UPPING THE ANTE: DOJ PROSECUTING OSHA CASES AS ENVIRONMENTAL CRIMES

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Environmental, Land and Natural Resources Alert

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In December of 2015 the Department of Justice ("DOJ") and the Department of Labor jointly announced an expansion of the "Worker Endangerment Initiative" to address violations of worker safety and environmental laws.[1] In conjunction with that announcement, Deputy Attorney General Sally Q. Yates sent a December 17, 2015 memorandum to all 93 U. S. attorneys across the country urging federal prosecutors to work with the Environmental Crimes Section of DOJ to, among other things, prosecute worker endangerment violations under environmental laws.[2] One of the primary reasons for this effort was an acknowledgement that violations of Occupational Safety and Health Administration ("OSHA") requirements were punishable only as misdemeanor, while violations of many environmental requirements were punishable as felonies.

Until now, this type of cooperative enforcement effort has been greeted with skepticism. Since as early as 1980 the United States Environmental Protection Agency ("EPA") and OSHA have entered into multiple Memoranda of Understanding to coordinate their enforcement work.[3] In 2006, the DOJ lauded its prosecution of McWane, Inc., noting that it was the centerpiece of the Department's "worker endangerment activities."[4] Now it appears that federal prosecutors in the DOJ and U.S. Attorneys Offices are following through with that initiative.

In a case recently settled in Texas[5], contract workers had begun welding on a pipeline connected to a tank used to store petroleum products at a chemical and petroleum processing facility in Port Arthur, Texas. According to the DOJ, those workers were authorized to undertake that work by the facility's owner through the owner's issuance of a "hot work permit" pursuant to OSHA regulations. The DOJ alleged that the tank had not been drained, isolated, and decontaminated as required by OSHA regulations and that the "hot work permit" had been issued by the company based on falsified information. The welding caused vapors in the pipeline and tank to ignite and the tank to explode. DOJ further alleged that due to the owner's failure to properly test, inspect, and maintain the tank, the collapsing tank caused severe injuries to two contract workers and the death of a third contract worker.

Ordinarily, such a tragic occurrence would seem to leave the owner potentially liable under OSHA for failure to assure, so far as possible, that workers are not exposed to dangerous working conditions. After all, that is the goal of the OSHA regulations which the owner's alleged actions would appear to violate.[6]

Rather than prosecute the owner/operator of the facility for alleged violations of OSHA laws and standards, they were prosecuted for environmental crimes, in this case for "negligently releasing to the ambient air a hazardous air pollutant and at the time negligently placing another person in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 7413(c)(4) [Section 113(c)(4) of the federal Clean Air Act]".[7] While relevant facts were alleged, the Information filed with the court does not include any charges directly alleging violations of

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the OSHA Act or regulations. Ultimately, the Defendants in the Port Arthur tank explosion case agreed to plead guilty to the allegations in the Information and collectively pay US$3.5 million in fines.

Based on the 2015 Initiative, and this case as a recent example, industries experiencing serious worker injuries and/or worker deaths may expect the DOJ to utilize environmental statutes to enforce what would otherwise appear to be worker safety violations.

NOTES:

[1] Press Release, Dept. of Justice,The Departments of Justice and Labor Announce Expansion of Worker Endangerment Initiative to Address Environmental and Worker Safety Violations (Dec. 17, 2015). https://www.justice.gov/opa/pr/departments-justice-and-labor-announce-expansion-worker-endangerment-initiative-address

[2] Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Dept. of Justice, on Prosecutions of Worker Safety Violations (Dec. 17, 2015). https://www.justice.gov/enrd/file/800431/download

[3] Memorandum ofUnderstanding between the Office of Pesticides and Toxic Substances, U.S. Environmental Protection Agency and OSHA, U.S. Department of Labor (Jan. 19, 1981) (focusing on exchange of information under TSCA). General working relationships between OSHA and EPA office of Pesticides and Toxic substances. | Occupational Safety and Health Administration
Memorandum of Understanding between the Office of Pesticides and Toxic Substances, U.S. Environmental Protection Agency and OSHA, U.S. Department of Labor (Nov. 23, 1990) (focusing on statutes). To improve the working relationship between EPA and OSHA. | Occupational Safety and Health Administration
Memorandum of Understanding between the Office of Pesticides and Toxic Substances, U.S. Environmental Protection Agency and OSHA, U.S. Department of Labor (Feb. 13, 1991) (focusing in industries - petroleum, inorganic chemicals and plastics). Working Relationships between OSHA and EPA. | Occupational Safety and Health Administration
Memorandum of Understanding between the Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency and OSHA, U.S. Department of Labor on Chemical Accident Investigation (focusing on investigations by the Chemical Safety Board). Chemical Accident Investigation. | Occupational Safety and Health Administration
See also EPA/OSHA Joint Accident Investigation Program Fact Sheet (focusing on investigations by the Chemical Safety Board) Document Display | NEPIS | US EPA

[4] U.S. Dept. of Justice, Environmental & Natural Resources Division, Summary of Litigation Accomplishments Fiscal Year 2006, at 2 (discussing *United States v. Atlantic States Cast Iron Pipe Co.*), https://www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/ENRD_2006_Accomplishments_Report_508.pdf

[5] *United States of America v. KTX Ltd.*, Cause No. 1:16-CR-75 (Eastern Dist. of Tex. Beaumont Division, 2016).

[6] 29 USC §651(b).

[7] A knowing violation of a Federal Operating Permit at another facility was also alleged based on facts unrelated to the explosion.

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