

OUTSIDE COUNSEL

BY DANIEL RIESEL AND DAN CHOROST

Initiatives Hit Workplace Violations With Environmental Laws

In May 2005, the U.S. Department of Justice (DOJ), the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) and the U.S. Environmental Protection Agency (EPA) announced a “major enforcement priority” (or Initiative) to provide for interagency coordination and prosecution of workplace-safety violations through the use of environmental statutes.

Major Enforcement Priority

The Initiative is being spearheaded by the DOJ's Environment and Natural Resources Division (ENRD). The Initiative already has resulted in significant interagency training and coordination, and increased enforcement activities.

The Initiative is of particular consequence to businesses dealing with hazardous substances, because today, even routine workplace-safety incidents may subject an employer and its management structure to increased scrutiny in both the safety and the environmental spheres. And unlike the relatively modest penalties contemplated by traditional workplace-safety laws and regulations, environmental statutes carry the possibility of substantial pecuniary penalties, criminal liability and lengthy incarceration.

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 under way: “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.” 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.

Although the Initiative was made public in May 2005, DOJ has been conducting a “pilot program” in the



Daniel Riesel

Dan Chorost

northeastern United States since 2003. That pilot program involved coordinated review of EPA and OSHA dockets, training of OSHA employees, and several recent, high-profile prosecutions discussed below.

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Over the past two years, ENRD attorneys have conducted nationwide trainings for over 700 OSHA supervisors, 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 ENRD's 39 prosecutors spend significant portions of their time on these cases—and that number will continue to increase as more cases come in.” 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. As reported in 2003 as part of a New York Times series, 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.¹

In the States

The trend evidenced by the Initiative is not limited to the federal government. In December 2004, New York Attorney General Eliot Spitzer announced

that his office would prosecute workplace-safety crimes using state environmental statutes. This strategy avoids pre-emption by OSHA, and empowers the state with the “sword of Damocles of criminal prosecution hanging over the owner of the company.”²

Mr. Spitzer pointed to the September 2004 indictment in *People v. Bronx Auto*, NYSupCt, No. 3671-2004, charging a junkyard and two officers with reckless endangerment and endangering public health, safety or the environment, N.Y. Environmental Conservation Law, §§37-0101, et seq. The indictment alleges that an employee was injured after being ordered to clean a storage tank containing waste fluids without protective gear. Appearing together with the Police Department and Department of Environmental Conservation commissioners, Mr. Spitzer warned that, “[b]usiness owners who put profit before the safety of their workers and violate environmental laws will be held accountable.”³

The federal Initiative and its state counterpart are the culmination of the gradual intersection of the formerly distinct spheres of environmental regulation and workplace-safety regulation. The theoretical basis of this intersection can be seen in an alliance between OSHA and EPA, first memorialized by two Memoranda of Understanding (MOU) entered into in the 1990s. Through these MOUs, the agencies agreed to conduct joint inspections and investigations, to share data and conduct inter-agency training, and to issue reports on major chemical accidents.⁴ While the extent to which such agreements were implemented is not clear, the MOUs demonstrated that high-level officials had begun to reject the notion that workplace safety and environmental safety were separate regulatory universes.

The importance of the convergence of the environmental and workplace safety spheres was not widely noticed, however, until landmark convictions were affirmed in the *Hansen* and *Elias* cases.

One of the most potent weapons currently used by federal prosecutors to combat workplace-safety violations is the Resource Conservation and Recovery Act (RCRA), 42 USCA §6901, et seq., a cornerstone of federal environmental legislation. But RCRA's connection to worker-safety prosecutions is not necessarily obvious; after all, the Occupational Safety and Health Act (OSH Act), 29 USCA §651, et seq., traditionally has been relied upon to ensure that employers “furnish to each of [their] employees... a [workplace that is] free from recognized hazards [likely] to cause death or serious harm to [their] employees.” 29 USCA §654(a)(1). The OSH Act achieves this goal, in part, by requiring that employers

Daniel Riesel and Dan Chorost are attorneys at *Sive, Paget & Riesel*. Mr. Riesel is a lecturer in law at Columbia University School of Law and author of “*Environmental Enforcement: Civil and Criminal*.” Mr. Chorost has lectured on the convergence of environmental and workplace-safety law.

comply with occupational safety and health standards promulgated by OSHA.

By contrast, RCRA's purpose is to regulate hazardous wastes "from cradle to grave," and the statute has spawned a detailed regulatory system aimed at reducing the release and improper disposal of hazardous waste. RCRA supplements traditional workplace-safety law such as the OSH Act by requiring the safe storage and handling of hazardous waste, and providing for civil penalties of up to \$32,500 per violation per day, where employees improperly are exposed to workplace hazards. 42 USCA §§6928.

One reason for the increased reliance by prosecutors upon RCRA instead of the OSH Act may derive from the fact that OSH Act violations can be more onerous to prove. For example, OSHA establishes permissible exposure limits for toxic and hazardous substances by setting ceiling values and eight-hour, time-weighted averages. Given the potential complexities involved in proving an exposure case over eight-hour shifts and 40-hour weeks, the more-straightforward standards provided for by environmental statutes may be more attractive to prosecutors.

Moreover, the penalties authorized by environmental statutes often are markedly more severe than those of the OSH Act. For example, OSH Act §666(e) provides that "any employer who willfully violates any standard, rule or order...and that violation cause[s] death to any 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...."

By contrast, RCRA §6928(e) significantly raises the stakes by providing that any person handling hazardous waste in violation of RCRA:

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 \$1 million if defendant is an organization] or imprisonment for not more than 15 years, or both.

In 2001, the U.S. Court of Appeals for the Eleventh Circuit affirmed in *United States v. Hansen*, 262 F3d 1217 (11th Cir. 2001), what at the time was the longest sentence ever imposed for an environmental workplace crime. The *Hansen* case involved LCP Chemicals, a manufacturer of bleach, soda and acid. Due to inadequate safety measures, employees suffered burns after exposure to mercury and hydrochloric acid. Four officers were indicted for conspiracy to commit environmental crimes, and for various substantive violations of environmental laws, including knowingly exposing employees to hazardous materials in violation of RCRA. Upon conviction, three officers were sentenced to between four and nine years each, while another was given 18 months after cooperating with prosecutors.

In late 2001, the U.S. Court of Appeals for the Ninth Circuit affirmed the conviction and 17-year prison sentence of Allen Elias in *United States v. Elias*, 269 F3d 1003 (9th Cir. 2001). The owner of a fertilizer company, Mr. Elias ordered employees to clean a cyanide-laced sludge tank while wearing only their regular work clothes. After the employees complained of sore nasal passages, an early symptom of cyanide poisoning, Mr. Elias promised to purchase safety equipment but ordered

that the tank be cleaned immediately. Upon re-entering the tank, an employee collapsed and suffered permanent brain damage. Mr. Elias was convicted of violating three RCRA counts, including knowingly endangering employees. He also was convicted of making a material false statement under the OSH Act.

'Motiva,' 'Salvagno,' Others

Federal prosecutors are implementing the Initiative by bringing cases not only under RCRA, but also under the Clean Air Act (CAA), the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

On March 17, 2005, Motiva Enterprises LLC (Motiva), the fifth-largest oil-refining operation in the United States, pleaded guilty to one CAA and two CWA counts arising from an explosion that killed an employee and injured nine others. The incident occurred at a Motiva refinery when vapors from a corroded steel tank caused the tank to explode, and spill 99,000 gallons of acid into the Delaware River.

Motiva pleaded guilty to negligently releasing an extremely hazardous substance into the ambient air which negligently placed a person in imminent danger of death or serious injury, a CAA violation, and to two CWA violations for discharging pollutants to the river. Motiva paid a \$10 million fine, the largest such fine in Delaware history.⁵

The CAA has been used successfully to prosecute workplace-safety violations with great effect in other cases, as well. Violating the CAA is punishable by civil penalties of up to \$27,500 per violation per day, while the most severe criminal penalties provide 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 18, or by imprisonment of not more than 15 years, or both.

Violations of this section by a corporation are punishable by a fine of up to \$1 million.

In December 2004, a judge in the U.S. District Court for the Northern District of New York imposed, in *United States v. Salvagno*, the two longest prison sentences for an environmental crime, as well as massive fines and restitution payments. Over a 10-year period, the defendants violated the CAA's asbestos standards by directing over 500 employees to remove dry asbestos instead of wetting it first, and defrauded clients on 1,500 abatement jobs by falsifying laboratory samples.

The *Salvagno* defendants were convicted of nine CAA counts and other charges, sentenced to between 19 and one-half and 25 years, and ordered to forfeit \$3.7 million and pay approximately \$46 million in restitution.⁶

The CWA is being employed in other cases under the workplace-safety approach embodied by the Initiative. In December 2003, a New Jersey pipe foundry with a long history of workplace injuries was indicted. Atlantic States and five of its executives are charged with, among other things, CWA violations, and for conspiracy to

violate the CWA and to make false statements. The indictment alleges the systematic alteration of accident scenes, and of workplace conditions that caused an employee death and numerous serious injuries. The case is pending in the District of New Jersey, where trial is scheduled to begin this fall.

On both the state and federal levels, environmental statutes and regulations increasingly are being used to regulate workplace safety. These formerly distinct regulatory universes are now bound by both historical trends as well as current developments, such as the federal Initiative and similar state-level initiatives. These developments dramatically have 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. This trend also raises the inevitable question about the appropriateness of replacing a statutory regime specifically designed for the protection of the work place, with statutory regimes generally thought to apply to areas outside of the work place.

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2. BNA Inc., "Attorney General Spitzer Urges Unions to Use Environmental Laws for Job Safety," *Daily Environment*, Dec. 9, 2004, page A-2; New York Committee for Occupational Safety and Health, "Attorney General Spitzer Discusses Criminal Prosecution at NYCOSH Meeting," *NYCOSH Update: Health and Safety News*, Dec. 9, 2004.

3. Minners, John, "Bx. Auto Venture Corp. indicted for environmental crimes," *Bronx Times*, Sept. 16, 2004.

4. MOU between OSHA and the U.S. EPA Office of Enforcement, dated Nov. 23, 1990; MOU Between the U.S. EPA Office of Solid Waste and Emergency Response, Office of Enforcement and Compliance Assurance and OSHA on Chemical Accident Investigation, dated Dec. 1, 1996.

5. BNA Inc., "Motiva Pleads Guilty to Air, Water Violations Stemming from Delaware Refinery Explosion," *Daily Environment*, March 18, 2005, page A-2.

6. Sentencing Memorandum of the United States, *United States v. Salvagno, et al.*, United States District Court, Northern District of New York, Case No. 5:02-CR-00051-HGM, at 1-3. See also Kates, William, "25 and 20 years for son, father who ran massive asbestos fraud," *Associated Press*, Dec. 23, 2004; "Lengthy jail sentences imposed for illegal asbestos removal activities," *Daily Record of Rochester*, Jan. 6, 2005.

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