WHEN REGULATORY UNIVERSES COLLIDE: ENVIRONMENTAL REGULATION IN THE WORKPLACE

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INTRODUCTION

On both the federal and state levels, prosecutors increasingly are using environmental laws instead of the Occupational Safety and Health Act (OSH Act)[1] to prosecute employers causing or threatening to cause the death or serious injury of their employees. Environmental laws are supplanting the OSH Act because, unlike the relatively modest penalties contemplated by traditional workplace safety law, environmental statutes carry the possibility, not only of substantial pecuniary penalties, but also of felony convictions and lengthy incarceration. There is more than a modicum of irony in the fact that the prosecutors who are vigorously enforcing workplace safety standards appear to have all but abandoned the OSH Act.

This intersection of the formerly distinct spheres of environmental regulation and workplace safety regulation emerged from developments in interagency coordination and state and federal regulations. This interplay of environmental and workplace regulation is of particular consequence to businesses dealing with hazardous substances, because even routine workplace safety incidents may subject an employer and its management structure to increased scrutiny in both the safety and the environmental spheres.

The trend combining the workplace safety and environmental regulatory spheres took on new significance with the May 2005 announcement of a major federal inter-agency initiative

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[1] Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (2000).

(Initiative)[2] whereby workplace safety violations would be enforced through the use of environmental statutes. The Initiative, spearheaded by the United States Department of Justice (DOJ), the United States Department of Labor Occupational Safety and Health Administration (OSHA), and the United States Environmental Protection Agency (EPA), seeks to increase the prosecution of workplace safety violations by improving training and coordination among the involved agencies. The trend is not limited to the federal government; New York's Attorney General recently unveiled a similar initiative using state environmental laws.[3]

Although the Initiative was announced only earlier this year, DOJ has been employing this strategy in the New York/New Jersey/Delaware area since at least 2003. In regional "pilot" cases brought after the death or serious injury of employees, the DOJ has relied on environmental laws—and ignored the OSH Act—to obtain millions of dollars in criminal penalties and lengthy incarceration sentences. A March 2005 settlement arising from an explosion in Delaware resulted in a $10 million criminal fine, while, in a New York asbestos case decided in December 2004, DOJ secured the two longest prison sentences for an environmental crime in American history.[4] Also, in December 2003, an indictment was issued against a New Jersey pipe foundry and five executives alleging substantive violations of, and conspiracy to violate, numerous environmental laws.[5] Despite their common thread of workplace safety violations, none of these recent cases involve alleged OSH Act violations.

Part I of this Article examines the historical underpinnings of the Initiative, in order to put into context the federal government's newest litigation strategy for addressing workplace safety violations. Indeed, the theoretical basis of the workplace-environmental intersection can be seen in an earlier alliance between OSHA and EPA, as memorialized by two Memoranda of Understanding entered into by the agencies in the 1990s.[6] In addition, federal statutes such as the Resource

[2] Discussed *infra* at pages 19–24.

[3] *See infra* notes 199–207.

[4] *See infra* text accompanying note 175.

[5] *See infra* text accompanying notes 194–96.

[6] MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION AND THE U.S.

Conservation and Recovery Act,[7] the Oil Pollution Act,[8] and the Clean Air Act[9] have evolved from strictly environmental legislation into tools used to prevent and punish incidents of worker injury caused by exposure to hazardous substances. Other environmental laws, such as the Emergency Planning and Right-to-Know Act,[10] have opened the door to citizen lawsuits for safety violations, and various federal and state environmental regulations now require certain employers to assess and improve the adequacy of the equipment and training provided to employees who are responsible for responding to, among other things, a release of hazardous waste.

Part II explains the Initiative as well as the similar initiative announced in New York State, and the most recent cases brought thereunder. The public statements issued by federal and state prosecutors, together with the fact that OSH Act violations have not been alleged in the most recent cases triggered by employee injury or death, indicate that use of environmental statutes to punish serious workplace safety offenses is supplanting enforcement under the OSH Act.

I. HISTORICAL UNDERPINNINGS OF THE INITIATIVE

A. *The OSHA-EPA Connection*

In November of 1990, OSHA and EPA entered into a Memorandum of Understanding (MOU), the stated purpose of which is to:

> [I]mprove the combined efforts of the agencies to achieve

ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF ENFORCEMENT (Nov. 23, 1990) [hereinafter MOU], *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=237; MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE AND THE UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, ON CHEMICAL ACCIDENT INVESTIGATION, *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=246 (Dec. 1, 1996) [hereinafter CHEMICAL MOU].

[7] Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992 (2000).

[8] Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2761 (2000).

[9] Clean Air Act, 42 U.S.C. §§ 7401–7671 (2000).

[10] Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001–11050 (2000).

> protection of workers, the public, and the environment at facilities subject to EPA and OSHA jurisdiction . . . [and] to provide guidelines for coordination of interface activities between the two agencies with the overall goal of identifying and minimizing environmental or workplace hazards.[11]

In the MOU, OSHA and EPA acknowledge that although some of their responsibilities are distinct, others are complementary. Where the agencies recognized complimentary responsibilities, they committed to "work together to maximize the efforts of both agencies to ensure the efficient and effective protection of workers, the public, and the environment."[12]

The authors believe the MOU is significant because it was the first time that high-level officials in both OHSA and EPA publicly recognized that the two agencies had compatible interests. The five separate general operating procedures for OSHA-EPA interagency activity set forth in the MOU deserve mention because they were a means to coordinated activity by the agencies, even though it is unclear to what extent, if any, the procedures were put into practice.

First, the MOU requires "the fullest possible cooperation and coordination . . . at all organizational levels" between the agencies regarding referrals of alleged violations and other enforcement-related activities.[13] Pursuant to the MOU, the agencies were to develop a joint annual workplan identifying and defining interagency enforcement priorities.[14]

Second, OSHA and EPA agreed to conduct joint inspections, including ad hoc inspections, in response to an accident or injury to workers that is reported to either agency.[15] Third, the MOU requires the agencies to develop a regular system to manage referrals of potential violations and situations requiring inspection or follow-up by either agency.[16] Accordingly, if either agency learns (either through a complaint, inspection, or investigation) of matters that appear to fall within the other agency's purview, that matter would be reported to the other agency.[17] The MOU sets

[11] MOU, *supra* note 6, § I.
[12] *Id.* § II.
[13] *Id.* § III(A)(1).
[14] *Id.* § III(A)(2).
[15] *Id.* § III(B)(1).
[16] *Id.* § III(C)(1).
[17] *Id.* § III(C)(2)–(5).

forth the following examples of matters that OSHA (or its state counterparts, if applicable) would report to EPA:

a. Worker allegations of significant adverse reactions to a chemical or chemical substance which poses a potential hazard to public health or the environment
b. Accidental, unpermitted, or deliberate releases of chemicals or chemical substances beyond the workplace
c. Unsafe handling, storage, or use practices involving chemicals, chemical substances, or waste materials in apparent violation of EPA-administered laws
d. Other readily detectible potential violations of EPA-administered laws, such as the by-passing of treatment systems
e. Asbestos dispersal or contamination affecting the public or the environment[18]

The fourth MOU operating procedure facilitates the sharing of data between OSHA and EPA.[19] And finally, pursuant to the fifth MOU procedure, the agencies must develop and conduct periodic training programs for each other's personnel regarding their respective laws and regulations.[20] Thus, while the extent to which the MOU's five procedures were implemented is difficult to ascertain, it appears to the authors that the MOU represents the earliest articulation of the convergence of the formerly distinct regulatory spheres of workplace safety and environmental protection.

Generally speaking, EPA is empowered to investigate chemical accidents pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 104(e)[21] and Clean Air Act (CAA) §§ 103, 112, 114, and 307.[22] In December 1996, OSHA and EPA entered into a second MOU (the Chemical MOU) designed to coordinate their investigation of the "root cause" of major chemical accidents and, where appropriate,

[18] *Id.* § III(C)(3).
[19] *Id.* § III(D).
[20] *Id.* § III(E).
[21] 42 U.S.C. § 9604(e) (2000). CERCLA is triggered when any hazardous substance is released or there is a substantial threat of such a release into the environment, or when there is a release or substantial threat of release into the environment of any pollutant or contaminant that may present an imminent and substantial danger to the public health or welfare. *Id.* § 9604(a)(1).
[22] *Id.* §§ 7403, 7412, 7414, 7607.

to issue reports recommending preventative measures.[23] As highlighted in the Chemical MOU, "[m]uch of the information required to meet the objectives of the two agencies is similar. Therefore, it is in the best interests of the government and the public that investigations and information-gathering be conducted in the most efficient and effective manner possible, with minimum duplication of activities."[24]

The Chemical MOU applies to any chemical release: (i) resulting in human death or the hospitalization of at least three workers or other persons; (ii) causing property damage in excess of $500,000; (iii) presenting "a serious threat to worker health or safety, public health, property, or the environment"; or (iv) causing "significant off-site consequences" such as large-scale evacuations, closing of major transportation routes, substantial environmental contamination, or a chemical release that "is an event of significant public concern."[25]

Like the MOU, the Chemical MOU outlines a number of measures intended to better facilitate OSHA-EPA investigation and enforcement. First, the agencies must immediately inform each other of any chemical accident not already reported to the National Response Center hotline.[26] Once on-site, the agencies must determine whether the event merits a joint root-cause investigation and issuance of a public report.[27]

Second, the Chemical MOU requires the development of inter-agency accident investigation teams, to be co-led by OSHA and EPA.[28] These teams are designed to reduce any duplication of effort and to maximize efficiency. In addition to looking for the root cause(s) of the accident, the OSHA-EPA team investigates to determine compliance with their respective regulations.[29] The Chemical MOU also streamlines criminal probes: "[i]n the event that the potential for criminal case development exists related to a particular accident, OSHA and EPA will coordinate with each other on a case-by-case basis to ensure the maximum cooperation

[23] CHEMICAL MOU, *supra* note 6, §§ I, III.
[24] *Id.* § II.
[25] *Id.* § III(A).
[26] *Id.*
[27] *Id.*
[28] *Id.* § III(B).
[29] *Id.*

with criminal investigators."[30]

Finally, the Chemical MOU sets forth several provisions designed to enhance both agencies' enforcement powers. For example, OSHA and EPA will not enter into any settlement agreement with any employer or potentially responsible party that would compromise the sharing of information between the agencies or the ability to use information that may otherwise be lawfully disclosed in the development of a public report.[31] In addition, the Chemical MOU provides that the agencies share all factual data gathered during investigations and, if necessary, withhold the identities of cooperating employees to ensure their protection.[32] This latter measure complements OSH Act section 11(c),[33] CAA section 322,[34] and CERCLA section 110,[35] all of which forbid discrimination or reprisal against an employee who reports unsafe conditions or otherwise is involved in accident investigations.[36]

Pursuant to the Chemical MOU, from 1996 through approximately 1999, OSHA and EPA jointly investigated a number of major chemical accidents and issued several reports aimed at identifying each accident's root cause and suggesting measures to prevent recurrences.[37] Since 1999, OSHA and EPA have coordinated their joint investigations of chemical accidents with the independent Chemical Safety and Hazard Investigation Board (CSB),[38] which was created by the 1990 Clean Air Act Amendments[39] but not funded until 1998.[40] As they did under the

[30] *Id.*

[31] *Id.* § III(C).

[32] *Id.*

[33] 29 U.S.C. § 660(c) (2000).

[34] 42 U.S.C. § 7622(a) (2000).

[35] *Id.* § 9610(a).

[36] CHEMICAL MOU, *supra* note 6, § III(C).

[37] *See, e.g.*, EPA/OSHA JOINT CHEMICAL ACCIDENT INVESTIGATION REPORT FOR BPS, INC., WEST HELENA, ARKANSAS (1999) [hereinafter ARKANSAS REPORT] (investigation of May 1997 explosion at facility that caused the death of three firefighters, the closing of several major transportation routes, and the evacuation of hundreds of people), *available at* http://yosemite.epa.gov/oswer/CeppoWeb.nsf/content/ap-chai.htm.

[38] *See id.* at i–ii.

[39] 42 U.S.C. § 7412(r)(6) (2000).

[40] ARKANSAS REPORT, *supra* note 37, at ii; Rick Weiss, *Chemical Safety Panel Survives Veto Pen*, WASH. POST, Nov. 4, 1997, at A-15; U.S. Chem. Safety & Hazard Investigation Bd., Mission Statement, *at* www.csb.gov (last visited

Chemical MOU, today OSHA and EPA, along with the CSB, continue jointly to respond to and investigate serious chemical accidents, and to suggest measures aimed at preventing future accidents. CSB's *Strategic Plan to Congress* for fiscal years 2004 through 2008 notes that "CSB works closely with EPA, OSHA and [the Bureau of Alcohol, Tobacco, and Firearms] on accident investigations to minimize duplication of activities. . . . [T]his is accomplished through sharing of forensic test results, coordinating accident site control, and preserving evidence."[41]

The cooperation engendered by the MOU, Chemical MOU, and CSB underscores the compatibility, at least in part, of the respective missions of OSHA and EPA. Perhaps more importantly, this cooperation put into practice a strategy whereby workplace safety and environmental safety were no longer treated by the federal government as separate regulatory universes, and served as the predecessor to the Initiative discussed in Part II.

But even setting aside the Initiative, this early OSHA-EPA collaboration has serious repercussions for employers who transport, store, or otherwise utilize hazardous substances. Because even a relatively minor workplace accident would subject an employer's operations to increased OSHA scrutiny under the OSH Act alone, OSHA-EPA collaboration has increased the number of regulatory eyes that are drawn to any reportable incident. Therefore, it is more important than ever for businesses that handle hazardous waste or hazardous substances to ensure that their operations comply with all applicable safety and environmental laws and regulations because workplace-injury incidents are prosecuted with increasing frequency under environmental statutes.

B. *RCRA's Workplace Safety Requirements and Use of the "Knowing Endangerment" Provision Instead of the OSH Act to Prosecute Workplace Exposure Incidents*

The broad purpose of the Resource Conservation and Recovery Act (RCRA),[42] enacted in 1976, is to regulate hazardous

June 6, 2005).

[41] U.S. CHEM. SAFETY & HAZARD INVESTIGATION BD., STRATEGIC PLAN TO CONGRESS, FY 2004–2008, at 17 (n.d.), *available at* http://www.csb.gov/news_releases/docs/CSBStrategicPlan2004-2008.pdf (last visited June 6, 2005).

[42] 42 U.S.C. §§ 6901–6992 (2000).

wastes "from cradle to grave." RCRA, which is administered by the EPA,[43] has spawned a detailed regulatory system aimed at reducing the release and improper disposal of hazardous waste.[44] RCRA declares it a national policy that, "wherever feasible, the generation of hazardous waste is to be reduced or eliminated [and that] [w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment."[45] To achieve that policy, RCRA: (i) establishes a nationwide tracking system and extensive record-keeping requirements to document the movement of all hazardous wastes from point of origin to final disposal;[46] (ii) prevents the release of hazardous wastes and ensures their safe disposal;[47] and (iii) provides mechanisms to enforce the statute's tracking, treatment, storage, and disposal requirements.[48]

The connection between RCRA—a cornerstone of federal environmental legislation—and worker safety is not an obvious one. After all, worker safety under the OSH Act traditionally has required only that each covered employer "furnish to each of [its] employees . . . a [workplace that is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."[49] The OSH Act achieves this goal, in part, by requiring that employers comply with occupational safety and health standards promulgated by OSHA.[50] RCRA supplements traditional workplace safety law by its host of

[43] EPA can delegate the administration of certain RCRA powers to any state with an approved hazardous waste program. *Id.* § 6926(b). However, even when EPA approves a state's hazardous waste program, the United States (through EPA) retains the authority to prosecute federal crimes. *See, e.g.*, United States v. Elias, 269 F.3d 1003, 1012 (9th Cir. 2001); United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 44 (1st Cir. 1991).

[44] Whether a waste is "hazardous" for RCRA purposes can be a complicated question—and one commonly raised by defendants in RCRA enforcement actions. Although this issue is beyond the scope of this article, generally speaking, in order for a solid waste to be deemed "hazardous," either it must be on a specific list of hazardous waste, or it must be on a list of wastes specifically excluded by regulation and meet any of certain criteria (ignitability, corrosivity, reactivity, and toxicity). *See, e.g.*, EPA Identification and Listing of Hazardous Waste, 40 C.F.R. §§ 261.3(a)(2)(i)–(iv), 261.4(b), 261.21–261.24 (2004).

[45] 42 U.S.C. § 6902(b) (2000).

[46] *See, e.g.*, *id.* §§ 6922(a)(1), 6922(a)(5), 6923(a)(1), 6924(a)(1)–(2).

[47] *Id.* § 6925.

[48] *Id.* § 6928.

[49] 29 U.S.C. § 654(a)(1) (2000).

[50] *Id.* § 654(a)(2).

requirements pertaining to the safe storage and use of hazardous waste. But perhaps even more significantly, RCRA's severe criminal penalties have caused the statute to emerge as a powerful tool for the prosecution of companies and individuals whose employees are improperly exposed to workplace hazards. Indeed, while recent cases show that OSH Act violations are no longer even alleged in the most serious cases, prosecutors have used RCRA's knowing endangerment provision[51] in workplace safety cases with increasing frequency and success.

Generally, the provisions of RCRA with which regulated parties must comply are found in Subchapter III (hazardous waste management),[52] Subchapter IX (regulation of underground storage tanks),[53] and Subchapter X (tracking and handling of regulated medical waste).[54] The remaining RCRA subchapters are of less consequence to private parties: for example, Subchapters II and V authorize creation of the Office of Solid Waste and detail the duties of the Commerce Department,[55] Subchapter IV authorizes the development of state or regional solid waste plans,[56] and Subchapter VI details federal responsibilities under the statute.[57]

Generators of hazardous waste are subject to Part 262 of RCRA's regulations,[58] which set forth numerous obligations including several implicating worker safety concerns. For example, applicable generators must comply with certain safety-related standards for the packaging, labeling, marking, and placarding of hazardous waste.[59] Generators accumulating hazardous wastes at the facility for more than ninety days are deemed under RCRA to operate a storage facility,[60] and so also are subject to the additional, and more stringent, requirements set forth in Part 264.[61]

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[51] 42 U.S.C. § 6928(e) (2000).

[52] *Id.* §§ 6921–6939e.

[53] *Id.* § 6991–6991i.

[54] *Id.* § 6992–6992k.

[55] *Id.* §§ 6911–6917, 6951–6956.

[56] *Id.* § 6941–6949a.

[57] *Id.* § 6961–6965.

[58] EPA Standards Applicable to Generators of Hazardous Wastes, 40 C.F.R. § 262 (2004).

[59] *See id.* § 262.30–262.33.

[60] *Id.* § 262.34.

[61] EPA Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, 40 C.F.R. § 264 (2004).

Owners and operators of hazardous waste treatment, storage, and disposal facilities are subject to Part 264,[62] which contains numerous highly detailed regulations concerning workplace safety. For example, such owners and operators must:

- prepare a contingency plan designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste;[63]
- develop and follow a written schedule for the inspection of monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment (such as dikes and sump pumps) critical to preventing, detecting, or responding to environmental or human health hazards;[64]
- remedy any deterioration or malfunction of such equipment or structures to ensure that the problem does not lead to an environmental or human health hazard;[65]
- conduct instruction or training of facility employees to ensure that the facility complies with applicable RCRA regulations;[66]
- take precautions to prevent the accidental ignition or reaction of ignitable or reactive waste, such as separating and protecting such waste from sources of ignition or reaction (open flames, smoking, welding, etc.), and by placing conspicuous "no smoking" signs wherever there is a hazard from ignitable or reactive waste;[67] and
- equip the facility with (i) internal communications or an alarm system capable of providing immediate emergency instruction to facility employees, (ii) portable fire extinguishers, fire-and spill-control equipment, and decontamination equipment, and (iii) a water- or

[62] *Id.*

[63] *Id.* § 264.51(a). Note that this contingency plan requirement under RCRA may be satisfied by making minor adjustments to the facility's Spill Prevention, Control and Countermeasures Plan, as required by the Oil Pollution Act. *See id.* § 264.52(b); *see also infra* text accompanying notes 122–26.

[64] 40 C.F.R. § 264.15(b)(1) (2004).

[65] *Id.* § 264.15(c).

[66] *Id.* § 264.16(a)(1).

[67] *Id.* § 264.17(a).

foam-based, facility-wide system to combat fire.[68]

Enforcement of such RCRA regulations can take the form of administrative compliance orders or penalties issued by the EPA, or civil suits for injunctions and/or penalties brought in federal court.[69] As of March 15, 2004, the maximum civil penalty for violating RCRA regulations was $32,500 per violation per day,[70] which can translate to enormous penalties for noncompliance events, which typically occur over long periods of time. Pursuant to EPA's RCRA Civil Penalty Policy, three basic factors go into the calculation of a RCRA penalty: the gravity of the violation, the economic benefit of noncompliance to the violator, and any adjustments for special circumstances.[71]

But RCRA's impact on workplace safety goes far beyond the above requirements and their associated monetary penalties because violations also may be addressed through criminal penalties and imprisonment. Indeed, in recent years, federal juries and federal courts have established RCRA as a powerful tool for the prosecution of individual officers who jeopardize the health and safety of their employees.

One reason for the increased reliance by prosecutors on RCRA instead of the OSH Act may derive from the difficulty prosecutors face in amassing a sufficient quantum of evidence to meet the government's production burden under the OSH Act. For example, OSHA establishes permissible exposure limits (PELs) for several toxic and hazardous substances by setting ceiling values and eight-hour time-weighted averages.[72] Given the potential complexities involved in proving an exposure case over eight-hour shifts extended over forty-hour work weeks, prosecutors may be more inclined to use the relatively straightforward standards of the RCRA and other environmental statutes.

Another reason that workplace safety enforcement

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[68] *Id.* § 264.32.

[69] *See generally* 42 U.S.C. § 6928 (2000).

[70] *Id.* § 6928(a)(3). This penalty increased pursuant to the Civil Monetary Penalty Inflation Adjustment Rule. 40 C.F.R. § 19.4 (2004) (revising upward the applicable penalty for violations occurring on or after March 15, 2004).

[71] RCRA ENFORCEMENT DIVISION, EPA, RCRA CIVIL PENALTY POLICY § I (2003), *available at* http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf.

[72] *See, e.g.*, OSHA Occupational Safety and Health Standards, 29 C.F.R. § 1910.1000 (2004).

increasingly has looked toward environmental statutes such as RCRA is the fact that the OSH Act's penalty structure is more lenient than that of many environmental laws. OSH Act § 666(e) controls in cases where employer conduct causes an employee death. This section provides that if an employer willfully violates any rule or regulation promulgated pursuant to OSH Act, and that violation causes the death of an employee, the employer "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. . . ."[73]

When compared to OSH Act § 666(e), the criminal penalties under RCRA are markedly more severe. Under RCRA § 6928(e), the so-called "knowing endangerment" provision, the stakes are raised significantly where the handling of hazardous waste places an employee in imminent danger of death (or serious injury):

> Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste [in violation of section 6928(d)[74]] *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*.[75]

The term "serious bodily injury" is defined as: "(A) bodily injury which involves a substantial risk of death; (B) unconsciousness; (C) extreme physical pain; (D) protracted and obvious disfigurement; or (E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[76] This statutory language makes plain that Congress intended that

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[73] 29 U.S.C. § 666(e) (2000) (emphasis supplied).

[74] RCRA includes criminal penalties for, among other things, knowingly transporting or causing to be transported any hazardous waste without a permit, knowingly treating, storing, or disposing of any hazardous waste without or in violation of a permit. 42 U.S.C. § 6928(d) (2000). Upon conviction, the statute provides for penalties of up to $50,000 for each day of violation, or imprisonment not to exceed five years. *Id*. These RCRA penalties require only general intent on the part of a defendant; that is, the defendant need only have intended the act charged, and need not specifically have intended to violate the law.

[75] *Id.* § 6928(e) (emphasis supplied).

[76] *Id.* § 6928(f)(6).

§ 6928(e) be reserved for "the occasional case where the defendant's knowing conduct shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster."[77] The statute provides an affirmative defense to a § 6928(e) prosecution if the defendant can prove, by a preponderance of the evidence, that the conduct charged was consented to by the endangered person, and that the danger and conduct charged were reasonably foreseeable occupational hazards.[78]

Section 6928(e) thus created a severe penalty for employers who failed to ensure the safety of employees exposed to hazardous substances in the workplace. It also raised the monetary penalty cap for corporate defendants to $1,000,000.[79] While it is unclear why Congress saw fit only to supplement RCRA instead of amending the OSH Act's penalty scheme,[80] the result has been that RCRA's knowing endangerment provision has been used to prosecute workplace safety cases with increasing frequency and success.

The first conviction under RCRA § 6928(e) was obtained in 1987 against Protex Industries, Inc.[81] Protex Industries operated a facility in which used fifty-five gallon drums were purchased and recycled.[82] Protex cleaned and repainted these drums, many of which previously stored toxic chemicals, then used them as storage and shipping containers.[83] Following two EPA inspections, a nineteen-count indictment was returned against Protex, including three counts of knowingly placing three Protex employees in

[77] H. R. CONF. REP. NO. 96-1444, at 38 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5028, 5038.

[78] 42 U.S.C. § 6928(f)(3) (2001).

[79] *Id.* § 6928(e).

[80] Two bills introduced in the Senate in 2004 propose increases in criminal penalties under the OSH Act. The Protecting America's Workers Act was introduced on April 29, 2004 by Senator Kennedy and would increase certain maximum statutory fines and periods of incarceration. S. 2371, 108th Cong. § 308 (2004). The Safety Advancement for Employees Act of 2004, which also proposes increased fines and incarceration maximums under the OSH Act, was introduced on July 22, 2004, by Senator Enzi. S. 2719, 108th Cong. § 13 (2004). Both bills were referred to the Committee on Health, Education, Labor, and Pensions.

[81] *See* United States v. Protex Indus., Inc., 874 F.2d 740, 741 (10th Cir. 1989).

[82] *Id.*

[83] *Id*.

imminent danger of death or serious bodily injury.[84]

The trial court found that Protex failed to provide its employees with safety equipment adequate to protect them from exposure to the toxic chemicals.[85] Medical experts testified at trial that, without adequate safety measures, Protex employees were at an increased risk of suffering solvent poisoning that could cause "psychoorganic syndrome" of varying severity and which led to, among other ailments, an increased risk of developing cancer.[86]

After being convicted of violating RCRA § 6928(e), Protex sought relief in the United States Court of Appeals for the Tenth Circuit.[87] On appeal, Protex argued that its conviction should be overturned because any injury to its employees—namely, the danger of developing a permanent form of psychoorganic syndrome, or of contracting an indeterminate type of cancer at some unspecified future date—was not sufficient to constitute "serious bodily harm" as defined by RCRA.[88] The Tenth Circuit was not receptive to this argument. In affirming the conviction, the court stated that, "[Protex's] position demonstrates a callousness toward the severe physical effect the prolonged exposure to toxic chemicals may cause or has caused to the three former employees," who, according to the trial court, in fact had suffered from a form of the syndrome that causes permanent health effects.[89]

Following *Protex*, there were no major convictions under RCRA § 6928(e) for a decade. Then, in 2001, the United States Court of Appeals for the Eleventh Circuit affirmed in *United States v. Hansen*,[90] what at the time was the longest sentence ever imposed for an environmental workplace crime. The *Hansen* case was brought against LCP Chemicals and its officers.[91] LCP Chemicals manufactured bleach, soda, gas, and acid. Due to inadequate safety and maintenance measures, LCP employees suffered chemical burns after exposure to hazardous materials including mercury, caustic soda, hydrochloric acid, and

[84] *Id*. at 742.
[85] *Id*.
[86] *Id*.
[87] *Id*. at 740.
[88] *Id*. at 743.
[89] *Id.*
[90] 262 F.3d 1217 (11th Cir. 2001).
[91] *Id*. at 1225.

chlor-alkali bleach.[92]

The government indicted three of LCP's officers along with its environmental health and safety manager for conspiracy to commit environmental crimes, and for various substantive crimes including violations of the Clean Water Act, RCRA, CERCLA, and the Endangered Species Act.[93] Among the charges was the allegation that LCP knowingly exposed its employees to hazardous materials in violation of RCRA § 6928(e).[94] After the jury rendered a guilty verdict, the district court sentenced LCP's chief executive officer to a nine-year prison sentence. The chief operating officer received almost four years, and the plant manager was sentenced to over six years in prison.[95] The environmental health and safety manager received an eighteen-month sentence after agreeing to testify against the other defendants and pleading guilty to two counts.[96]

As suggested by the language of the provision itself, RCRA § 6928(e) is most likely to be used to prosecute cases where employees have been seriously injured or killed due to the conduct of the employer. One of the best examples of a preventable workplace tragedy forming the basis of a § 6928(e) prosecution is *United States v. Elias*,[97] wherein the United States Court of Appeals for the Ninth Circuit in late 2001 affirmed the RCRA conviction and seventeen-year prison sentence of a company owner—to date, the third longest criminal sentence imposed for an environmental crime.[98]

The defendant Allen Elias owned Evergreen Resources, an Idaho fertilizer company.[99] In August 1996, Elias ordered four Evergreen employees to enter and clean a thirty-six-foot-long, eleven-foot-high tank containing two tons of cyanide-laced sludge, a byproduct of a cyanide leaching process.[100] Despite repeated

[92] *Id*. at 1243.
[93] *Id*. at 1231.
[94] *Id*.
[95] *Id*. at 1232.
[96] *Id*. at 1231 n.15.
[97] 269 F.3d 1003 (9th Cir. 2001).
[98] The two longest criminal sentences imposed for environmental crimes were handed down in *United States v. Salvagno* in December 2004. *See infra* text accompanying notes 175–82.
[99] 269 F.3d at 1007.
[100] *Id*.

requests from the employees, Elias failed to provide any safety equipment and sent two workers into the tank wearing only their regular work clothes.[101] Because they were unable to clean the tank, the workers emerged fifteen minutes later suffering from sore throats and nasal passages, which are early symptoms of cyanide poisoning.[102]

The next day, the workers explained to Elias the health effects they suffered and again requested the safety equipment required by the OSH Act.[103] Elias agreed to provide such equipment in the future, but ordered his employees to clean out the tank that morning.[104] A short time after re-entering tank, employee Scott Dominguez was overcome by cyanide fumes and collapsed.[105] Because of their lack of adequate rescue equipment, Evergreen employees were unable to extricate Dominguez from the tank's small opening.[106] When arriving firefighters and Dominguez's treating physician asked whether there was cyanide in the tank, Elias denied knowing that anything was in the tank other than water and "sludge."[107] Dominguez ultimately was treated for cyanide poisoning, but not before suffering permanent brain damage as a result of the toxic cyanide levels in his body.[108]

After a nearly monthlong trial, a federal jury convicted Elias of violating three RCRA counts: one charged that Elias knowingly endangered his employees in violation of § 6928(e), and two others charged that Elias illegally disposed of hazardous cyanide waste on separate occasions in violation of § 6928(d).[109] Elias also was convicted of making a material false statement under the OSH Act, stemming from his fabrication of a confined-space permit after the accident occurred.[110]

The *Hansen* and *Elias* convictions amply demonstrate both the severity of punishment possible for workplace safety incidents

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[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] *Id.* at 1008.
[108] *Id.*; Answering Brief for the United States at 2, 269 F.3d 1003 (No. 00-30145), 2000 WL 33982562.
[109] 269 F.3d at 1008.
[110] *Id*.

and the increased application of environmental laws such as RCRA to prosecute cases traditionally viewed through an OSH Act lens. Remarkably, only a single, minor OSH Act violation was charged between the *Hansen* and *Elias* cases, despite their subject matter. This fact is attributable to RCRA's substantial penalty provisions, which offer prosecutors far more leverage than the OSH Act's relatively meager enforcement tools.

C. *Plans Required by Environmental Regulations that Implicate Workplace Safety*

As discussed above, the cooperation between OSHA and EPA, along with prosecutors' increasing reliance upon environmental statutes to enforce workplace safety violations, have resulted in the intersection of the workplace safety and environmental protection spheres. In addition to these developments, numerous federal and state environmental regulations are furthering the overlap between these formerly separate regulatory areas.

Together with its accompanying regulations, the Oil Pollution Act (OPA)[111] of 1990, part of which amended section 311 of the Clean Water Act,[112] facilitated and strengthened the EPA's ability to prevent and respond to catastrophic oil spills occurring in navigable waters. The OPA is similar to CERCLA insofar as it authorizes the use of a trust fund[113] financed by a tax on oil to subsidize oil spill cleanups when there is no cooperating responsible party.[114] Although unmistakably an "environmental" statute, the OPA's regulations implicate worker safety issues insofar as they require oil storage facilities and vessels to prepare plans detailing their anticipated responses to discharges.[115]

For example, a Facility Response Plan (FRP) must be prepared under the OPA by any owner or operator of a nontransportation-related onshore facility (defined to include, for example, any industrial, commercial, agricultural, or public facility that uses and stores oil, excluding terminal facilities[116]) that,

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[111] 33 U.S.C. §§ 2701–2761 (2000).

[112] *Id.* § 1321(b)(3), (j).

[113] A component of the OPA, the Oil Spill Liability Trust Fund, was created pursuant to the Internal Revenue Code. I.R.C. § 9509(a) (2000).

[114] 33 U.S.C. § 2712(a) (2000).

[115] *See, e.g.*, EPA Oil Pollution Prevention, 40 C.F.R. § 112.20(a)(1) (2004).

[116] *Id.* § 112.2. Note that other, less common types of facilities also are

because of its location, could cause substantial harm to the environment by discharging oil into navigable waters.[117] Such a facility may escape regulation if (i) its total aboveground storage capacity is less than 1320 gallons (with no single container exceeding 660 gallons) and (ii) its total underground storage capacity is less than 42,000 gallons.[118]

OPA's extensive regulations mandate that each FRP describe the training of employees and include documentation of numerous worker safety concerns related to the response to an oil spill. For example, the FRP must include:

- a requirement that individuals or organizations be contacted in the event of a discharge;
- a description of the facility's response equipment and its location;
- a description of immediate measures to secure the source of the discharge;
- plans for the evacuation of the facility and a reference to community evacuation plans, as appropriate;
- a diagram of evacuation routes; and
- a description of self-inspection, drills, exercises, and response training for employees, including record-keeping requirements for inspections of all tanks, secondary containment and response equipment, as well as logs documenting all training sessions, drills, and exercises.[119]

The OPA regulations further mandate that each facility owner is responsible for "the proper instruction of facility personnel in the procedures to respond to discharges of oil and in applicable oil spill response laws, rules, and regulations."[120]

The OPA regulations also require that each facility required to prepare a FRP appoint and train a "qualified individual" who must, among other things, coordinate rescue actions with response personnel and "[a]ssess the possible hazards to human health and the environment due to the release. This assessment must consider both the direct and indirect effects of the release . . . ."[121]

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subject to OPA jurisdiction. *See id.* § 112.1.

[117] *Id.* § 112.20(a)(1).

[118] *Id.* § 112.20(f)(1)(i).

[119] *Id.* § 112.20(h)(1).

[120] *Id.* § 112.21.

[121] *Id.* § 112.20(h)(3)(ix)(F). The indirect effects of a release include "the

In July 2002, EPA published a ruling requiring each facility regulated under the OPA to prepare a Spill Prevention, Control and Countermeasure Plan (SPCCP).[122] Unlike the FRP, which is a contingency plan primarily addressing measures to be taken after a spill occurs,[123] the SPCCP requires that facilities put measures into place with the goal of preventing a spill from reaching navigable waters.[124]

The SPCCP, like the FRP, requires employers to supply employees with both the equipment and the training to safely and effectively respond to a spill.[125] At a minimum, the facility is required to train its oil-handling personnel in numerous safety-related areas, such as the operation and maintenance of equipment to prevent discharges, discharge procedure controls, applicable pollution control laws, rules, and regulations, and the contents of the facility's SPCCP.[126]

While there are no criminal penalties for violating the SPCCP or the FRP regulations, the available civil penalties are, as is the case with most environmental statutes, prohibitive. Pursuant to CWA section 311(b)(6)–(7), any regulated facility failing to comply with any of the FRP and SPCCP requirements is subject to a civil penalty of up to $27,500 per violation per day,[127] and also may be assessed a Class I administrative fine (ranging from $10,000 to a maximum of $25,000) or Class II fine (ranging from $10,000 to a maximum of $125,000).[128]

EPA's "Civil Penalty Policy for section 311(b)(3) and section 311(j) of the Clean Water Act,"[129] sets forth how the agency

effects of any toxic, irritating, or asphyxiating gases that may be generated, or the effects of any hazardous surface water runoffs from water or chemical agents used to control fire and heat-induced explosion." *Id.*

[122] *See generally id.* § 112.

[123] *Id.* § 112.20(h)(1).

[124] *Id.* § 112.1.

[125] *See, e.g.*, *id.* §§ 112.7(c), (f) (SPCCP requirements); § 112.20(h)(3), (8) (FRP requirements).

[126] *Id.* § 112.7(f)(1).

[127] 33 U.S.C. § 1321(b)(7)(C) (2000). This penalty increased pursuant to the Civil Monetary Penalty Inflation Adjustment Rule. 40 C.F.R. § 19.4 (2005) (revising upward the applicable penalty for violations occurring on or after March 15, 2004).

[128] 33 U.S.C. §§ 1321(b)(6) (2000).

[129] OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, EPA, CIVIL PENALTY POLICY FOR SECTION 311(B)(3) AND SECTION 311(J) OF THE CLEAN WATER ACT (1998) [hereinafter EPA CWA PENALTY POLICY], *available at*

exercises its enforcement discretion, and how courts should determine the civil penalties for non-compliance with, among other things, the SPCCP and FRP regulations. According to the EPA, a CWA section 311 civil penalty assessment should be based upon the following factors: (i) the seriousness of the violation; (ii) the degree of culpability involved; (iii) the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of any discharge; (iv) history of prior violations; (v) any other penalty for the same incident; (vi) any other matters "as justice may require;" (vii) the economic impact of the penalty on the violator; and (viii) the economic benefit to the violator, if any, resulting from the violation.[130]

The EPA CWA Penalty Policy also addresses the agency's approach to arriving at a penalty through settlement by considering the seriousness, culpability, mitigation, and history of prior violations at issue.[131] When characterizing the "seriousness" of FRP and SPCCP violations, the agency construes as "major noncompliance" the failure to have or to implement a plan, or inadequate implementation resulting in hazardous site conditions. "Moderate noncompliance" includes having an inadequate or incomplete plan, or inadequate or incomplete implementation not causing a hazardous site condition.[132] Federal courts may review civil penalties levied by EPA.[133]

Those responsible for compliance with health, safety, and environmental laws and regulations must not overlook state requirements that may be analogous to the FRP and/or SPCCP regulations. For example, under the aegis of New York's Hazardous Bulk Storage Act (HBSA),[134] owners of chemical bulk storage facilities[135] in New York must comply with a comprehensive set of regulations, including the preparation of a

http://cfpub.epa.gov/compliance/resources/policies/civil/cwa/.

[130] *Id.* at 3; *see also* 33 U.S.C. § 1321(b)(8) (2000).

[131] EPA CWA PENALTY POLICY, *supra* note 129, at 7–11.

[132] *Id*. at 8–9.

[133] *See* 33 U.S.C. § 1319(g)(8) (2000).

[134] N.Y. ENVTL. CONSERV. LAW §§ 40-0101 to 40-0123 (McKinney 2004).

[135] A storage facility is regulated under this part if it has (i) an aboveground tank storing a hazardous substance, or mixture thereof, with a capacity of 185 gallons or more, (ii) an underground tank storing a hazardous substance, or mixture thereof, of any capacity, or (iii) a nonstationary tank used to store 2200 pounds or more of a hazardous substance or a mixture thereof for more than ninety consecutive days. 6 N.Y.C.R.R. §§ 596.1(b), 598.1(b) (2004).

Spill Prevention Report (SPR).[136] The primary purpose of the SPR is to detail the various on-site chemicals, storage facilities, and transfer points; assess causes of spills; and identify measures to be taken in response to future spills.[137]

Workplace safety concerns are at the heart of several requirements of the SPR's mandatory "plan for spill response." For example, the SPR must set forth "a list of equipment and materials to contain a spill; name and phone number for emergency contacts, coordinators and clean-up contractors; spill reporting procedures; plans for annual drills and other information consistent with generally accepted spill prevention control and countermeasure practices."[138] Safety concerns are also central to other HBSA regulations, such as those setting forth procedural requirements for the transfer of hazardous substances and the maintenance and repair of storage facilities.[139]

Violations of the regulations promulgated under the HBSA—including the SPR regulations—are punishable by civil and administrative sanctions of up to $25,000 per violation per day, and by misdemeanor criminal penalties calling for a fine of up to $25,000 per violation per day and up to one year in prison.[140] The penalty caps are doubled for repeat offenders.[141]

D. *Applicability of Environmental Citizen Suit Provisions to Workplace Safety Issues*

Although the OSH Act contains no citizen suit provision, noncompliance with workplace safety regulations can potentially expose an employer to a citizen suit brought under certain environmental statutes.

RCRA authorizes three types of citizen suits, two of which can be applied to workplace safety violations.[142] First, RCRA § 6972(a)(1)(A) permits any person to commence a lawsuit against any person "alleged to be in violation of any permit, standard,

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[136] *Id.* § 598.1(k)(1).

[137] *Id.* § 598.1(k)(2).

[138] *Id.* § 598.1(k)(2)(x).

[139] *Id.* §§ 598.4, 598.9.

[140] N.Y. ENVTL. CONSERV. LAW § 71-4303 (McKinney 2004).

[141] *Id*.

[142] The third type of citizen suit is one that may be brought against the EPA for failure to perform a nondiscretionary act or duty. *See* 42 U.S.C. § 6972(a)(2) (2000).

regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA]."[143] This type of suit may be brought to remedy an employer's failure to comply with, for example, the Part 264 regulations requiring the preparation of a contingency plan, the implementation of an inspection schedule and employee training, and the installation of systems for emergency communication and fire control.[144]

A RCRA citizen suit also may be brought against any person who has contributed or is contributing "to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."[145] When applied to worker safety, this "substantial endangerment" provision obviously requires that the alleged violation present a heightened risk to an employee exposed to hazardous waste. For example, it is possible that an agency could invoke this provision in response to an employer's failure to provide adequate safety equipment or failure to prepare the contingency plan required by Part 264.[146]

Either type of citizen suit under RCRA must be brought on ninety days' notice,[147] unless the suit alleges a violation of Subchapter III's requirements pertaining to the management of hazardous waste, in which case the suit may be commenced immediately.[148]

The Emergency Planning and Right-to-Know Act (EPCRA)[149] also has a citizen suit provision that could be used to redress violations of workplace safety regulations. EPCRA is a unique environmental law in that rather than addressing the cleanup of existing pollution, it focuses on disseminating information regarding where chemicals are being stored and how to deal with

[143] *Id.* § 6972(a)(1)(A).

[144] 40 C.F.R. §§ 264.15(b)(1), 264.16(a)(1), 264.51(a) (2004).

[145] 42 U.S.C. § 6972(a)(1)(B) (2000).

[146] *See* 40 C.F.R. §§ 264.15(b)(1), 264.51(a) (2004).

[147] 42 U.S.C. § 6972(b)(2)(A) (2000). This section mandates that a citizen suit may not be filed until ninety days after the plaintiff has given written notice of the endangerment to the EPA, the state government where the alleged endangerment may occur, and any person alleged to have contributed to the endangerment.

[148] *Id.* § 7002(b)(1)(A)(iii).

[149] Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11001–11050 (2000).

them in the event of an accidental release.[150] EPCRA's citizen-suit provision permits "any person" to sue on his or her own behalf either an owner or operator of a facility for failure to satisfy a variety of the statutory reporting requirements.[151]

A citizen suit under EPCRA must be brought on sixty days' notice, but is barred if the EPA already is "diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this chapter."[152] The courts are empowered under the statute to "enforce the requirement concerned and impose any civil penalty provided for violation of that requirement," with such penalties typically ranging from $11,000 to $27,500 per violation.[153] In addition, the courts may award "reasonable attorney and expert witness fees" to the "prevailing party or the substantially prevailing party."[154]

EPCRA's citizen-suit provision can be used to pursue what is essentially a violation of the OSH Act. For example, OSHA regulations require chemical manufacturers and importers to assess the hazards of their chemicals, and require all employers to provide information to their employees about the hazardous chemicals to which they are exposed.[155] Such information is transmitted to employees through a hazard communication program, labeling and other forms of warning, and the distribution of material safety data sheets (MSDS) and training.[156] Meanwhile, EPCRA requires owners and operators to distribute the MSDS to state and local emergency officials—and permits the initiation of a citizen lawsuit in the event of employer noncompliance.[157] Other EPCRA requirements subject to citizen-suit enforcement include the distribution of emergency and hazardous chemical inventory forms, along with toxic chemical release forms.[158]

Although such suits remain uncommon, a business that manufactures or uses chemicals may find itself the target of a citizen lawsuit if it fails to comply with EPCRA's reporting

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150 *See, e.g., id.* §§ 11021–11022.
151 *Id.* § 11046(a)(1)(A).
152 *Id.* § 11046(e).
153 *Id.* §§ 11045; 40 C.F.R. § 19.4 (2004).
154 42 U.S.C. § 11046(f) (2000).
155 29 C.F.R. 1910.1200 (2004).
156 *Id.* 1910.1200(b)(1).
157 42 U.S.C. § 11021 (2000).
158 *Id.* §§ 11022–11023.

requirements, including those related to workplace safety and in fact based upon OSH Act requirements.[159]

II. THE INITIATIVE AND SIMILAR STATE INITIATIVES

A. *Announcement of the Initiative*

In May 2005, the DOJ, EPA, and OSHA announced the inter-agency Initiative, which is being spearheaded by the DOJ's Environment and Natural Resources Division ("ENRD"). The Initiative already has resulted in significant inter-agency training and coordination, and increased enforcement activities.

According to Andrew Goldsmith, Assistant Section Chief for the Environmental Crimes Section and the ENRD attorney primarily responsible for the Initiative, the Initiative was first contemplated when ENRD supervisors recognized a pattern in several investigations and prosecutions then underway. "We noticed that employers who ignored worker safety often ignored environmental safety, and that gross violations of environmental laws and regulations often precipitated worker injury or death."[160] The Initiative thus represents an attempt to address these most serious of violators by training OSHA compliance officers to recognize, and refer to DOJ, environmental violations, and by enhancing communication between OSHA, EPA and DOJ so that the "worst offenders" are identified, investigated and prosecuted.[161]

Although the Initiative was made public in May 2005, DOJ has been conducting a "pilot program" in the northeastern United States since 2003. The pilot program included a coordinated review of EPA and OSHA dockets and training of OSHA employees. Between 2003 and May 2005, ENRD attorneys have conducted nationwide trainings for over 700 OSHA supervisors,

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[159] *See, e.g.*, Williams v. Leybold Techs., Inc., 784 F. Supp. 765 (N.D. Cal. 1992) (denying a motion to dismiss a citizen lawsuit brought against company for failing to submit an MSDS for nickel, a hazardous chemical pursuant to the OSH Act regulations); Atl. States Legal Found., Inc. v. Whiting Roll-up Door Mfg. Co., 772 F. Supp. 745 (W.D.N.Y. 1991) (denying motion to dismiss EPCRA citizen suit against company for failing to submit MSDS forms, despite fact that company cured failure prior to filing of lawsuit).

[160] Telephone Interview with Andrew Goldsmith, Senior Trial Attorney, DOJ Environment and Natural Resources Division, and Assistant Section Chief, Environmental Crimes Section (May 3, 2005).

[161] *Id.*

managers, and compliance officers as part of the Initiative. Recently, Mr. Goldsmith explained that OSHA trainees are excited about the Initiative because "whereas there used to be only one DOJ attorney to handle enforcement nationwide, today several of the ENDR's thirty-nine prosecutors spend significant portions of their time on these cases—and that number will continue to increase as more cases come in."[162] The fact that OSHA's rank-and-file are beginning to refer cases for prosecution represents a change in OSHA's culture, which historically disfavored criminal enforcement. In fact, between 1982 and 2002, OSHA declined to seek prosecution in 93 percent of the 1,242 cases where workers were killed due to willful safety violations.[163]

The pilot program also resulted in several recent, high-profile prosecutions, discussed below. The common thread throughout these pilot cases is that, following a trend evidenced in *Hansen* and *Elias*, not a single OSH Act violation has been alleged despite the fact that they each involve the death or serious injury of employees as a result of the conduct. Underlying this trend is the fact that the OSH Act provides no criminal redress for those cases involving a "serious violation," defined as a condition creating "a substantial probability that death or serious physical harm could result";[164] for such occasions, the statute calls not for criminal penalties but only a citation that could result in the assessment of a civil penalty of up to $7000.[165]

Moreover, although the pilot cases that involved employee deaths could have been prosecuted criminally under OSH Act § 666(e), such charges were not brought. Section 666(e) provides only for a fine of $10,000 or less and for up to six months imprisonment for violations of any OSH Act standard that results in an employee death,[166] penalties that pale in comparison to the penalty provisions of the major environmental statutes. Due to the OSH Act's relative lack of teeth, § 666(e) simply could not have resulted in the severity of fines and incarcerations that have been achieved in the CWA, CAA, and RCRA cases discussed below.

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[162] *Id.*

[163] David Barstow & Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws*, N.Y. TIMES, May 2, 2005, at A17.

[164] 29 U.S.C. § 666(b), (k) (2000).

[165] *Id.*

[166] *Id.* § 666(e).

B. *Prosecuting Salvagno Under the Clean Air Act and Other Statutes*

Pursuant to section 112 of the CAA, EPA promulgated National Emissions Standards for Hazardous Air Pollutants (NESHAP) for asbestos in April 1973 (Asbestos NESHAP).[167] The purpose of the Asbestos NESHAP regulations is to protect the public by limiting the release of asbestos fibers during activities involving the processing, handling, and disposal of asbestos-containing material, such as the renovation or demolition of all structures, installations, and (with certain exceptions) buildings.[168]

Noncompliance with the Asbestos NESHAP by any regulated owner or operator is punishable by CAA section 113. Civil penalties of up to $27,500 per violation per day may accrue, and the government may seek a temporary or permanent injunction.[169]

Section 113 also includes several categories of criminal penalties for violations of CAA provisions (including the NESHAPs). For example, section 113(c)(1) provides for a fine and/or imprisonment of not more than *five years* for the knowing violation of various CAA provisions, including any requirement or prohibition of an applicable implementation plan, new source review standard, or inspection requirement.[170] Section 113(c)(2) provides a fine and/or imprisonment up to *two years* for any knowingly false statement, or for knowingly altering or failing to maintain a required document, or for knowingly falsifying or otherwise rendering inaccurate any required monitoring device or method.[171]

The most severe criminal penalties under the CAA are set forth in section 113(c)(5)(A), which provides that:

> Any person who knowingly releases into the ambient air any hazardous air pollutant . . . or any extremely hazardous substance . . . and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title

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[167] 42 U.S.C. § 7412(d) (2000); EPA National Emissions Standards for Hazardous Air Pollutants, 40 C.F.R. § 61 (2004).

[168] *See, e.g.*, 40 C.F.R. § 61.145 (2004).

[169] 42 U.S.C. § 7413(b) (2000); 40 C.F.R. § 19.4 (2004).

[170] 42 U.S.C. § 7413(c)(1) (2000).

[171] *Id.* § 7413(c)(2).

18, or by imprisonment of not more than *15 years*, or both.[172]

Violations of this section by a corporation are punishable by a fine of up to $1,000,000.[173] Moreover, for each of the CAA violations described above, the fine and imprisonment maximums are doubled as to individual and corporate defendants in the event of a second or subsequent violation.[174]

In December 2004, due in large measure to the potent penalty provisions of the CAA, a United States District Court judge imposed, in *United States v. Salvagno*, the two longest prison sentences for an environmental crime in history, as well as massive fines and restitution payments.[175] *Salvagno* involved a classic "rip-and-run" asbestos operation; the evidence established that between 1990 and 1999, Raul and Alex Salvagno, a father-and-son team, conspired to violate the CAA and the Asbestos NESHAP by directing their over 500 employees to remove dry asbestos instead of wetting it first, as required under the Asbestos NESHAP. Their motive was to reduce the cost of asbestos abatements and thereby maximize their profits. Moreover, the defendants defrauded clients on 1555 abatement jobs by directing a laboratory, purportedly independent but in fact secretly co-owned by Alex Salvagno, to falsify some 75,000 laboratory samples so that the samples would indicate that the asbestos had been abated.[176]

The defendants were convicted in March 2004 of nine counts of substantive violations of the CAA and the Asbestos NESHAP (including violations of section 113(c)(1) and (2)), as well as of conspiracy to violate the CAA, the Toxic Substances Control Act,[177] and the Racketeer Influenced and Corrupt Organization

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[172] *Id.* § 7413(c)(5)(A) (emphasis supplied).

[173] *Id*.

[174] *Id.* §§ 7413(c)(1)–(2), (5).

[175] *See* United States v. Salvagno, 375 F.Supp. 2d 117, 118 (N.D.N.Y. 2005) (reconsidering sentence in light of Supreme Court holding in *United States v. Booker*, 125 S. Ct. 738 (2005)). *See also* Press Release, U.S. Attorney's Office (N.D.N.Y.), Two Men Sentenced for Criminal Violations Relating to Illegal Asbestos Removal Activities Throughout New York State (Dec. 23, 2004), *at* http://www.usdoj.gov/usao/nyn/NewsReleases/NewsReleases.htm; William Kates, *25 and 20 Years for Son, Father Who Ran Massive Asbestos Fraud*, ASSOC. PRESS, Dec. 23, 2004; *Lengthy Jail Sentences Imposed for Illegal Asbestos Removal Activities*, DAILY RECORD (Rochester, N.Y.), Jan. 6, 2005, 2005 WLNR 390616.

[176] *See* Press Release, U.S. Attorney's Office (N.D.N.Y.), *supra* note 175.

[177] 15 U.S.C. §§ 2601–2629 (2000).

Act.[178] After experts testified that, as a result of the Salvagnos' conduct, most of the 100 employees who suffered the worst exposure would contract asbestosis, lung cancers, and mesothelioma, Alex Salvagno was sentenced to twenty-five years in prison, and his father Raul was sentenced to nineteen years. In addition, Alex and Raul were ordered to forfeit a combined $3.7 million to the United States, and to pay approximately $23 million each in restitution to their victims.[179] The Salvagnos' abatement company, AAR Contractor, Inc., also was ordered to forfeit over $2 million and to pay approximately $23 million in restitution.[180] Finally, convictions were also obtained against thirteen supervisors (most of whom cooperated with the government) from AAR and the affiliated laboratory.[181]

Besides the severity of the sentencing, *Salvagno* is significant insofar as not a single OSH Act violation was alleged, despite the nature of the underlying crimes and the focus on the exposure of AAR's 500 employees to asbestos. The *Salvagno* case therefore continued the trend of *Hansen* and *Elias*, which, as discussed previously, also involved employee injury but included only a single OSH Act charge between them.[182]

C. *The Motiva Plea Agreement*

On March 17, 2005, Motiva Enterprises LLC (Motiva), the fifth largest oil-refining operation in the United States,[183] pleaded guilty to two CWA counts and one CAA count arising from a 2001 explosion that killed one employee and injured nine others.[184] The incident occurred at Motiva's Delaware City, Delaware, refinery when flammable vapors emanating from a corroded steel tank used

[178] 18 U.S.C. §§ 1961–1968 (2000). Alex Salvagno also was convicted of three counts of tax fraud. Press Release, U.S. Attorney's Office (N.D.N.Y.), *supra* note 175.

[179] *See* Press Release, U.S. Attorney's Office (N.D.N.Y.), *supra* note 175.

[180] *See id. See also* Kates, *supra* note 175; *Lengthy Jail Sentences Imposed for Illegal Asbestos Removal Activities*, *supra* note 175.

[181] *See Lengthy Jail Sentences Imposed for Illegal Asbestos Removal Activities*, *supra* note 175.

[182] Moreover, while Alex and Raul Salvagno have appealed their verdicts, their sentences exceeded those of both the *Hansen* and *Elias* cases. *See supra* text accompanying notes 164–65.

[183] Information ¶ 1, United States v. Motiva Enter. LLC, No. 05-CR00021 (D. Del. Mar. 16, 2005), 2005 WL 691605.

[184] Memorandum of Plea Agreement ¶ 1, *Motiva*, No. 05-CR00021 (D. Del. Mar. 16, 2005), 2005 WL 691606.

to store up to 415,000 gallons of sulfuric acid (designated by EPA as an "extremely hazardous substance"[185]), reached a heat source and exploded.[186]

Motiva admitted to improperly converting the tank, and to failing to take numerous steps that could have averted the explosion despite knowledge of corrosion and leaks in the tank over a period of eight years.[187] In addition to the human toll, the explosion caused approximately 99,000 gallons of sulfuric acid to spill into the Delaware River and resulted in the death of 2500 fish and 250 crabs.[188] Under the agreement, Motiva pleaded guilty to (i) knowingly discharging a pollutant into a water of the United States (via the local wastewater treatment plant) in violation of a National Pollutant Discharge Elimination System (NPDES) permit and the CWA,[189] (ii) negligently releasing an extremely hazardous substance into the ambient air that negligently placed a person in imminent danger of death or serious bodily injury, a CAA violation,[190] and (iii) negligently discharging a pollutant into the Delaware River in violation of Motiva's NPDES permit and the CWA.[191]

No individuals were involved in the plea deal, whereby Motiva agreed to a three-year probation and a $10 million fine—the largest criminal environmental fine in Delaware history[192]—to resolve the criminal case.[193] As was the case with the *Salvagno*, *Hansen* and *Elias* cases, no violation of the OSH Act was alleged in *Motiva*.

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[185] Information, *supra* note 183, ¶ 4; *see also* 42 U.S.C. § 11002(a)(2) (2000); EPA Emergency Planning and Notification Rule, 40 C.F.R. § 355, app. A (2004).

[186] Information, *supra* note 183, ¶¶ 3, 16.

[187] *Id*. ¶¶ 8–13.

[188] *Id*. ¶ 17.

[189] Memorandum of Plea Agreement, *supra* note 184, ¶ 1(a); 33 U.S.C. §§ 1311, 1319(c)(2)(A) (2000).

[190] Memorandum of Plea Agreement, *supra* note 184, ¶ 1(b); 42 U.S.C. § 7413(c)(4) (2000).

[191] Memorandum of Plea Agreement, *supra* note 184, ¶¶ 7–8, 14; 33 U.S.C. §§ 1311, 1319(c)(1)(A) (2000).

[192] Steve Cook, *Motiva Pleads Guilty to Air, Water Violations Stemming from Delaware Refinery Explosion*, DAILY ENV'T REP. (BNA), at A-2, Mar. 18, 2005.

[193] Memorandum of Plea Agreement, *supra* note 184, ¶ 7–8, 14.

D. *The Atlantic States Indictment*

On December 15, 2003, the DOJ filed an indictment in the United States District Court for the District of New Jersey against the Atlantic States Cast Iron Pipe Company.[194] Atlantic States is a pipe foundry with a long history of alleged workplace injuries, fatalities, and environmental violations.[195] By the indictment, Atlantic States and five executives were charged with substantive violations of the CWA and CAA, conspiracy to violate the CWA and CAA, conspiracy to make false statements and obstruct EPA and OSHA and to defeat the lawful purpose of EPA and OSHA, as well as false statement and obstruction counts.[196]

The indictment alleges, among other things, that the defendants discharged petroleum-contaminated wastewater onto the ground and into the Delaware River, and concealed such discharges from governmental regulators, in order to maximize the production of cast iron pipe at the Phillipsburg, New Jersey facility without concern to environmental pollution or worker safety.[197] The defendants also are charged with systematically altering accident scenes and existing conditions at the facility in order to conceal the unsafe working practices from OSHA.[198]

At the time of this writing, the *Atlantic States* trial was scheduled to begin in September 2005.

E. *New York's Strategy Complements the Initiative*

There is evidence that state law enforcement officials, too, are following the trend embodied in the Initiative. Presenting the keynote speech at the annual meeting of the New York Committee for Occupational Safety and Health (a union and public interest coalition) on December 7, 2004, New York Attorney General Elliot Spitzer stated that his office was beginning to prosecute workplace safety crimes using environmental statutes as a way to

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[194] Press Release, DOJ, Major N.J. Iron Pipe Manufacturer, Top Managers Charged in Eight-Year Conspiracy to Pollute, Expose Employees to Danger, Cover Up and Impede Investigations (Dec. 15, 2003), *at* http://www.usdoj.gov/opa/pr/2003/December/03_enrd_691.htm.

[195] Indictment at 14–36, United States v. Atl. States Cast Iron Pipe Co., No. 3:03CR00852, 2005 WL 213870 (D.N.J. Dec. 15, 2003).

[196] *Id.* at 37–46.

[197] *Id*. at 14–15.

[198] *Id*. at 15–16.

avoid federal preemption by OSHA.[199] Mr. Spitzer noted that by using state environmental laws, he has the "sword of Damocles of criminal prosecution hanging over the owner of the company, and criminal prosecution is what people fear, because the sanctions and the consequences are very significant, not only to the individual but to the company."[200]

It appears that New York's initiative will rely heavily on the state's analog to RCRA § 6928(e). Article 71 of the New York Environmental Conservation Law (ECL), which generally regulates the storage and prohibits the release of hazardous waste, was amended in 1986 to create the crime of "endangering public health, safety or the environment" (EPHSE) of which there are five degrees.[201]

Under the New York law, persons are guilty of EPHSE in the first degree when they *knowingly* engage in conduct that causes the release of a substance hazardous to public health or the release of a substance, which at the time of the conduct they know to meet any of the criteria set forth in ECL § 37-0103(b), and such release *causes physical injury* to any other person.[202] The aforementioned criteria in ECL § 37-0103(b) include New York's list of waste exceeding certain hazardous toxicity thresholds, or waste that causes or is capable of causing death, serious illness, or serious physical injury to any person as a consequence of its release into the environment.[203] Conviction of first-degree EPHSE, a Class C felony, subjects a defendant to a fine of *$200,000* and up to *fifteen years* in prison.[204]

Persons are guilty of EPHSE in the second degree when they either *knowingly* engage in conduct that causes the release of a substance hazardous to public health, and such release *causes physical injury* to any person who is not a participant in the crime,

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[199] John Herzfeld, *Attorney General Spitzer Urges Unions To Use Environmental Laws For Job Safety*, DAILY ENV'T REP. (BNA), at A-2 (Dec. 9, 2004); *Attorney General Spitzer Discusses Criminal Prosecution at NYCOSH Meeting*, NYCOSH UPDATE (N.Y. Comm. for Occupational Safety and Health, New York, N.Y.), Dec. 9, 2004, *available at* http://www.nycosh.org/UPDATE/update_index.php.

[200] *See* Herzfeld, *supra* note 199, at A-2.

[201] N.Y. ENVTL. CONSERV. LAW §§ 71-2710 to -2714 (McKinney 2004).

[202] *Id.* § 71-2714.

[203] *Id.* § 37-0103(b).

[204] *Id.* §§ 71-2714(2), 71-2721(2); N.Y. PENAL LAW § 70.00(2)(c) (McKinney 2004).

or when they *recklessly* engage in conduct which causes the release of a substance acutely hazardous to public health, and such release *causes physical injury* to a person who is not a participant in the crime.[205] Conviction of second-degree EPHSE, a Class D felony, subjects a defendant to a maximum fine of *$150,000* and up to *seven years* in prison.[206]

As an example of New York's initiative, Attorney General Spitzer pointed to the September 2004 indictment of a Bronx junkyard and two of its officers with reckless endangerment and two counts of EPHSE.[207] These charges stemmed from the serious injury suffered by a twenty-one-year-old employee. The indictment alleges that these injuries resulted from cleaning an underground storage tank that contained gasoline and other vehicle waste fluids without proper protective gear. The Commissioners of the New York Police Department and the New York State Department of Environmental Conservation convened to announce the indictment. At the press conference, Mr. Spitzer warned, "[b]usiness owners who put profit before the safety of their workers and violate environmental laws will be held accountable."[208]

By filing this indictment and the Attorney General's statements, New York has publicly acknowledged the adoption of a strategy similar to that adopted by the federal government in its Initiative for dealing with workplace safety violations. Just as the Initiative will affect employers nationwide with respect to potential violations of federal law and regulations, New York companies are likely to face more serious state-based charges for conduct that causes an injury or death to an employee.

CONCLUSION

On both the state and federal levels, environmental statutes and regulations increasingly are being used to regulate workplace safety, and to supplant enforcement efforts that historically relied upon the OSH Act. The formerly distinct regulatory universes of

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[205] N.Y. ENVTL. CONSERV. LAW § 71-2713 (McKinney 2004).

[206] *Id.* §§ 71-2713, 71-2721(2); N.Y. PENAL LAW § 70.00(2)(d) (McKinney 2004).

[207] Press Release, Office of New York State Attorney General Eliot Spitzer, Bronx Company Indicted After Near Death of Employee (Sept. 9, 2004), *at* http://www.oag.state.ny.us/press/agpress05.html.

[208] *Id.*

workplace safety and environmental protection are now bound by historical trends as well as by current developments, such as the Initiative and similar state initiatives mandating interagency activity and using environmental laws to prosecute workplace safety violations.

Moreover, in light of the requirements contained in environmental statutes such as RCRA, the Oil Pollution Act, and the Clean Air Act, as well as other regulatory requirements such as the preparation of Facility Response Plans, Spill Prevention, Control and Countermeasure Plans, and Spill Prevention Reports, today's employers not only must consider the health effects that a discharge may have upon their employees, but also must acquire and inspect relevant safety gear, conduct applicable safety training, and inspect potential sources of health hazards. In addition, the citizen suit provisions of environmental statutes such as RCRA and EPCRA may be brought to bear on employers who fail to comply with safety rules.

Cumulatively, such developments have reinforced workplace safety standards while simultaneously causing a shift away from enforcement under the OSH Act. As a result, these developments have dramatically changed the legal landscape for employers by threatening more significant penalties for noncompliance—including extended prison sentences for corporate officials—than would be possible in enforcement proceedings brought under the OSH Act alone. These changes, in turn, raise the inevitable question about the appropriateness of replacing a statutory regime specifically designed for the protection of the workplace, with statutory regimes generally thought to apply to areas outside of the workplace.