhazardous.¹⁰⁹ The gas ignited when Steen attempted to pump the truck's contents into the recycling center, injuring three employees.¹¹⁰ A blaze triggered by the explosion burned for eight days until the fire department could determine the actual contents of the truck.¹¹¹ The court sentenced Steen to a three-year term of probation and a \$20,000 fine.¹¹²

¹⁰² Plea Agreement, *Emery Worldwide Airlines*, ECF No. 5.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Judgment in a Criminal Case, *Emery Worldwide Airlines*, ECF No. 10.

¹⁰⁶ *Id.*

¹⁰⁷ Judgment in a Criminal Case, *United States v. Steen*, No. 14-CR-00111 (D. Mont. Aug. 20, 2015), ECF No. 29.

¹⁰⁸ See 49 C.F.R. § 172.

¹⁰⁹ Offer of Proof, *Steen*, ECF No. 20.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Judgment in a Criminal Case, *Steen*, ECF No. 29.

5. *United States v. Pacific Gas & Electric Co.* (N.D. Cal. 2014)

After investigating the September 2010 rupture of the PG&E pipeline in San Bruno, California, the NTSB determined that the probable cause of the pipeline rupture was

(1) inadequate quality assurance and quality control [of a pipeline during an earlier relocation that] . . . allowed the installation of a substandard and poorly welded pipe section with a visible seam weld flaw [which grew over time] . . . causing the pipeline to rupture during a pressure increase stemming from poorly planned electrical work at [a PG&E terminal]; and (2) inadequate pipeline integrity management program, which failed to detect and repair or remove the defective pipe section.”¹¹³

PG&E was charged with obstruction and 27 counts of willfully violating the PSA.¹¹⁴ The violations arose out of deficiencies found by the NTSB in PG&E’s record keeping, integrity management program, and maintenance practices.¹¹⁵ Several of the PSA counts were dismissed or consolidated before trial.¹¹⁶ In August 2016, a jury found PG&E guilty of obstructing an NTSB proceeding and 11 violations of the PSA.¹¹⁷ PG&E was sentenced to five years of probation and fined \$3 million.¹¹⁸ Additionally, PG&E was ordered to perform 10,000

¹¹³ See PIPELINE ACCIDENT REPORT: PACIFIC GAS AND ELECTRIC COMPANY NATURAL GAS TRANSMISSION PIPELINE RUPTURE AND FIRE, *supra* note 27, at xii.

¹¹⁴ Superseding Indictment, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175-TEH-1, 2014 WL 4954040 (N.D. Cal. July 30, 2014).

¹¹⁵ Gov.’s Trial Brief, *Pac. Gas & Electric Co.*, No. 3:14-CR-00175-TEH-1, 2014 WL 4954040 (N.D. Cal. Sept. 29, 2014), ECF No. 305.

¹¹⁶ *Id.* at 4.

¹¹⁷ Verdict Form, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175-TEH-1, 2014 WL 4954040 (N.D. Cal. Sept. 29, 2014) (No. 14-cr-00175-TEH).

¹¹⁸ Judgment in a Criminal Case, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175-TEH-1, 2014 WL 4954040 (N.D. Cal. Jan. 31, 2017), ECF No. 922.

hours of community service and to develop a compliance and ethics program to prevent future violations.¹¹⁹

6. *United States v. Airgas Doral, Inc.* (S.D. Fla. 2016)

In May 2016, prosecutors charged Airgas Doral, Inc. (Airgas), with 14 criminal violations of the HMTA.¹²⁰ Airgas, located in Miami, was exporting argon—a cryogenic (refrigerated) liquid and hazardous material—to customers in Central and South America.¹²¹ The argon was stored in bulk tanks covered by a DOT special permit.¹²²

A tank containing argon was loaded onboard a cargo vessel for transport to a customer in Peru.¹²³ During transport, the tank failed and released argon into the hold of the vessel.¹²⁴ Three workers entered the hold and died from exposure to the argon gas.¹²⁵ Federal prosecutors charged Airgas with violating HMTA regulations and the special permit by, among other things, failing to train employees and managers who handle hazardous materials on required pre-transportation functions, such as making visual inspections of the tank for deficiencies and taking required pressure and temperature readings.¹²⁶

Airgas pleaded guilty to all counts and was placed on probation for two years, fined \$4,300, and ordered to pay \$2.7 million in restitution. As part of its sentence, Airgas must implement an environmental compliance plan; obtain an independent auditor; and submit to searches of its corporate properties, inspections of its corporate properties, or both.¹²⁷

7. *United States v. Ernesto Alvarez Jr.* (C.D. Cal. 2016)

Ernesto Alvarez Jr. was sentenced to a year and a day in prison for transporting regulated fireworks in a rental truck.¹²⁸ The truck did

¹¹⁹ *Id.*

¹²⁰ Plea Agreement, *United States v. Airgas Doral, Inc.*, No. 1:16-CR-20270 (S.D. Fla. May 5, 2016), ECF No. 13.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Judgment in a Criminal Case, *Airgas Doral, Inc.*, ECF No. 26.

¹²⁷ *Id.*

¹²⁸ Judgment and Probation/Commitment Order, *Alvarez*, ECF No. 42.

not have placards identifying the contents of the truck as hazardous.¹²⁹ Under HMTA regulations, the fireworks were classified as explosives.¹³⁰ The truck contained over 8,000 pounds of illegal fireworks, and a warehouse Alvarez used for storage contained over 75,000 pounds of illegal fireworks.¹³¹

8. *United States v. Woody's Trucking, LLC* (D. Mont. 2017)

Donald E. Wood Jr. was sentenced to 12 months and one day in prison after he was found guilty of multiple charges stemming from a 2012 explosion at an oil and gas processing facility.¹³² In December 2012, a Woody's Trucking driver loaded natural gas condensate, or "drip gas," from a pipeline station that transports products from the Bakken oil fields in Montana and North Dakota.¹³³ The drip gas was hauled to a slop-oil processing/recycling company, Custom Carbon Processing, Inc. (CCP). The bill of lading accompanying the shipment falsely identified the product as "slop oil and water," a non-hazardous substance.

As the driver pumped the liquid from the truck into the CCP facility, a fire ignited, seriously injuring three employees. Drip gas is a hazardous material, and the truck was not placarded to indicate it held a flammable liquid. Wood and his company, Woody's Trucking, LLC, were found guilty of multiple violations of the HMTA, wire fraud, mail fraud, conspiracy, and obstruction of justice.

¹²⁹ Plea Agreement, *United States v. Alvarez*, No. 2:16-CR-00818-DOC (C.D. Cal. Oct. 10, 2017), ECF No. 25.

¹³⁰ *Id.* at 7.

¹³¹ *Id.* at 6–7.

¹³² Judgment in a Criminal Case, *United States v. Donald E. Wood Jr.*, No. 1:17-CR-00138-SPW, 2018 WL 7687961 (D. Mont. Nov. 14, 2018).

¹³³ Indictment, *United States v. Woody's Trucking, LLC*, No. CR 17-138-BLG-SPW, 2018 WL 443454 (D. Mont. 2018).

9. *United States v. U-Haul Co. of Pa. & Miguel Rivera* (E.D. Pa. 2018)

U-Haul of Pennsylvania (U-HP) and its general manger, Miguel Rivera, were charged with multiple violations of the HMTA.¹³⁴ The charges related to the handling of propane, which U-HP sold at its facility in Philadelphia.¹³⁵ The Indictment alleged, among other violations, that U-HP instructed untrained and untested employees to fill propane cylinders.¹³⁶

Under the HMTA, propane is regulated as a hazardous material.¹³⁷ Because employees of U-HP handled hazardous materials, U-HP was considered a hazmat employer, and its employees who handled hazardous material were considered hazmat employees.¹³⁸ U-HP was, therefore, required to ensure that its hazmat employees were properly trained and tested to perform duties related to handling hazardous materials.¹³⁹

In July 2014, a propane cylinder attached to a food truck exploded while parked on a street in Philadelphia.¹⁴⁰ The propane ignited, and a fireball enveloped the truck, seriously injuring several individuals and causing significant property damage.¹⁴¹ Two people later died from injuries sustained in the explosion.¹⁴² The propane cylinder attached to the truck had been filled by U-HP.¹⁴³

U-HP and Rivera pleaded guilty to two counts of willfully and recklessly causing U-HP employees who had not been trained or tested, as require under the HMTA regulations, to fill propane

¹³⁴ Superseding Indictment, *United States v. U-Haul Co. of Pennsylvania*, No. 2:18-CR-00247-RK, 2018 WL 8895786 (E.D. Pa 2018).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See 49 C.F.R. § 172.101 (Hazardous Materials Table).

¹³⁸ See 49 C.F.R. § 171.8.

¹³⁹ See 49 C.F.R. § 172.702.

¹⁴⁰ Superseding Indictment, *United States v. U-Haul Co. of Pennsylvania*, No. 2:18-CR-00247-RK, 2018 WL 8895786 (E.D. Pa 2018).

¹⁴¹ *Id.* at 7.

¹⁴² *Id.*

¹⁴³ *Id.*

cylinders.¹⁴⁴ Both were sentenced to two years of probation.¹⁴⁵ U-HP was also ordered to pay a \$1 million criminal fine and implement a propane compliance program.¹⁴⁶

B. A note about compliance plans

In addition to pursuing those who violate safety laws and jeopardize workers' safety, achieving the ultimate goal of creating and maintaining a safe working environment requires that any resolution of a case brought for violations of the HMTA or the PSA include a compliance plan sufficient to prevent and deter future violations.

C. Related criminal enforcement efforts

A hazmat incident may result in criminal investigation by several different federal agencies with overlapping authorities. An incident involving the transportation of hazardous materials that results in a fatality, injury, or illness in a workplace covered by the Occupational Safety and Health Act (OSH Act) will elicit an investigation by the Occupational Safety and Health Administration (OSHA). Criminal penalties can be imposed against an employer for a willful violation of an OSH Act regulation that causes the death of an employee.¹⁴⁷ The Environmental Protection Agency could also initiate a criminal investigation if the incident caused a spill or release into the environment of a substance regulated under the Clean Water Act, the Resource Conservation and Recovery Act, or the Clean Air Act.¹⁴⁸

¹⁴⁴ Judgment as to Miguel Rivera, *United States v. U-Haul Co. of Pennsylvania*, No. 2:18-CR-00247-RK (E.D. Pa. May 6, 2019), ECF No. 161; Judgment as to U-Haul Co. of Pennsylvania, *United States v. U-Haul Co. of Pennsylvania*, No. 2:18-CR-00247-RK (E.D. Pa. May 7, 2019), ECF No. 163.

¹⁴⁵ Judgment as to Miguel Rivera, *United States v. U-Haul Co. of Pennsylvania*, No. 2:18-CR-00247-RK (E.D. Pa. May 6, 2019), ECF No. 161; Judgment as to U-Haul Co. of Pennsylvania, *United States v. U-Haul Co. of Pennsylvania*, No. 2:18-CR-00247-RK (E.D. Pa. May 7, 2019), ECF No. 163.

¹⁴⁶ Judgment as to U-Haul Co. of Pennsylvania, *United States v. U-Haul Co. of Pennsylvania*, No. 2:18-CR-00247-RK (E.D. Pa. May 7, 2019), ECF No. 163.

¹⁴⁷ See 29 U.S.C. § 666(e).

¹⁴⁸ See 33 U.S.C. § 1319(c); 42 U.S.C. §§ 6928(d), 7413(c).

V. Other safety related non-criminal investigations

In addition to local enforcement agencies, an incident involving hazmat could also prompt investigations by the NTSB and/or the Chemical Safety Board (CSB). Both are independent federal agencies tasked with the responsibility of ensuring safety.

The NTSB's sole mission is to determine the cause of transportation-related accidents.¹⁴⁹ The CSB is tasked with investigating the cause of industrial chemical accidents.¹⁵⁰

While both agencies conduct safety-related investigations into incidents involving a hazmat, neither agency conducts criminal investigations or has criminal enforcement authority.

VI. Conclusion

Maintaining a good safety record is challenging; the movement of hazmat in commerce grows while being dictated by just-in-time inventory, manufacturing, and delivery practices. Protecting the safety of the transportation community and the public against the dangers inherent in the movement of hazmat requires those who produce and transport hazmat to ensure that workers are properly trained and policies and procedures are in place to confirm compliance with applicable hazmat laws. The government must use all available enforcement tools—administrative, civil, and criminal—to pursue those who violate hazmat transportation laws and risk the health and safety of workers, the public, and the environment.

About the Author

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¹⁴⁹ See *History of The National Transportation Safety Board*, NAT'L TRANSP. SAFETY BD., <https://www.nts.gov/about/history/Pages/default.aspx> (last visited Nov. 26, 2019).

¹⁵⁰ See *About the CSB*, U.S. CHEM. SAFETY AND HAZARD INVESTIGATION BD., <https://www.csb.gov/about-the-csb/> (last visited Nov. 26, 2019).

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When Pollution Threatens the Workplace: Occupational Safety & Environmental Endangerment Crimes

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I. Introduction

On an average day in the United States, 14 workers are killed on the job, according to data that employers provide to the Occupational Safety and Health Administration (OSHA).¹ If one factors in the much larger number of deaths from occupational disease—a figure estimated between 5 and 15 times greater than the 5,250 annual fatalities from traumatic injury—then the nation’s workplace-related deaths may exceed 50,000 each year.²

America’s total number of occupational injuries, however, is much higher: OSHA’s most recent count tallies over 2.8 million injuries, nearly a third of which were serious enough to require time off from work.³ Such figures are disturbing and—somewhat counter-intuitively—a demonstration of the significant improvements

¹ *Injuries, Illnesses, and Fatalities*, BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., <https://www.bls.gov/iif/> (last visited Nov. 27, 2019).

² *See Cancer, Reproductive, and Cardiovascular Diseases: Occupational Safety and Health Risks*, NAT’L INST. FOR OCCUPATIONAL SAFETY AND HEALTH, CTR. FOR DISEASE CONTROL AND PREVENTION (May 23, 2011), <https://www.cdc.gov/niosh/programs/crcd/risks.html>; *see also* Kyle Steenland et al., *Dying for Work: The Magnitude of US Mortality from Selected Causes of Death Associated with Occupation*, 43 AM. J. OF INDUS. MED. 461 (2003).

³ *See Injuries, Illnesses, and Fatalities*, *supra* note 1; News Release, Bureau of Lab. Stat., Employer-Reported Workplace Injury and Illness—2018 (November 7, 2019); *see also Injuries, Illnesses, and Fatalities Table R65*, BUREAU OF LAB. STAT., U.S. DEP’T OF LABOR., https://www.bls.gov/iif/oshwc/osh/case/cd_r65_2018.htm (last visited Jan. 3, 2020) (showing over 260,000 injuries involving more than a month away from work in 2018).

in worker safety since the passage of the 1970 Occupational Safety and Health Act (OSH Act).

In 1970, when the U.S. population barely exceeded 200 million, daily workplace fatalities were more than double today's figures. In the early 1990s, labor advocates reported that more than 10,000 workers were killed on the job every year and over 6 million workers were injured.⁴ The decrease in the rate and overall number of workplace deaths since 1970 prompts estimates that over a half a million workers' lives have been saved during this period.⁵

Yet despite this significant progress in workplace safety, no one would declare satisfaction with the status quo. Each piece of data represents a human story, and each occupational death or serious injury involves heartache and potential financial ruin for the victims and their families. The financial cost of traumatic deaths and injuries alone (excluding longer term occupational illness and death) is estimated to exceed \$160 billion per year, including direct medical costs and indirect costs such as lost wages and productivity.⁶

Where the conscious violation of workplace safety requirements results in death or injury, criminal investigators and prosecutors may join government efforts to improve occupational safety. Law enforcement contributions, however, are hobbled by the OSH Act's feeble penalty provisions. OSHA's director testified before Congress in 2014 that the biggest obstacle to his agency's worker protection efforts was the "lack of being a credible deterrent" and lamented, "Our criminal penalties are virtually meaningless."⁷

Willful violations of the Act resulting in death—that is, situations where an employer understands and specifically intends to violate applicable legal obligations with fatal results—are Class B misdemeanors.⁸ Violations resulting in catastrophic but non-fatal

⁴ AM. FED'N OF LABOR & CONG. OF INDUS. ORG., DEATH ON THE JOB: THE TOLL OF NEGLECT—A NATIONAL AND STATE-BY-STATE PROFILE OF WORKER SAFETY AND HEALTH IN THE UNITED STATES 56 (2016).

⁵ *See id.*

⁶ *See Work Injury Costs*, INJURY FACTS, NAT'L SAFETY COUNCIL, <https://injuryfacts.nsc.org/work/costs/work-injury-costs/> (last visited Jan. 3, 2020).

⁷ *OSHA Fines Virtually Meaningless*, CSPAN2, <https://www.c-span.org/video/?c4583727/ osha-fines-virtually-meaningless> (last visited Dec. 4, 2019).

⁸ 29 U.S.C. § 666(e).

injuries are not OSH Act crimes, no matter how extreme an employer's conscious disregard for the law.⁹ Given the OSH Act's shortcomings, federal prosecutors presented with egregious cases of workplace death and/or injury have looked to other provisions of the U.S. Code.

The most common causes of workplace death and serious injury are highway accidents and construction industry hazards like those OSHA terms the "fatal four": falls, electrocution, being struck by an object, and crushing injuries. But a significant number of workplace deaths and injuries—and likely an even greater proportion of serious occupational disease—are caused by exposure to pollutants or the effects of a violent pollutant release, often involving fire or explosion. In these situations, prosecutors have looked to federal pollution control statutes—several of which contain criminal endangerment provisions imposing felony penalties for conduct that violates environmental requirements and thereby "places another person in imminent danger of death or serious bodily injury."¹⁰

Although not designed solely for occupational safety purposes, the environmental endangerment provisions apply in the workplace, and for the better part of three decades, they have been recognized as powerful tools in the effort to prevent worker deaths and injuries.¹¹ These statutes provide for up to 15 years of incarceration, in addition to significant fines, for illegal pollution that can pose catastrophic risks to workers as well as to communities and the environment.

This article will examine the contours and prosecution of the environmental endangerment provisions found in the Clean Air Act (CAA), the Clean Water Act (CWA), and the hazardous waste statute (the Resource Conservation and Recovery Act, or RCRA). The discussion will highlight several consistent themes:

⁹ See, e.g., Deborah Harris, *Achieving Worker Safety Through Environmental Crimes Prosecutions*, 59 U.S. ATT'YS BULL., no. 4, 2011, at 58 (observing that "the OSH Act . . . lacks teeth"); see also David M. Uhlmann, *Prosecuting Worker Endangerment: The Need for Stronger Penalties for Violations of the Occupational Safety and Health Act*, ADVANCE: J. ACS ISSUE GROUPS 3, NO. 1 191, 201 (2009).

¹⁰ 42 U.S.C. § 6928(e).

¹¹ See, e.g. Robert G. Schwartz, Jr., *Criminalizing Occupational Safety Violations: The Use of "Knowing Endangerment" Statutes to Punish Employers Who Maintain Toxic Working Conditions*, 14 HARV. ENVTL L. REV. 487 (1990).

- (1) Congress modeled endangerment statutes after the RCRA, which was the earliest enacted. Although the statutes are superficially similar, looks can be deceiving, and prosecutors must be aware of significant differences between the elements of these offenses and potential defenses to each charge.
- (2) The defense bar has long worked to limit the applicability of these provisions in the occupational context. Those efforts have been mostly unsuccessful; there is an established history of using these provisions to combat pollution crimes that endanger workers. But forewarned is forearmed for the likelihood of continuing defense arguments aimed at excluding workers from these statutory protections.
- (3) The environmental endangerment provisions are potentially powerful tools in the effort to combat corporate crime that endangers worker health and safety. Yet these statutes have been used relatively sparingly during their more than three decades of existence—in part because of the way they are treated in U.S. Sentencing Guidelines. Understanding the Guidelines' applicability to endangerment offenses is, therefore, a critical aspect of effective practice in this area.
- (4) Environmental endangerment prosecutions will invariably implicate the Crime Victims' Rights Act (CVRA)—a statute that allows victims to obtain counsel and intervene in criminal proceedings in order to vindicate their rights. Recent court decisions and changes to the CVRA have made it even more important that criminal investigators and prosecutors are aware of, and prepared to address, victims' rights issues that can arise in these cases.

II. Environmental endangerment prosecutions

A. RCRA endangerment

The RCRA establishes a “cradle to grave” regulatory structure governing solid and hazardous wastes.¹² The statute’s “knowing endangerment” offense,¹³ along with several other criminal provisions contained in the Hazardous and Solid Waste Act of 1980, were the first pollution control felonies enacted by Congress (apart from a CWA provision that modified that statute’s misdemeanor-only penalty scheme by authorizing two years of incarceration for recidivists).

The RCRA’s original knowing endangerment provision required proof that the defendant (1) knowingly managed hazardous waste in violation of specified statutory requirements; (2) knew at the time that he placed another person in “imminent danger of death or serious bodily injury”; and (3) that the offense conduct “manifest[ed] an unjustified and inexcusable disregard [or extreme indifference] towards human life or injury.”¹⁴ In 1984, Congress amended the statute to drop the third prong, creating the provision that remains in effect today and has served as a model for the other environmental endangerment provisions:

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter . . . in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.¹⁵

¹² 42 U.S.C. § 6901–6986.

¹³ 42 U.S.C. § 6928(e).

¹⁴ Solid Waste and Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334, 2340.

¹⁵ 42 U.S.C. § 6928(e).

Among the “special rules” regarding the endangerment provision is one defining “serious bodily injury” as that “which involves a substantial risk of death”; is characterized by “unconsciousness”; “extreme physical pain”; “protracted and obvious disfigurement”; or “protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”¹⁶ Another “special rule” provides that knowing conduct means the defendant “is aware of the nature of his conduct” and that the defendant’s state of mind is “knowing” with respect to “a 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.”¹⁷

The “special rules” also provide for an affirmative defense (which the defendant may establish by a preponderance of the evidence) if “the conduct charged was consented to by the person endangered and . . . the danger and conduct charged were reasonably foreseeable hazards of (A) an occupation, a business, or a profession; or (B) medical treatment or medical or scientific experimentation conducted by professionally approved methods.”¹⁸

The earliest RCRA endangerment prosecutions were brought to address worker safety issues. The first case charged a corporation, Protex Industries, with a combination of three endangerment felonies, 16 other RCRA violations, a violation of Title 18, and CWA crimes.¹⁹

Protex operated a drum recycling business in the District of Colorado. It purchased used 55-gallon drums, many of which contained residual toxic chemicals, cleaned and repainted the drums, then used them to store and ship various manufactured products.²⁰ The company was convicted of multiple felonies for knowingly storing, treating, and disposing of hazardous waste without a permit; transporting hazardous waste without a manifest; and several counts of endangerment, one for each company employee who suffered from solvent poisoning so severe that they exhibited signs of neurological injury constituting “psychoorganic syndrome.”²¹ An expert witness for the government testified that the employees also “suffered an

¹⁶ 42 U.S.C. § 6928(f)(6).

¹⁷ 42 U.S.C. § 6928(f)(1)(A).

¹⁸ 42 U.S.C. § 6928(f)(3).

¹⁹ *United States v. Protex Inds., Inc.*, 874 F.2d 740 (10th Cir. 1989).

²⁰ *Id.* at 741.

²¹ *Id.* at 742.

increased risk of contracting cancer as a result of their extended exposure to the toxic chemicals.”²²

On appeal, the company argued the RCRA’s endangerment provision was unconstitutionally vague as applied for two reasons: First, the case was submitted to the jury despite an alleged lack of evidence regarding “imminent danger of death or serious bodily injury.” Second, a jury instruction stated that “imminent danger” existed if it “could reasonably be expected” that death or serious bodily injury would result.²³ These arguments were premised on Protex’s claims that neither psychoorganic syndrome nor an enhanced risk of cancer that might arise at an unspecified future date met the statutory definition of “serious bodily injury.”²⁴

The Tenth Circuit made short work of these arguments, noting that Protex’s “position demonstrate[d] a callousness toward the severe physical effect the prolonged exposure to toxic chemicals may cause or has caused to the three former employees.”²⁵ The court concluded that the evidence at trial showed the employees in question had in fact suffered serious bodily injury, because “psychoorganic syndrome may cause an impairment of mental faculties.”²⁶

Regarding the mens rea claim, the court noted that, under the statute, the “substantially certain” standard defines the defendant’s requisite knowledge regarding endangerment, rather than the degree to which, as a matter of fact, a defendant’s conduct must be likely to cause death or serious bodily injury.²⁷ The district court quoted directly from the statute’s mens rea provision, section 6828(f)(1)(C), when instructing the jury on that element. The circuit court rejected Protex’s contention that the term “substantial certainty” (rather than the trial court’s use of “reasonable expectation”) should have been used in the context of defining “imminent danger,” saying that the argument “ha[d] no basis in the statutory language.”²⁸ The court concluded the following:

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 743.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 744.

²⁸ *Id.*

The trial court’s interpretation was not an unforeseeable expansion of a criminal statute that was narrow and precise, in violation of due process. . . . The gist of the “knowing endangerment” provision of the RCRA is that a party will be criminally liable if, in violating other provisions of the RCRA, it places others in danger of great harm and it has knowledge of that danger.²⁹

The *Protex* decision remains a relevant and useful source of authority for prosecutors working to combat worker safety crimes. The primary issues addressed by the opinion—what harm and risks constitute endangerment, and what does the government need to prove about the defendant’s knowledge of that danger—are central to any prosecution and reoccur in the subsequent case law discussed below.

The first individual prosecution we are aware of—with the caveat that our records may not be comprehensive regarding the portion of our docket older than 30 years—was also an effort to address occupational hazards. *United States v. Arthur J. Greer* involved a defendant whose waste handling business regularly violated the RCRA’s felony disposal prohibitions.³⁰

Greer also allegedly directed his employees to test cyanides and chlorinated solvents, not through conventional lab analysis, but rather by smelling samples or setting them alight in soft drink cans. The trial jury, considering a 33-count indictment, acquitted Greer on endangerment charges but convicted him of RCRA disposal and numerous Title 18 felonies.³¹

In the LCP Chemical case, four managers of a chlor-alkali chemical manufacturing facility were indicted on endangerment charges, along with dozens of RCRA, CWA, and other environmental felonies. LCP’s Brunswick, Georgia, plant employed around 150 people in two “cell buildings”—each about the size of a football field and contained 50 mercury “cells” where the company produced bleach, caustic soda, hydrogen gas, and hydrochloric acid, while generating hazardous mercury-bearing and extremely caustic wastes.³²

²⁹ *Id.* (internal citation omitted).

³⁰ *United States v. Arthur J. Greer*, Cr-85-00105 (M.D. Fla.).

³¹ *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988).

³² *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001).

During an early 1990s bankruptcy, the defendants pushed to increase chemical production without regard for required pollution controls. The malfunctioning wastewater treatment system, however, caused caustic wastewater to accumulate on cell room floors, resulting in burns to employees and illegal discharges in violation of the facility's CWA permit.³³ Additionally, the mishandling of mercury wastes caused significant worker exposure to that potent neurotoxin. The plant closed in 1994, and an estimated \$50 million dollar superfund cleanup began. The defendants were convicted of endangerment and multiple additional felonies and sentenced to prison terms ranging from 18 months to 9 years.³⁴

The most prominent RCRA endangerment case is probably *United States v. Elias*, which resulted in a 17-year prison sentence for the defendant—a Wharton School-educated businessman whose RCRA crime resulted in severe and irreversible neurological damage to one of his employees, then-20-year-old Scott Dominguez. The case was detailed in a book titled *The Cyanide Canary*, co-authored by Joseph Hilldorfer, the Environmental Protection Agency's (EPA) lead investigator on the case, and Robert Dugoni.³⁵ A recent interview with Dominguez and his mother can be found among EPA videos that tell the stories of environmental crime victims.³⁶

In August 1996, Elias ordered Dominguez and another employee about the same age into a massive tank, 36 feet long and 11 feet high, to clean out what Elias knew to be one to two tons of hardened cyanide-bearing sludge generated at another of his business ventures.³⁷ Despite protests by an older employee that safety gear was required to work inside the confined space, Elias provided none—he merely told the employees to get to work. Forty-five minutes after descending a ladder inside the tank, Dominguez collapsed.³⁸ His

³³ *Id.*

³⁴ *Id.*

³⁵ JOSEPH HILLDORFER & ROBERT DUGONI, *THE CYANIDE CANARY* (Free Press 2004).

³⁶ U.S. Environmental Protection Agency, *EPA Criminal Case File: Scott Dominguez*, YOUTUBE (Nov. 29, 2012), <https://www.youtube.com/watch?v=cfv9asREaFw&feature=youtu.be>.

³⁷ *United States v. Elias*, 269 F.3d 1003, 1007 (9th Cir. 2001).

³⁸ *Id.*

co-workers tried to remove him, but the tank had only one 22-inch manhole that was 11 feet above the sludge.³⁹

When emergency response personnel arrived, Dominguez was in severe respiratory distress and in danger of dying. The fire chief asked whether the tank contained cyanide, but Elias insisted he had no knowledge of the specific contents.⁴⁰ After Dominguez was evacuated to a nearby hospital, the treating physician concluded he might be suffering from cyanide poisoning and called Elias to inquire about the possibility of cyanide in the tank; Elias denied it.⁴¹

The doctor nevertheless asked a life flight helicopter to bring a cyanide antidote kit from a neighboring community and administered the treatment. Dominguez responded positively, although blood tests later showed “extremely toxic levels of cyanide in his body.”⁴² He was irrevocably brain damaged by the incident. After Dominguez’s injury, Elias lied to investigators about having completed a confined space entry permit for the work; created one after the fact and post-dated it; and some weeks later, ordered a new employee to move and bury the same sludge again without safety precautions.⁴³

Elias was indicted on knowing endangerment, RCRA felony disposal, and false statement charges. He was convicted at trial on all counts. In early 2000, he was sentenced to 17 years in prison and ordered to pay Dominguez \$6.3 million in restitution.⁴⁴

On appeal, Elias raised a number of claims related to basic elements of the RCRA’s regulatory scheme—how federal law interacts with authorized state programs, what amount of sampling is sufficient to establish the presence of hazardous waste, etc.—and one issue related to his endangerment conviction: a challenge to the jury instruction regarding *mens rea*.⁴⁵

The jury instruction quoted the statute’s three-part definition of “knowing,” section 6928(f)(1)(A)–(C), and concluded with the statement that “[t]he government does not need to show that the defendant actually intended to harm or endanger any person.”⁴⁶

³⁹ *Id.*

⁴⁰ *Id.* at 1008.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1009.

⁴⁵ *Id.* at 1017.

⁴⁶ *Id.* at 1018.

Citing the Restatement (Second) of Torts, Elias asserted that the law equates “intention” to achieve a given result with actions that are conducted with knowledge of a “substantial certainty” regarding that result.⁴⁷ Thus, he argued the instruction’s final sentence told the jury that the government did not have to prove his intention to harm, while the third prong of the statutory definition told them it did.⁴⁸

After finding that Elias had failed to preserve the issue below, the Ninth Circuit held that, “[a]lthough there [was] potential for confusion here, it d[id] not rise to the level of plain error because it [was] confusion that would only afflict law students or lawyers.”⁴⁹ The jury had not been instructed on the Restatement of Torts, and thus, the Ninth Circuit reasoned that the jurors understanding of “intent” had been the everyday or dictionary definition: “to have in mind as a design or purpose.”⁵⁰ The instruction, therefore, told the jury that “harming the workers did not have to have been Elias’s objective in order for him to be guilty as charged.”⁵¹ “While this instruction [was] not a model of clarity,” said the appellate panel, “and we would not advise its use in the future, it was not plainly erroneous.”⁵²

The circuit affirmed Elias’s conviction and sentence but vacated the restitution order, noting that 18 U.S.C. § 3663 authorizes restitution for Title 18 crimes (and others), but not those under the RCRA. Although the district court subsequently re-imposed the restitution order as a condition of supervised release, Elias died in prison in 2014.

Since *Hansen* and *Elias*, RCRA endangerment convictions have been obtained in only a few additional cases. While none involved worker safety issues in the conventional sense, they did address extreme risks to emergency personnel who responded to underlying fire/hazardous material incidents. *United States v. Fargas* involved an explosion and fire at a large cocaine manufacturing facility in rural upstate New York that nearly triggered a catastrophic detonation that would have undoubtedly killed or injured numerous emergency

⁴⁷ *Id.*

⁴⁸ *See id.* at 1018; 42 U.S.C. § 6928(f)(1)(C) (“A person’s state of mind is knowing with respect to—(C) a 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.”).

⁴⁹ *Elias*, 269 F.3d at 1018.

⁵⁰ *Id.* (citing WEBSTER’S THIRD NEW INT’L DICTIONARY 1175 (1986)).

⁵¹ *Id.*

⁵² *Id.* at 1018–19.

response personnel.⁵³ *United States v. Wyman* was prompted by a fire and explosion in a residential San Fernando Valley neighborhood, caused by the defendant's accumulation of a large cache of toxic materials at his residence, including thousands of rounds of corroded ammunition, highly reactive lead-contaminated waste from shooting ranges, hundreds of pounds of decades-old gunpowder and military M6 cannon powder, and chlorinated solvents.⁵⁴

B. Clean Water Act endangerment

Using the RCRA as a model, Congress added a “knowing endangerment” provision to the CWA in 1987. The CWA provision now shares its predecessor's maximum penalties, as well as its definition of “serious bodily injury.”⁵⁵ The CWA knowing endangerment provision, however, lacks two “special rules” found in the RCRA. As noted, the RCRA states that “[a] person's state of mind is knowing with respect to . . . a 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.”⁵⁶ Congress chose not to include this definition of knowledge in the CWA because the “unusual nature of that subsection has discouraged prosecutions.”⁵⁷

Another “special rule” in the RCRA references standard defenses that are available in criminal cases.⁵⁸ Congress omitted this provision from the CWA's endangerment provision out of a concern that it is “an unnecessary restatement of existing criminal law and only raises a potential for misunderstanding and invites unnecessary litigation.”⁵⁹

Prosecutors began charging CWA endangerment cases soon after enactment of the provision—but with results markedly different from the government's successful record of RCRA prosecutions. In the first case, EPA criminal investigators working with the FBI opened an investigation of a Massachusetts defense contractor that operated a nickel-plating facility and was illegally disposing untreated, spent plating and acid stripping baths into municipal sewers.⁶⁰

⁵³ 99-CR-537 (N.D.N.Y. 1999).

⁵⁴ No. 09-5779(A) (C.D. Cal. 2011).

⁵⁵ See 33 U.S.C. § 1319(c)(3)(A), (B)(iv).

⁵⁶ 42 U.S.C. § 6928(f)(1)(C) (emphasis added).

⁵⁷ S. Rep. No. 99-50, 99th Cong., 1st Sess. at 30 (1985).

⁵⁸ See 42 U.S.C. § 6928(f)(4).

⁵⁹ S. Rep. No. 99-50, at 30.

⁶⁰ *United States v. Borowski*, 977 F.2d 27, 28 (1st Cir. 1992).

The resulting pollution far exceeded the CWA “pretreatment” standards established to prevent industry from creating hazardous conditions in public sewers or damaging sewage treatment plants. The facility’s workers lacked proper safety equipment and suffered “‘daily nose bleeds,’ headaches, chest pains, breathing difficulties, dizziness, rashes, and blisters” from exposure to the toxic liquid and chemical sludge they were directed to pour and scrape into sinks at the factory.⁶¹

John Borowski owned the company and participated in, and personally directed, the dumping. He was aware that the discharges violated the EPA’s pretreatment regulations; lied about them to state water pollution inspectors—falsely claiming he used a hazardous waste disposal company to haul away wastes; and “knew that [his] practices created serious health risks to the employees.”⁶² An indictment initially charged Borowski and his firm with 133 separate CWA crimes over 16 months. A superseding indictment supplanted those charges with two CWA endangerment felonies spanning the same period—one related to the discharges of nickel wastes, and the second related to acids.

After an 18-day trial, the jury returned guilty verdicts on both counts, and Borowski was sentenced to a 26-month prison term and a \$400,000 fine.⁶³ On appeal, however, Borowski pressed an argument he unsuccessfully raised below: a claim that the CWA endangerment provision applies only to dangers posed at or after the point of illegal discharge—in this case, where the company’s sewer drains met municipal sewers on the edge of the property.

The CWA’s endangerment provision, like its RCRA predecessor, requires proof that a knowing violation of the Act’s underlying pollution control requirements occur with knowledge that endangerment would result “thereby.” The First Circuit found that the underlying CWA offenses had not caused the worker endangerment. After all, the court observed,

[t]hey would have been subject to the identical hazards had they been dumping the chemicals into drums or other containers for appropriate treatment under the Act. In that respect, therefore, although the defendants

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 29.

knew that the employees were placed in imminent danger, that danger was not caused by the knowing violation of § 1317 [*i.e.*, CWA pretreatment requirements].⁶⁴

Thus, the court concluded that while “defendants’ conduct here was utterly reprehensible and may have violated any number of other criminal laws . . . it did not violate the knowing endangerment provision of the Clean Water Act.”⁶⁵

Another CWA endangerment case, charged within a few months of *Borowski*, resulted in the conviction of Geronimo Villegas—the co-owner of a Brooklyn, New York, medical laboratory who had repeatedly dumped medical wastes such as blood samples contaminated with hepatitis into the Hudson River. The district court granted a Rule 29 motion, however, accepting Villegas’s argument that the government had not proven his knowledge that the waste dumping would cause imminent danger.⁶⁶

The court acknowledged the statutory language, saying that “a person acts with the requisite degree of knowledge if he possesses ‘actual awareness’ or an ‘actual belief’ that he is placing another person in imminent danger.”⁶⁷ It also recognized that legislators, when creating the CWA endangerment crime, voiced their intention to avoid “discouraging prosecutions” and, therefore, excised from the new law the language found in the RCRA “special rule” providing that “a person’s state of mind is knowing with respect to a 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.”⁶⁸ The Senate Committee had intended that the CWA endangerment provision be “measured against the standard established by prevailing case law, as it is for any other Federal crime sharing the same state of mind element.”⁶⁹

The court concluded that “‘imminent danger’ must mean danger that is a highly probable consequence of a discharge. . . . It is this particular level of danger that the defendant must have known

⁶⁴ *Id.* at 30.

⁶⁵ *Id.* at 32.

⁶⁶ *United States v. Villegas*, 784 F. Supp. 6, 7 (E.D.N.Y. 1991).

⁶⁷ *Id.* at 11 (quoting 33 U.S.C. § 1319(c)(3)(B)).

⁶⁸ *Id.*

⁶⁹ *Id.* (quoting S. Rep. No. 99-50, 99th Cong., 1st Sess., at 30 (1985)).

existed when he discharged the blood vials into the Hudson River.”⁷⁰ Citing the government’s own expert witnesses—both of whom testified about an appreciable but relatively low risk that a passer-by or a swimmer would contract hepatitis from the contaminated blood—the court found that the evidence did “not support the conclusion that when he placed the vials in the Hudson River, Mr. Villegas knew there was a high probability that he was thereby placing another person in imminent danger of death or serious bodily injury.”⁷¹

C. Clean Air Act endangerment

Congress’s 1990 amendments to the Clean Air Act (CAA) included the addition of a criminal endangerment provision. In keeping with its RCRA and CWA antecedents, the CAA provision authorizes up to 15 years of incarceration for those whose knowing release of hazardous pollutants places another person in imminent danger of death or serious bodily injury.⁷² Unlike those earlier statutes, however, the CAA amendments contain not only a felony endangerment provision, but also a misdemeanor, applicable to negligent conduct.⁷³

Another difference from the hazardous waste and water pollution statutes is that proof of a CAA endangerment involves no prerequisite showing that the defendant’s knowing violation of underlying provisions of the Act gave rise to the danger. Instead, the CAA provision criminalizes knowing or negligent “releases into the ambient air [of] any hazardous air pollutant . . . or extremely hazardous substance” that give rise to imminent danger.⁷⁴ The felony provision, however, also states that

[f]or any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4) [relating to negligent endangerment].⁷⁵

⁷⁰ *Id.* at 13 (internal citation omitted).

⁷¹ *Id.*

⁷² 42 U.S.C. § 7413(c)(5)(A).

⁷³ 42 U.S.C. § 7413(c)(4).

⁷⁴ 42 U.S.C. § 7413(c)(4)–(5).

⁷⁵ 42 U.S.C. § 7413(c)(5)(A).

Thus, although the government need not prove—as would be the case in a RCRA or CWA endangerment prosecution—that the defendant knowingly violated an underlying requirement of the Act, it is a complete defense if the polluting activity *complies with* an applicable CAA standard or permit.⁷⁶

The CAA endangerment provision shares the same definition of “serious bodily injury” with its predecessors.⁷⁷ It also contains the same affirmative defenses related to informed consent on the part of endangered persons.⁷⁸ But where the RCRA’s endangerment provision applies to all hazardous wastes, and the CWA provision covers any water pollutant, the CAA provision applies only to specified air pollutants: those deemed “hazardous” under section 112,⁷⁹ and those deemed “extremely hazardous substances” pursuant to a separate environmental statute, the Emergency Planning and Community Right-to-Know Act.⁸⁰

The CAA endangerment provision has been the subject of a much larger body of prosecutions than its two predecessors. This may be because air pollutant releases that endanger workers or others occur with greater frequency than violations of the analogous provisions of the RCRA and the CWA. Alternatively, the greater number of CAA prosecutions may arise from its provision criminalizing negligent (in addition to knowing) endangerment.

Three recent prosecutions illustrate the potentially wide variety of criminal conduct constituting CAA endangerment:

- In early September 2019, Lloyd Robl was sentenced to 12 years’ incarceration for a series of CAA and fraud offenses, the most serious of which was knowing endangerment.⁸¹ Robl falsely represented himself as a licensed asbestos abatement contractor while conducting a long-running illegal asbestos removal and

⁷⁶ United States v. W.R. Grace, 429 F. Supp. 2d 1207, 1229–36 (D. Mont. 2006) (holding that violation of a CAA emissions standard is not an element of a knowing endangerment offense, and compliance with emission standard would be an affirmative defense).

⁷⁷ 42 U.S.C. § 7413(c)(5)(F).

⁷⁸ 42 U.S.C. § 7413(c)(5)(C).

⁷⁹ 42 U.S.C. § 7412.

⁸⁰ See 42 U.S.C. § 11001; 40 C.F.R. Part 355, Appendices A & B.

⁸¹ See News, Western District of Wisconsin, U.S. Dep’t of Justice, Former Asbestos Abatement Contractor Sentenced to 12 Years for Violating Clean Air Act (Sept. 12, 2019).

disposal scheme. He failed to provide adequate protective equipment to his workers, whom he sometimes paid with methamphetamine.⁸² By burning asbestos-containing construction debris on his rural Wisconsin property and spreading the ashes along his property and in the adjacent field, Robl also endangered other individuals—including local firefighters who responded to blazes on the property and were unaware of the asbestos hazards.⁸³

- Later in September, a Montana jury convicted Peter Margiotta, former president and Director of Custom Carbon Processing, Inc., of three felonies, including CAA knowing endangerment.⁸⁴ Margiotta directed the construction and operation of an oil reclamation facility in eastern Montana in ways that allowed hydrocarbon vapors (including hazardous air pollutants hexane and xylene) to be released into ambient air. He ordered the opening of the facility in 2012, despite knowing it lacked appropriate electrical wiring, ventilation, and other safety measures, and in the face of a warning from his project manager that “[they] . . . r[a]n the risk of killing someone, not only [their] operators but also customers.”⁸⁵ In December of that year, while offloading highly volatile natural gas condensate, hazardous vapors reached an ignition source, resulting in an explosion that injured three people and caused extensive damage to the plant. The resulting fire burned for six days.⁸⁶ (Margiotta’s sentencing is scheduled for January 2020.)
- In mid-November 2019, MGP Ingredients, Inc. (MGPI), pleaded guilty to CAA negligent endangerment and agreed to pay a million-dollar criminal fine related to an October 2016 incident in which 4,000 gallons of sulfuric acid were negligently combined with nearly 6,000 gallons of sodium hypochlorite, creating a cloud of chlorine gas that prompted approximately 10,000

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See* News, District of Montana, U.S. Dep’t of Justice, Jury Convicts Former Custom Carbon Processing President of Clean Air Act Violations Stemming From Explosion of Wilbaux Oil Processing Plant (Sept. 27, 2019).

⁸⁵ *See id.*

⁸⁶ *See id.*

Atchison, Kansas, residents to shelter in place, the evacuation of schools, and over 140 people to seek medical attention.⁸⁷

While the misdemeanor provision affords broader use of the CAA provision compared to the water and waste statutes, there are separate provisions of the CAA that exert a contrary influence, complicating proof of mens rea. Subsection 7413(h) effectively increases the mens rea requirements for specified categories of individual defendants. Specifically, with regard to the negligent endangerment provision, subsection (h) states, “Except in the case of knowing and willful violations . . . the term ‘a person’ shall not include an employee who is carrying out his normal activities and who is not part of senior management personnel or a corporate officer.”⁸⁸ Regarding the felony endangerment provision (and other CAA crimes), the subsection provides that “[e]xcept in the case of knowing and willful violations . . . the term ‘a person’ shall not include an employee who is carrying out his normal activities and who is acting under orders from the employer.”⁸⁹

As the legislative history of this provision explains:

These provisions create a new affirmative defense to criminal actions under certain parts of [42 U.S.C. § 7413(c)]. As such, once the government has satisfied its burden to prove a “knowing” violation in the traditional sense, the burden will shift to the person seeking to claim the defense and the defendant must prove that he was acting under his employer’s orders or carrying out normal activities. Only after a defendant has satisfied that burden will the government be required to prove that the defendant’s actions were “willful.” If the defense is successfully asserted and the government successfully overcomes it with a showing of a “willful” violation, criminal penalties shall be applied under [42 U.S.C. § 7413(c)]. . . . The “knowing and willful” standard does not require proof by the government that the defendant knew he was violating

⁸⁷ See News, District of Kansas, U.S. Dep’t of Justice, Atchison Company Agrees to Pay \$1 Million for Violating Clean Air Act (Nov. 18, 2019).

⁸⁸ 42 U.S.C. § 7413(h).

⁸⁹ *Id.*

the Clean Air Act per se. It is sufficient for the government to prove the defendant's knowledge that he was committing an unlawful act.⁹⁰

There is scant case law on the applicability of subsection 7413(h) to the mens rea elements set forth in the CAA's criminal provisions. Federal prosecutors wrestling with these issues will benefit from carefully studying the detailed discussion in the Environmental Crimes Manual published by the Environmental Crimes Section of the Environment and Natural Resource Division. (See Appendix A to the Clean Air Act Chapter.)

Beyond those elevated mens rea requirements, other supposed limitations of the CAA's endangerment provisions have been examined in academic and professional publications.⁹¹ Foremost among these limitations is the statute's requirement that the dangerous emission of hazardous air pollutants be to the "ambient air."

There is no definition of "ambient air" in the statute itself, nor in regulations promulgated under section 112 of the Act, which governs hazardous air pollutants. The EPA, however, has defined "ambient air" under a separate CAA regulatory program relating to National Ambient Air Quality Standards (NAAQS). NAAQS are applicable to a short list of "criteria pollutants" (smog-generating volatile organic compounds and nitrogen oxides, acid-rain producing sulfur-dioxide, particulate matter, carbon monoxide, and lead) that receive special attention due to their nationwide prevalence, often in concentrations that generate chronic adverse health effects. The NAAQS define ambient air as the "portion of the atmosphere, external to buildings, to which the general public has access."⁹²

Defendants facing CAA endangerment charges have attempted to apply this NAAQS definition to their cases in two different ways. First, they have argued that the release of air toxics inside buildings

⁹⁰ 136 Cong. Rec. S.36085 (Oct. 27, 1990).

⁹¹ See John Gibson, *The Crime Of "Knowing Endangerment" Under The Clean Air Act Amendments Of 1990: Is It More "Bark Than Bite" as a Watchdog To Help Safeguard a Workplace Free From Life-Threatening Hazardous Air Pollutant Releases?*, 6 FORDHAM ENVTL. L. J. 197 (1995); Kevin A. Gaynor & Benjamin S. Lippard, *Worker Safety and Criminal Enforcement of Environmental Laws*, ALI-ABA COURSE OF STUDY 455 (2007).

⁹² 40 C.F.R. § 50.1(e).

does not constitute a release into the ambient air, and thus, cannot serve as the basis for an endangerment charge. This claim has arisen repeatedly in prosecutions concerning CAA requirements designed to control asbestos emissions from construction or demolition activity.⁹³

Those regulations mandate specified “work practices” by persons who demolish or renovate buildings erected prior to 1978 in order to prevent the release of asbestos from insulation and other building materials. Compliance with these work practices adds time and expense to a construction budget, creating incentives to engage in what are called “rip and strip” or “rip and run” asbestos jobs—which create significant environmental hazards and simultaneously expose workers to potentially deadly amounts of this well-known carcinogen.

The asbestos control requirements are promulgated under the CAA’s section 112 air toxics authority,⁹⁴ and a knowing violation of those provisions is a felony under 42 U.S.C. § 7413(c)(1). The elements of that crime do *not* include the emission of asbestos (though such emissions almost invariably occur in these cases). Rather, it is sufficient to prove the defendant had knowledge of asbestos and consciously violated the applicable work practice standards designed to prevent the release of that deadly pollutant.⁹⁵

Where asbestos “rip and strip” cases involve egregious worker exposure to this known carcinogen, prosecutors sometimes pursue charges not only for the knowing violation of section 112 regulations, but also for knowing endangerment.⁹⁶ Some district courts have held that if asbestos emissions and consequent danger occurs inside a building, the elements of knowing endangerment have not been met.⁹⁷

Additionally, defendants attempting to apply NAAQS to endangerment cases make an even more ambitious argument to restrict the statute’s applicability by referencing the NAAQS’s

⁹³ See 40 C.F.R. Part 61.

⁹⁴ 42 U.S.C. § 7412.

⁹⁵ See, e.g., *United States v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993) (“The question of emission of an air pollutant to the ambient air is not relevant. The violation of the work practice rule violates the statute.”).

⁹⁶ See, e.g., *United States v. Farmer*, No. 8:13-CR-938 (D.S.C. 2014).

⁹⁷ See *United States v. W.R. Grace*, 455 F. Supp. 2d 1172, 1175 (D. Mont. 2006) (“Both canons of statutory construction and prior case law compel reading ‘ambient air’ to exclude indoor air.”); see also *United States v. Ho*, 311 F.3d 589, 601 (5th Cir. 2002) (“The district court dismissed [a knowing endangerment charge] after a pre-trial hearing.”).

definition statement that ambient air is something “to which the general public has access.” Defendants citing this language argue that endangerment cannot occur “inside the fenceline” of a non-public facility, even where an undisputed release of hazardous pollutants to outside air kills or injures workers. These “fenceline” arguments suffer from multiple flaws.

The fenceline claim is premised on a regulatory definition of “ambient air” that does not apply to hazardous air pollutants, but rather, is specifically intended to govern NAAQS. This argument consequently implicates the Supreme Court’s observation in a recent CAA decision that “[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.”⁹⁸

In other words, the EPA’s definition of “ambient air” for purposes of one CAA regulatory program does not speak to congressional or agency interpretation regarding the meaning of that term in the context of endangerment from air toxics. Consistent with this, the NAAQS’s definitions begin with a statement that addresses terms “as used in this part”—that is, the NAAQS themselves, as opposed to other CAA programs.⁹⁹

Apart from judicial precedent, the “fenceline” argument appears odd and implausible from a common-sense perspective. It effectively asserts that, in adding the endangerment provision to the CAA, Congress intended to exclude from its protection the overwhelming majority of industrial workers across the country—a population facing the greatest risks of death or injury from hazardous air pollutants. That claim is at odds with the broader context of the environmental endangerment provisions discussed above, particularly in light of the fact that the RCRA’s endangerment provision, with its clear worker-safety focus (as represented by the *Protex*, *Hanson*, and *Elias* cases), served as the model for the CAA law.

The statute’s applicability to occupational safety contexts is also indicated by the affirmative defense (found in the CAA provision, as

⁹⁸ *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); see also *W.R. Grace*, 504 F.3d at 756 (holding in the context of a CAA endangerment prosecution regarding asbestos exposures that Congress can “create multiple enforcement mechanisms that each draw on different definitions for the same term”).

⁹⁹ 40 C.F.R. § 50.1.

well as its predecessors) applicable where “the conduct charged was freely consented to by the person endangered and . . . the danger and conduct charged were reasonably foreseeable hazards of . . . an occupation.”¹⁰⁰

Perhaps most important in rebutting the “fenceline” argument, however, is the extensive body of successful CAA prosecutions involving death or injury to workers on non-publicly accessible property. A few examples suffice to make the point:

- Among the earliest CAA endangerment cases was the 1994 prosecution of two individuals who directed a crew of inmate workers to dispose of drug lab and other unknown chemical wastes into a pit at a Parish Corrections Center, generating a chemical cloud that exposed workers to toxins.¹⁰¹
- After a 1997 refinery explosion in Minnesota, the Ashland Oil company was prosecuted for negligent CAA endangerment and paid over \$9 million in criminal fines, restitution to five injured employees, and community service payments.¹⁰²
- A 2001 refinery explosion that killed one worker, critically injured another, and endangered others led to the prosecution of Motiva Enterprises, LLC, on negligent endangerment and other charges, resulting in a \$10 million fine.¹⁰³
- The fatal release of antimony pentachloride from a mislabeled cylinder that a worker attempted to evacuate for reuse led to a negligent endangerment plea by Honeywell International, Inc., which paid a criminal fine of \$8 million, \$2 million in restitution to the victim’s estate, and another \$2 million in community service.¹⁰⁴
- Two executives of a Louisiana refinery received short prison terms after pleading guilty to negligently endangering the company’s workers at their facility.¹⁰⁵

¹⁰⁰ 42 U.S.C. § 7413(c)(5)(C).

¹⁰¹ *United States v. Morgan*, No. 2:94-CR-20051-02 (W.D. La. 1994).

¹⁰² *United States v. Ashland Oil Co, Inc.*, No. CR-02-152 (D. Minn. 2002).

¹⁰³ *United States v. Motiva Ents., LLC*, No. 1:05-cr-00221 (D. Del. 2005).

¹⁰⁴ *United States v. Honeywell Int’l, Inc.*, Crim. No. 07-31-RET-SCR (M.D. La. 2007).

¹⁰⁵ *United States v. Hamilton*, No. 2:11-CR-00130; *United States v. LeBleu*, No. 2:11-CR-00266 (W.D. La. 2011).

- As referenced above, a recent knowing endangerment prosecution in South Carolina involved asbestos “rip and strip” crimes during the demolition of an abandoned textile mill and resulted in a 41-month term of incarceration.¹⁰⁶
- And in late 2016, two petro-chemical companies in Texas pleaded guilty to negligent endangerment and paid a multi-million dollar fine after a tank explosion at their Port Arthur processing facility killed one worker at the plant and severely injured two others.¹⁰⁷

Thus, to the extent that the defense bar has attempted to achieve an occupational zone of immunity from endangerment prosecution, that effort has been unsuccessful. Where the negligent or knowing release of hazardous air pollutants threatens fatal or serious bodily injury to workers, the CAA endangerment provisions are available prosecutorial tools.

D. Endangerment under other statutes

In July 2016, President Obama signed into law the Frank R. Lautenberg Chemical Safety Act for the 21st Century. The Act made significant updates to the Toxic Substances Control Act (TSCA), which had long been viewed as inadequate to the challenge of ensuring the safety of chemicals used in commerce.¹⁰⁸ Felony endangerment penalties were among the new provisions of the statute.

Although it shares its predecessors’ maximum penalties and definition of endangerment, the mens rea element of this new offense differs from the “knowing” standard found in the three major pollution control statutes discussed above. Interestingly, this provision’s mens rea requirement also differs from the “knowing or willful” mens rea language contained in the TSCA’s pre-existing criminal provisions—all of which are misdemeanors enacted in the 1970s.

While earlier versions of the Lautenberg Act included a proposed endangerment felony with a mens rea element mirroring the TSCA’s long-standing definition of a crime as a “knowing or willful” violation, a last-minute amendment altered the provision to criminalize “knowing and willful” endangerment. As discussed above in the CAA

¹⁰⁶ United States v. Farmer, No. 8:13-CR-938 (D.S.C. 2013).

¹⁰⁷ United States v. KTX Ltd., No. 1:16-cr-00075-MAC-KFG (E.D. Tex. 2016).

¹⁰⁸ Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016).

context, a willful standard requires proof beyond a reasonable doubt that the defendant knew his conduct was illegal. The TSCA's new endangerment provision, thus, stands apart from—and is more difficult to prove than—its predecessors.

In the wake of the TSCA's recent amendment, there remains only one major pollution control statute that lacks a criminal endangerment provision—the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The FIFRA's criminal enforcement provisions are of the same early-1970s vintage as those in the OSH Act. And like that statute, the FIFRA contains only misdemeanor penalties—with the notable exception of a provision that threatens up to three years' incarceration for any person who uses or reveals pesticide manufacturing trade secrets acquired during the registration process with intent to defraud.¹⁰⁹

Thus, even the most egregious FIFRA violations—those severe enough to kill or permanently injure multiple victims—do not trigger felony liability. In just the last few years, there have been several cases with such terrible consequences. A 2011 prosecution in the District of Utah involved an illegal residential fumigation that killed two children who were exposed to Fumitoxin applied too close to their home.¹¹⁰

An interview with the victims' parents can be found among the EPA videos telling environmental crime victims' stories.¹¹¹ In 2016, one of the nation's largest exterminating companies and a subcontractor were prosecuted in two separate cases where knowing misapplication of fumigant insecticides caused severe and potentially permanent neurological injuries to members of two different families.¹¹²

Were different types of illegal pollution involved, the deaths and injuries caused by these pesticide crimes might have prompted endangerment prosecutions with the potential for multi-year prison

¹⁰⁹ 7 U.S.C. § 1361(b)(1)–(3).

¹¹⁰ Press Release, U.S. Dep't of Justice, Dist. of Utah, Bugman Pest and Lawn, Inc. and Coleman Nocks Plead Guilty to Unlawful Use of Pesticide (Oct. 11, 2011).

¹¹¹ U.S. Environmental Protection Agency, *EPA Criminal Case File: Rebecca and Rachel Toone*, YOUTUBE (Nov. 29, 2012), <https://www.youtube.com/watch?v=XzAmkfRGFgc&feature=youtu.be>.

¹¹² See *United States v. Terminix Int'l Co., LP*, 3:16 Cr-00010, (D.V.I. 2016); *United States v. Sunland Pest Control Servs., Inc.*, 16-14001 (S.D. Fla. 2016).

terms, but for FIFRA crimes, as with those under the OSH Act, misdemeanors are the only available sanction.

From an occupational safety perspective, agricultural and pesticide industry workers face far greater risks than members of the general population who depend on the safe application of pesticides. The EPA has estimated 10,000 to 20,000 incidents of physician-diagnosed pesticide illnesses and injuries per year in agricultural work but says this figure is likely low due to “serious underreporting.”¹¹³ Absent a FIFRA endangerment provision, those workers remain unprotected by the type of provision Congress has written into each of the other statutes set forth above.

III. The Sentencing Guidelines’ impact on endangerment charging decisions

A. Individual defendants

Although there is a significantly higher number of CAA endangerment prosecutions than those brought under the RCRA and the CWA, environmental endangerment prosecutions remain relatively rare. One might infer from this statistic that the worst sort of environmental crime—intentional actions that violate the law (or release hazardous air pollutants) and predictably place others at risk of serious harm—occurs infrequently.

An alternative and less optimistic inference relates to the treatment of endangerment offenses under the Sentencing Guidelines. Understanding how the Guidelines apply to endangerment offenses is critical to making well-informed choices about whether and how to use these potentially powerful statutes to help ensure protection for workers, communities, and the environment.

The Guidelines for environmental crimes are at section 2Q, and the first of these addresses “Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants.”¹¹⁴ The base offense for felony endangerment is 24. There are no offense characteristics that could further increase the offense

¹¹³ See, e.g., U.S. GOV’T ACCOUNTING OFFICE REPORT TO CONG. REQUESTORS, GAO/RCED-00-40, PESTICIDES: IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARMWORKERS AND THEIR CHILDREN 12 (2000).

¹¹⁴ U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2Q1.1 (U.S. SENTENCING COMM’N 2019).

level. There is only a single application note, stating that “[i]f death or serious bodily injury resulted, an upward departure may be warranted.”¹¹⁵

Thus, absent such an upward departure (and absent offense level increases from the application of Chapter 3 adjustments), the offense level for knowing endangerment will be 24, which for a defendant with no criminal history (as is the norm in many environmental prosecutions), translates to a recommended 51–63 months of incarceration.

Contrast that information with the offense level resulting from the prosecution of a conventional environmental crime, such as the knowing violation of the CWA or the RCRA, which are predicates for endangerment liability. Under section 2Q1.2, the base offense level for the “Mishandling of Hazardous or Toxic Substances or Pesticides” is 8.¹¹⁶ Multiple offense characteristic provisions build on that base level by adding four points for a release or discharge of a toxic or hazardous pollutant into the environment—or 6 if that discharge or release was repetitive;¹¹⁷ adding 4 points if the discharge resulted in the disruption of a public utility, the evacuation of a community, or a cleanup requiring “substantial expenditure” (which case law places in the six-figure range or higher);¹¹⁸ and adding 4 points if the offense involved offense conduct in violation of a permit or without a required permit.¹¹⁹ A major environmental prosecution can implicate each of these provisions, resulting in an offense level (absent Chapter 3 adjustments) of 24—approaching the offense level for knowing endangerment under § 2Q1.1.

But the section 2Q1.2 Guidelines also contain an offense-characteristic provision regarding endangerment, which adds another 9 offense levels. It applies without regard to any knowledge of the danger on the defendant’s part “[i]f the offense resulted in a substantial likelihood of death or serious bodily injury.”¹²⁰ (An application note explains, similar to the note in section 2Q1.1, that “[i]f death or serious bodily injury results, a departure would be called

¹¹⁵ U.S.S.G. § 2Q1.1 app. n.1.

¹¹⁶ U.S.S.G. § 2Q1.2.

¹¹⁷ See U.S.S.G. § 2Q1.2(b)(1).

¹¹⁸ See U.S.S.G. § 2Q1.2(b)(3).

¹¹⁹ See U.S.S.G. § 2Q1.2(b)(4).

¹²⁰ U.S.S.G. § 2Q1.2(b)(B)(2).

for.”)¹²¹ Thus, a conventional environmental felony that results in imminent danger—regardless of whether the defendant knew that danger would occur, which, along with the offense characteristics described above, is a necessary element of a knowing endangerment charge—can result in an offense level of 31. For a defendant without a criminal history, that translates to a recommended incarceration range of 108–135 months. That range is more than double the result for a knowing endangerment sentence calculated under section 2Q.1.1.

The U.S. Sentencing Commission is cognizant of this issue and announced as a priority during a recent Guidelines amendment cycle the “[s]tudy of environmental offenses involving knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides, or other pollutants, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.”¹²²

Absent changes to the Guidelines, however, prosecutors analyzing evidence that would support a knowing endangerment charge should evaluate whether the offense conduct is such that the case can be prosecuted as a conventional environmental crime with a lower burden of proof and result in a higher Guidelines offense level.

Where an environmental crime causes death or serious injury, charging decisions may turn on whether multiple conventional felony convictions are available: A single-count conventional felony conviction in such a case might yield a Guidelines offense level far exceeding the three-to-five year, one-count statutory maximum. With multiple felony convictions, however, the statutory maximum level of incarceration might meet or exceed Guidelines offense levels under section 2Q.1.2 that are higher than those that would apply to a knowing endangerment conviction under 2Q.1.1.

Alternatively, in a case affording no possibility for multi-count, conventional felony convictions yet resulting in death or injury, the 15-year maximum punishment for knowing endangerment may be the only way to obtain the potential for incarceration that is commensurate with the Guidelines recommendations—even under section 2Q.1.1’s lower calculus.

¹²¹ *Id.* at app. n.6.

¹²² Final Priorities for Amendment Cycle, 81 Fed. Reg. 58,004, 58,005 (Aug. 24, 2016).

B. Corporate defendants

A second Guidelines issue relevant to charging strategy in corporate endangerment prosecutions is that the calculation of organizational environmental criminal fines is not subject to the Chapter 8 Guidelines.¹²³ In cases involving corporate defendants with a substantial ability to pay and environmental offenses that cause severe harm, this aspect of the Guidelines effectively places greater relative importance on the maximum fines authorized by the statute(s) of conviction and/or the Alternative Fines Act.

The felony endangerment provisions provide for criminal fines up to \$1 million for organizational defendants—double the amount generally available under the Alternative Fines Act.¹²⁴ By contrast, the conventional environmental felony provisions of the RCRA and the CWA (but not the CAA) authorize \$50,000 fines for each day of the offense. Under those per-day fine provisions, the prosecution of conventional RCRA or CWA felony conduct that continues for three weeks or more will generate a higher statutory maximum fine than would an endangerment charge.

Such fact patterns are all-too common in environmental crimes: A company may illegally store ignitable hazardous wastes for months or even years before a fire or explosion occurs; another may engage in covert discharges to sanitary sewers for weeks or months before releasing a slug of pollutants that poses imminent threat or causes actual harm.

Consequently, prosecutors will need to carefully analyze the potential for maximum fines when preparing an endangerment case. As with the Guidelines provisions regarding incarceration, it may be that more severe (and appropriate) punishment is—counter-intuitively—available through use of “lesser” felonies under the RCRA and the CWA than via a knowing endangerment conviction (at least in a single-count case).

Of course, the statutory maximum fine in any case can, alternatively, be calculated based on the gain or loss from the offense under 18 U.S.C. § 3571(d). For those environmental crimes imposing severe harm—whether in terms of human health or financial damage—this provision may surpass all others in defining maximum fines. In the wake of the Supreme Court’s decision in

¹²³ U.S.S.G. § 8C2.1(B)(2) & cmt.

¹²⁴ See 18 U.S.C. § 3571(c)(3).

Southern Union Co. v. United States,¹²⁵ the gain or loss amount that generates such a fine must be either admitted by a defendant or found as fact by the jury. (The same is true of the days of violation referenced above, which was the sentencing factor at issue in the Southern Union case itself.)

Moreover, subsection (d) states that its gain- or loss-based fines are not available if “imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.”¹²⁶ In contested cases, especially given the need for jury findings, questions about the causation or magnitude of gain or loss may be sufficiently complicated to preclude application of this provision. By contrast, questions regarding the chronological duration of the offense conduct are likely to be more straightforward. In any event, these corporate sentencing factors require careful analysis and a conscious choice regarding the relative merits of an endangerment prosecution versus one that charges conventional felonies.

IV. Crime victims’ rights and endangerment prosecutions

Federal prosecutors are obligated to ensure that victims are treated with dignity and accorded their rights under the CVRA.¹²⁷ When a case involves victims who have been killed or suffered serious injuries, these obligations are at their most acute.

Congress recently amended the CVRA to expand on victims’ long-standing right to confer with the prosecutor: The Justice for Victims of Trafficking Act of 2015¹²⁸ explicitly conferred on victims “[t]he right to be informed in a timely manner of any plea bargain.”¹²⁹ And even before this amendment, some courts had held that the government risked reopening the negotiated resolution of a criminal case if it failed to comply with its conferral obligations before entering into a public plea.

Environmental prosecutions have generated what might seem to be a disproportionate amount of case law regarding victims’ rights, including one of the leading cases on a victim’s right to confer with

¹²⁵ 132 S. Ct. 2344 (2012).

¹²⁶ 18 U.S.C. § 3571(d).

¹²⁷ 18 U.S.C. § 3771.

¹²⁸ Pub. L. No. 114-22 § 113(a)(1), 129 Stat. 240 (2015).

¹²⁹ 18 U.S.C. § 3771(a)(9).

prosecutors. The first CVRA decision in an environmental context, *In re Dean*,¹³⁰ was a mandamus action arising out of the CAA prosecution of a British Petroleum subsidiary related to a refinery explosion that killed 15 people and injured nearly 200.

The victims complained that the United States violated the CVRA by concluding a felony plea agreement with the corporation without providing prior notice to and conferring with the victims. The Fifth Circuit concluded that “Congress made the policy decision—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached.”¹³¹ Acknowledging that complications flow from victim consultation during plea negotiations, the court stated the following:

It is true that communication between the victims and the government could, in the district court’s words, “impair the plea negotiation process,” . . . if, by using the word “impair,” the court meant that the views of the victims might possibly influence or affect the result of that process. It is also true (and we cannot know whether the court considered) that resourceful input from victims and their attorneys could facilitate the reaching of an agreement. The point is that it does not matter: The Act gives the right to confer.¹³²

Another provision of the CVRA likely to play a significant role in endangerment cases is the “right to full and timely restitution as provided in law.”¹³³ This provision does not confer any additional rights to restitution beyond what is already provided in Title 18.¹³⁴ But restitution issues are likely to arise in any endangerment

¹³⁰ 527 F.3d 391 (5th Cir. 2008).

¹³¹ *Id.* at 395.

¹³² *Id.* (internal citation omitted); *see also* *Doe v. United States*, 950 F. Supp. 2d 1262, 1267 (S.D. Fla. 2013) (“the court finds that the CVRA is properly interpreted to authorize the rescission or ‘re-opening’ of a prosecutorial agreement—including a non-prosecution arrangement—reached in violation of a prosecutor’s conferral obligations under the statute”).

¹³³ 18 U.S.C. § 3771(a)(6).

¹³⁴ *See* *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 533 (D.N.J. 2009) (“This provision is not considered to confer substantive rights to restitution.”).

prosecution involving death or injury, and both the law and Department of Justice (Department) policy require prosecutors—like any Department employees engaged in the detection, investigation, or prosecution of crime—to “make their best efforts to see that crime victims . . . are accorded . . . the rights contained in the CVRA.”¹³⁵

As the *Elias* decision demonstrated, restitution for environmental crimes generally does not fall within the provisions of the Mandatory Victims Restitution Act,¹³⁶ nor the provisions of the Victim and Witness Protection Act.¹³⁷ To the extent that an endangerment prosecution also involves Title 18 charges, however, those restitution statutes may indeed apply.¹³⁸ Otherwise, restitution under the RCRA, the CWA, and the CAA will generally be imposed as a condition of probation or supervised release, pursuant to 18 U.S.C. § 3563(b)(2).

Thus, when a business organization is prosecuted for endangerment, a restitution order will be effective immediately upon sentencing. By contrast, where an individual defendant faces a term of incarceration, the restitution order will become effective only at the point of supervised release (absent a negotiated agreement to the contrary).

In an endangerment case involving one or more deaths or injuries, it is easy to imagine issues relating to causation or pecuniary loss that, in a hotly-contested case, could turn sentencing into a mini-trial akin to the damages phase of a tort case. This raises the prospect of tension between the obligation to pursue restitution and the need to ensure other CVRA rights, such as right to be free from unreasonable delay.

One way to avoid such complications is to thoroughly investigate the issues of harm early in the case, even though their proof will not be necessary at trial (unless evidence of loss will be presented to the jury for purposes of obtaining a maximum fine calculated under 18 U.S.C. § 3571(d)). If the criminal case team has assembled a compelling body of evidence regarding the victims’ losses, the defendant may be poorly positioned to contest such calculations. In that event, the plea

¹³⁵ OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 55 (2011) (citing 18 U.S.C. § 3771(c)(1)).

¹³⁶ 18 U.S.C. § 3663A.

¹³⁷ 18 U.S.C. § 3663.

¹³⁸ See, e.g., *United States v. Sawyer*, 825 F.3d 287 (6th Cir. 2016) (where conspiracy to violate CAA’s asbestos requirements necessitated a multi-million dollar cleanup, the defendant committed an offense against property under 18 U.S.C. § 3663A, triggering mandatory restitution).

agreement might contain language akin to that used in a recent FIFRA prosecution discussed above:

The parties agree that there is an identifiable victim who has suffered a physical injury and/or pecuniary loss in this case as defined by Title 18, United States Code, Section 3663 and Section 5E1.1 of the Sentencing Guidelines and that they will jointly recommend that the Court enter a restitution order for the full amount of the victim's loss.¹³⁹

Given the development of the law in this area—both via litigation by victims' advocates (which will doubtlessly continue) and Congress's recent amendments to the statute—prosecutors are well advised to analyze the CVRA issues arising in endangerment prosecutions with the same degree of care they apply to the other legal issues posed by these challenging but critically-important cases.

About the Author

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¹³⁹ Plea Agreement at 8, *United States v. Sunland Pest Control Services Inc.*, No. 2:16-cr-14001-JEM (S.D. Fla. 2016), ECF No. 22.

Worker Safety in Offshore Oil and Gas Exploration and Production—The Outer Continental Shelf Lands Act

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There is no question that working on an oil and gas exploration and production platform at sea, whether floating or fixed to the sea-floor, is a hazardous and dangerous occupation. The grueling work happens on remote, man-made islands, miles from shore. The Centers for Disease Control and Prevention note that oil and gas extraction industry workers (offshore and onshore, combined) “had a collective fatality rate seven times higher than for all U.S. workers (27.1 versus 3.8 deaths per 100,000 workers).”¹ Between 2003 and 2010, there were 128 fatalities in offshore oil and gas operations.² Over the decades, often after disasters that left workers dead and the environment polluted, laws and regulations have been enacted to address these problems, although progress has often been slow and imperfect.

Before 2010, there were very few prosecutions of individuals or corporations working in the offshore industry for violations of regulations or statutes designed to protect the environment or workers’ health and safety. Following the Deepwater Horizon explosion that cost 11 men their lives and spilled millions of barrels of oil into the Gulf of Mexico, however, there have been a number of prosecutions of individuals and companies for violations related to human health and environmental safety in the Gulf.³ One such

¹ *Fatal Injuries in Offshore Oil and Gas Operations—United States, 2003–2010*, MORBIDITY AND MORTALITY WEEKLY REPORT, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 26, 2013).

² *Id.*

³ *United States v. Donald Hudson*, 2:12-cr-115 (E.D. La. Feb. 28, 2012); *United States v. W&T Offshore, Inc.*, 2:12-cr-312 (E.D. La. Dec. 11, 2012);

prosecution involved an explosion on West Delta 32, owned by the now-defunct Black Elk Energy Offshore Operations, LLC (Black Elk), and charged the owner and operator, along with its contractors, for a number of criminal violations under the Outer Continental Shelf Lands Act (OCSLA). This article will provide prosecutors with a history of the OCSLA and discuss the viability of the statute and its regulations for criminal prosecutions in the wake of the Black Elk prosecution.

I. Statutory and regulatory history of OCSLA

The regulatory era for offshore oil and gas operations began as the result of conflict between state and federal sovereignty over submerged land that covered many, many millions of dollars' worth of petroleum. Before 1945, California, Louisiana, and Texas took the position that they had the right to the submerged lands off their coastlines and beyond.⁴ Oil had been discovered in these submerged lands and, the states were issuing leases and permits for drilling.⁵ In 1945, President Truman proclaimed that the federal government regarded “the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States . . .” as appertaining to the United States, “subject to its jurisdiction and control”⁶ Following this proclamation, in a series of cases involving California, Louisiana, and Texas, the

United States v. Helmerich & Payne Int'l Drilling Co., 2:13-cr-238 (E.D. La. Oct. 30, 2013); United States v. Sean Granger, 2:14-cr-252 (E.D. La. Nov. 12, 2014); United States v. Race Addington, 2:15-cr-13 (E.D. La. Jan. 26, 2015); United States v. XPLORE Energy SPV1, Inc., 2:14-cr-202 (E.D. La. March 4, 2015); United States v. Energy Res. Tech. GOM, LLC, 2:15-cr-281 (E.D. La. Nov. 30, 2015); Walter Oil & Gas, Co., 2:15-cr-245 (E.D. La. March 14, 2016); United States v. Champion ES Holdings, Inc., 2:16-cr-160 (E.D. La. Aug. 30, 2016); United States v. Luke Ball et. al., 6:17-cr-35 (W.D. La. Feb. 9, 2017); United States v. Kenneth Johns, 2:17-cr-190 (E.D. La. Oct. 12, 2017).

⁴ Michael McHale, *An Introduction to Offshore Energy Exploration—A Florida Perspective*, 39 J. MAR. L. & COM. 571, 572–73 (2008).

⁵ *Id.* at 573.

⁶ Exec. Order No. 9633, 10 Fed. Reg. 12,305 (1945).

Supreme Court held in favor of the federal government's right to control the submerged lands beyond the states' coasts.⁷

In 1953, in response to these decisions, Congress passed the Submerged Lands Act and OCSLA.⁸ The Submerged Lands Act gave the states title to, and the right to administer and use of, certain lands beneath their waters, to include, for most states, the area within three nautical miles of their coastlines.⁹ The Submerged Lands Act also gave states the rights to the natural resources beneath those submerged lands.¹⁰ The OCSLA was passed to ensure that the federal government maintained the rights and ability to administer the lands and mineral resources of the Outer Continental Shelf (OCS)—those lands beneath the navigable waters beyond the states' boundaries as defined in the Submerged Lands Act.¹¹

In 1978, OCSLA was amended, in part, as a legislative response to the 1969 Santa Barbara oil spill.¹² On January 29, 1969, a natural gas blowout occurred on a Union Oil drilling rig off the California coast, releasing thousands of barrels of oil onto the beaches.¹³ While the blowout was contained relatively quickly, it opened undersea fault lines that continued to spew oil for the remainder of 1969.¹⁴ The Santa Barbara oil spill was, at that time, the worst in the nation's history.¹⁵ This spill was closely followed by other offshore oil spill incidents in the Gulf of Mexico. Among the most significant, on December 1, 1970, Shell Oil Company's Platform 26 in the Gulf of Mexico off the coast of

⁷ *United States v. California*, 332 U.S. 19, 38–39 (1947); *United States v. Louisiana*, 339 U.S. 699, 704 (1950); *United States v. Texas*, 339 U.S. 707, 719–20 (1950).

⁸ See 43 U.S.C. §§ 1301–1315; 43 U.S.C. §§ 1331–1356b.

⁹ 43 U.S.C. § 1311; see 4 *Summers Oil and Gas* § 51:13 (3d ed. 2019 update).

¹⁰ 43 U.S.C. § 1311; see 4 *Summers Oil and Gas* § 51:13 (3d ed. 2019 update).

¹¹ See 4 *Summers Oil and Gas* § 51:13 (3d ed. 2019 update).

¹² Jennifer Larson, *Challenges Under OCSLA and the Future of Offshore Drilling Under the Obama Administration*, 13 *SMU SCI. & TECH. L. REV.* 55, 61 (2009).

¹³ Erin McClam, *1969 Oil Spill Near Santa Barbara Was Galvanizing for Environmentalism*, NBC NEWS (May 20, 2015), <http://www.nbcnews.com/news/us-news/1969-oil-spill-near-santa-barbara-was-galvanizing-environmentalism-n361911>.

¹⁴ *Id.*

¹⁵ *Id.*

Louisiana exploded and caught fire, killing 4 people and causing 37 others to suffer serious burns.¹⁶

The OCSLA amendments were made, in part, “to balance orderly energy resource development with protection of the human, marine, and coastal environments,” and “to encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments.”¹⁷ While signing the OCSLA amendments into law, President Jimmy Carter stated that the bill “mandates significant changes in existing law to improve environmental safeguards . . . and to ensure safe working conditions for those employed on the OCS.”¹⁸

Following the 1978 amendments, the Department of the Interior’s Mineral Management Service (MMS) was the primary agency developed for oversight of leasing, permitting, operations, and collection of revenues from offshore activity. At this time, safety and environmental management systems for operators were voluntary. In 2006, critics called for restructuring MMS to avoid conflicts of interest and improve offshore operators’ safety and environmental management systems, but to no avail.¹⁹ Then, on April 20, 2010, the Deepwater Horizon explosion, which resulted in 11 workers’ deaths and the discharge of nearly 5 million barrels of oil into the Gulf of Mexico, prompted congressional and executive inquiries into the safety and environmental management of the offshore oil industry.²⁰ BP Exploration and Production Inc. pleaded guilty to 11 counts of felony manslaughter, obstruction of Congress, and violations of the Clean Water Act and Migratory Bird Treaty Act and was sentenced to

¹⁶ *Shell Platform 26*, INCIDENT NEWS, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., <https://incidentnews.noaa.gov/incident/6211> (last visited Sept. 14, 2016).

¹⁷ 43 U.S.C. § 1802(1), (2).

¹⁸ Jimmy Carter, *Outer Continental Shelf Lands Act Amendments of 1978 Statement on Signing S. 9 Into Law* (Sept. 18, 1978), THE AMERICAN PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/243108>.

¹⁹ See David M. Hunter & Kara McQueen-Borden, *From Santa Barbara to Macondo to SEMS*, 4 LSU J. OF ENERGY L. & RESOURCES 223, 247–48 (2016).

²⁰ See generally NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING REPORT TO THE PRESIDENT (2011).

pay \$4 billion in criminal fines and penalties.²¹ Transocean Deepwater Inc., one of the contractors onboard the Deepwater Horizon, pleaded guilty to violating the Clean Water Act and was sentenced to pay civil and criminal penalties of \$1.4 billion.²²

Although the House passed the Consolidated Land, Energy, and Aquatic Resources Act (CLEAR Act), which would have eliminated the MMS and increased the liability limits for oil spill cleanup, the Senate rejected the bill.²³ The Department of the Interior, however, took its own action and abolished MMS, splitting its revenue collection, permitting and leasing, and safety and environmental oversight duties into three separate agencies. Safety and environmental enforcement for offshore oil and gas operations is now overseen by the Bureau of Safety and Environmental Enforcement (BSEE); permitting and leasing is governed by the Bureau of Ocean Energy Management (BOEM); and revenue collection is administered by the Office of Natural Resource Revenue (ONRR).²⁴

The Department of the Interior also made mandatory the safety and environmental management programs that had previously been voluntary. In October 2010, the Safety and Environmental Management System (SEMS) rule, otherwise known as the Workplace Safety Rule, was issued, requiring OCS operators to institute the previously voluntary practices recommended in the American Petroleum Institute's (API) Recommended Practice 75 (RP 75).²⁵ The Workplace Safety Rule includes, among other things, requirements that operators have programs and/or policies in place to assess facility-level risk, implement a management of change protocol, establish safe work practices, conduct safety and technical training for

²¹ Press Release, U.S. Dep't. of Justice, BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012).

²² Press Release, U.S. Dep't. of Justice, Transocean Agrees to Plead Guilty to Environmental Crime and Enter Civil Settlement to Resolve U.S. Clean Water Act Penalty Claims from Deepwater Horizon Incident (Jan. 3, 2013).

²³ See H.R. 3534, 111th Cong. (2010) (CLEAR Act).

²⁴ *History*, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, <https://www.bsee.gov/who-we-are/history> (last visited Nov. 12, 2019).

²⁵ *Safety and Environmental Management Systems (SEMS) Fact Sheet*, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, <https://www.bsee.gov/site-page/fact-sheet> (last visited Nov. 12, 2019).

employees and contractors, and maintain mechanical integrity of equipment.²⁶ The SEMS II rule, which was made final on April 5, 2013, augments the 2010 Workplace Safety Rule. The SEMS II rule requires that operators establish “stop work authority” procedures authorizing personnel to stop potentially dangerous activities and “ultimate work authority” procedures clarifying who can exercise decision-making authority.²⁷

Despite the OCSLA having contained a criminal provision since its original passage in 1953, before the Deepwater Horizon explosion, enforcement of the OCSLA’s health, safety, and environmental regulations was generally limited to civil penalties. Those civil penalties had only been issued against lessees and operators, regardless of the degree to which the violations were the fault of their contractors. The Deepwater Horizon tragedy made clear that contractors, and any others performing work on the OCS, should also be held accountable when their work was performed in violation of the OCSLA’s health, safety, and environmental regulations. In 2011, BSEE started to impose civil penalties on contractors. Some contractors, including Island Operating Co., Inc., which was cited for causing a chemical spill and fire that resulted in a discharge of oil to the Gulf of Mexico, challenged the imposition of the penalties. The Interior Board of Land Appeals (IBLA) determined that contractors could be liable under OCSLA regulations.²⁸ Island Operating appealed that decision to the district court for the Western District of Louisiana. The district court determined that contractors could not be liable for civil penalties.²⁹

²⁶ Hunter & McQueen-Borden, *supra* note 19, at 249 (citing Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Safety and Environmental Management Systems, 75 Fed. Reg. 63,610 (Oct. 15, 2010)); *see also* 30 C.F.R. pt. 250, subpt. S.

²⁷ Hunter & McQueen-Borden, *supra* note 19, at 252–53 (citing Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Revisions to Safety and Environmental Management Systems, 78 Fed. Reg. 20,423, 20,424 (Apr. 5, 2013)); *see also* 30 C.F.R. pt. 250, subpt. S.

²⁸ Island Operating Co., Inc., 186 IBLA 199, 212 (2015).

²⁹ *See* Island Operating Co. Inc. v. Jewell, et al., No. 6:616-cv-00145, 2016 WL 7436665, at *8 (W.D. La. Dec. 23, 2016) (trial ruling).

III. The *Black Elk* case and its impact

In November 2012, as a result of an explosion caused by negligent welding operations, three workers were killed on the Black Elk West Delta 32 oil production platform off the coast of the Eastern District of Louisiana.³⁰ Three years later, criminal charges were brought against Black Elk; two of its contractors, Wood Group PSN and Grand Isle Shipyards, Inc.; and three individual supervisors on the platform.³¹ Citing the Department of the Interior's history of non-enforcement against contractors, the recent district court victory in the unrelated Island Operating case regarding civil penalties for failure to perform in a workmanlike manner and challenging how the regulations defined who was responsible for compliance, the contractors moved the district court in the Eastern District of Louisiana to dismiss the OCSLA charges against them. The district court found in favor of the contractors.³²

Both the Island Operating and Black Elk contractor cases were appealed to the Fifth Circuit Court of Appeals.³³ The criminal case

³⁰ Rick Jervis, *4 Injured, 2 Missing In Gulf Oil Rig Fire*, USA TODAY (Nov. 16, 2012), <https://www.usatoday.com/story/news/nation/2012/11/16/gulf-oil-rig-dead-fire-louisiana/1709131/>.

³¹ Superseding Indictment, *United States v. Black Elk Energy Offshore Operations, LLC et al.*, No. 2:15-cr-00197, 2015 WL 10435616 (E.D. La. Nov. 19, 2015). Black Elk was the owner and operator of the platform. Black Elk contracted with Wood Group to provide manpower for regular operations on the platform, including a "Person-In-Charge" whose role included overseeing compliance with safety requirements. Black Elk contracted with Grand Isle Shipyards to provide a construction crew for a series of platform reconfiguration projects, one of which required the welding that led to the explosion. *Id.*

³² Order on Motion To Dismiss, *United States v. Black Elk Energy Offshore Operations, LLC*, No. 2:15-cr-00197, 2016 WL 1458925 (E.D. La. Apr. 14, 2016).

³³ A criminal fine of \$4.2 million was assessed against Black Elk after it pleaded guilty to 11 felony violations of the OCSLA for failing to properly conduct pre-hot work inspections, failing to render piping safe, failing to obtain proper written authorization prior to conducting hot work, and for violating the Clean Water Act. Press Release, U.S. Dep't of Justice, *Black Elk Energy Offshore Operations LLC. Convicted of Worker Safety and Clean Water Act Violations in Connection to Offshore Explosion* (Aug. 31, 2017). Before the plea, Black Elk went into bankruptcy and did not emerge as a

against the Black Elk contractors was heard first and the Fifth Circuit found that the regulations did not allow for contractors to be held criminally liable. The court largely adopted the appellant-contractors' reasoning. The regulations under the OCSLA are drafted as though the agency is in conversation with the regulated community, with the section titles formulated as questions and the standards drafted as answers directed to "you."³⁴ The Fifth Circuit held that, because the regulations defined "you" as "a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee" and did not specifically list "contractors" within the definition of "you," the appellant-contractors were not covered by the regulations.³⁵ The court went on to reason that if contractors were not included in "you" within the regulations, then they could not be included within "any person" who could be criminally penalized for "knowingly and willfully violat[ing] 'any regulation'" under section 1350(c)(1).³⁶ The court further opined that the lack of prior enforcement actions by the government against contractors corroborated its interpretation.³⁷

The practical impact of the *Black Elk* ruling means that, under the current set of regulations, only the corporate owner or lease holder of an offshore oil and gas facility faces the prospect of criminal liability for the actions of their employees, agents, or contractors that violate OCSLA regulations. The Fifth Circuit opinion effectively prohibits charging any contractor company or contract employee under

going concern. Wood Group PSN, which provided the personnel for the day-to-day operation of the West Delta 32 platform, agreed to transfer venue to the Western District of Louisiana and pleaded guilty to violating the Clean Water Act and was sentenced to pay a total criminal penalty of \$2 million. *United States v. Wood Group*, 6:16-cr-192 (W.D. La. 2016). In the same district, Wood Group PSN also agreed to pay a criminal penalty of \$9.5 million after pleading guilty to making a false statements in inspection reports to BSEE. *United States v. Wood Group*, 6:16-cr-145 (W.D. La. 2016); Press Release, U.S. Dep't of Justice, Company to Pay \$9.5 Million for False Reporting of Safety Inspections and Clean Water Act Violations That Led to Explosion in Gulf of Mexico (Feb. 23, 2017). The reports claimed that certain safety inspections were performed on offshore platforms when, in fact, they were never done.

³⁴ See 30 C.F.R. §§ 250.101–250.197.

³⁵ *United States v. Moss*, 872 F.3d 304, 310–12 (5th Cir. 2017).

³⁶ *Id.* at 309.

³⁷ *Id.* at 312.

43 U.S.C. § 1350(c)(1) for his own negligent, grossly negligent, or intentional violation of OCSLA regulations “designed to protect health, safety, or the environment or conserve natural resources.” The court left open the possibility that the BSEE could update the regulations to clarify that the regulations, and the penalties for violating them, apply to contractors and other persons, noting, “we assume *arguendo*, without deciding, that [the OCSLA] may expose contractors and subcontractors to criminal liability, and move on to the issue of whether the regulations can support this criminal indictment.”³⁸ The appeal in the civil matter was dismissed without hearing after the Fifth Circuit published its opinion in the *Black Elk* appeal.³⁹

Importantly, the decision did not suggest that the OCSLA could not be used to bring criminal charges against contractors or individuals who make false statements in any record or report required to be maintained under the OCSLA (43 U.S.C. § 1350(c)(2)), tamper with a monitoring device or method or record required to be maintained under the OCSLA (43 U.S.C. § 1350(c)(3)), or reveal confidential data or information (43 U.S.C. § 1350(c)(4)). Those provisions do not hinge on a violation of a regulation.⁴⁰ While 18 U.S.C. § 1001 and the Clean Water Act may be a substitute for an OCSLA false statement or tampering charge in certain circumstances, the maximum statutory term of imprisonment is higher under the OCSLA. A violation of section 1350(c) carries a term of imprisonment of not more than ten years and/or a fine of not more than \$100,000. Furthermore, under the OCSLA, each day that a regulatory or permit violation persists under section 1350(c)(1) or that a monitoring device or data recorder remains inoperative or inaccurate because of falsification or tampering under section 1350(c)(3) is considered a separate violation. The provision mandating that such violations be treated as separate violations is particularly significant when it comes to enforcement of violations of

³⁸ *Id.* at 309–10.

³⁹ Clerk Order Granting Motion to Dismiss Appeal Pursuant to Fed. R. App. P. 42 Filed by Appellants, Island Operating Co., Inc. v. Jewell, No. 17-30440 (5th Cir. Dec. 18, 2017).

⁴⁰ Prior to the *Black Elk* prosecution, a coil tubing operator working for a contractor on an offshore platform pleaded guilty to 43 U.S.C. § 1350(c)(3). See *United States v. Granger*, 2:14-cr-252 (E.D. La. Nov. 12, 2014); Press Release, U.S. Dep’t of Justice, Man Sentenced for Tampering with Blowout Preventer Testing Records (Mar. 18, 2015).

produced water sampling and blowout preventer testing, two common and difficult to detect violations in the offshore energy industry.⁴¹ A tampering violation under the Clean Water Act (33 U.S.C. § 1319(c)(4)) only carries a fine of \$10,000 and/or imprisonment of not more than two years. A knowing violation of a permit under the Clean Water Act (33 U.S.C. § 1319(c)(2)) carries a \$5,000 to \$50,000 fine and/or a term of imprisonment of not more than three years. Furthermore, the Clean Water Act does not cover tampering with a blowout preventer which is the last line of defense for the platform in the event of a well control incident.

The Administration has sought to expand offshore drilling and exploration along the Atlantic and Pacific seaboard, Gulf of Mexico, and Alaska.⁴² A recent decision from the District of Alaska vacated section 5 of Executive Order 13,795, which had opened up many areas for oil and gas leasing.⁴³ The Administration has since reportedly paused its offshore drilling plan and appealed the decision.⁴⁴ Regardless of whether offshore oil and gas drilling will be expanded, concerns over workplace and environmental health and safety will continue to be present. This, combined with the Fifth Circuit's ruling in *Black Elk*, will require prosecutors to monitor the legal landscape and carefully consider what kinds of cases and remedies are appropriate to pursue to encourage safe work practices and deter bad practices on the OCS.

⁴¹ See Press Release, U.S. Dep't of Justice, Oil Company Sentenced for Multiple Felonies Related to Violations of Offshore Oil Production Safety and Environmental Regulation (Apr. 6, 2016).

⁴² Exec. Order No. 13,795 (Apr. 28, 2017).

⁴³ League of Conservation Voters et. al. v. Trump et. al., 363 F. Supp. 3d 1013, 1020 (D. Alaska 2019); Order Granting Mot. To Consolidate and Set Briefing Schedule, League of Conservation Voters et al. v. Trump et al., No. 19-35460 (9th Cir. Sept. 3, 2019), ECF No. 10 (further directing the clerk "to calendar these consolidated cases during the week of June 1–5, 2020").

⁴⁴ See Alan Neuhauser, *Trump Administration Halts Offshore Drilling Plan*, U.S. NEWS & WORLD REPORT (Apr. 25, 2019), <https://www.usnews.com/news/national-news/articles/2019-04-25/trump-administration-halts-offshore-drilling-plan>.

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Note from the Editor-in-Chief

Worker safety. For a bygone era, those words might conjure up images of the deadly Triangle Shirtwaist Factory fire.¹ But today, as this issue of the *DOJ Journal of Federal Law and Practice* demonstrates, “worker safety” encompasses much more—mining and drilling safety, hazardous materials, and pollution to name just a few topics. This issue’s authors are all subject-matter experts who have devoted their careers to insuring the safety of America’s work force.

Special thanks go out to Lana Pettus and Deborah Harris, who were not only authors, but also points of contact in recruiting our experts and developing articles for this issue. As always, I’m privileged to work with the Office of Legal Education Publications team—Managing Editor Addison Gantt, Associate Editors Gurbani Saini, and Phil Schneider, and our law clerks—who spent countless hours putting this issue together. And thanks to all the folks inside and outside the Department of Justice who support this publication. We couldn’t do it without you!

Chris Fisanick
Columbia, South Carolina
March 2020

¹ *Triangle Shirtwaist Factory fire*, https://en.wikipedia.org/wiki/Triangle_Shirtwaist_Factory_fire (last visited March 2, 2020).