

## Environmental Enforcement and Crimes Committee Newsletter

Vol. 16, No. 2

July 2016

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### WORD FROM THE CO-CHAIRS

Rich Alonso and Christine LeBel

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Hello committee members, and welcome to those of you newly joined! We hope you will find this to be your home within this ABA Section.

Summer is now upon us, which means appointments for next bar year are well under way. If you want to be more involved in this committee—a great way to stay abreast of developments and do some terrific networking with experts in the field—please let us know. We have a number of vice chair positions available and can get you involved in your area of interest. Want to publish? Write an article for our committee newsletter. Want to attend a teleconference on your issue of expertise? Get involved in its planning. Have other ideas? We are open to all suggestions and encourage you to get the most out of your membership through active involvement with your peers.

This year, the committee has focused on a few issues, including, significantly, the impact of the Department of Justice's (DOJ) so-called Yates memo on enforcement. In the September 2015 memo, DOJ outlined a strategy to combat corporate misconduct by seeking greater accountability from the individuals who perpetrated the wrongdoing. So, the question arises, is civil/criminal enforcement against individuals on the uptick?

As a practitioner at the state level, your Co-Chair Christine has seen a trend in that direction over the

last few years, even prior to the memo that may have coalesced the trend, with a big case breaking recently that involved coordination between DOJ, the Massachusetts attorney general and her state agency (Department of Environmental Protection) and led to two criminal indictments and significant civil settlements via consent judgment in a matter involving tampering with the continuous emissions monitors at an air source. For further details, see the DOJ's Berkshire Power press release at <https://www.justice.gov/usao-ma/pr/western-massachusetts-power-plant-owner-and-management-companies-agree-plead-tampering>.

Anecdotal as the foregoing is, we cannot ignore how much more often we are witnessing the attempts of agency, attorney general, and DOJ investigators at state and federal levels to get more information on the individuals involved in alleged violations. Individual liability has, of course, always been a viable route of enforcement, so perhaps the Yates memo has simply captured a sign of the times. Or, perhaps, the memo sought to grab the trend by the tail and shape it into a much more powerful whip. Regardless of this chicken-and-egg question, we suspect, with the immediate past's examples of egregious corporate wrongdoing (e.g., leading to the Great Recession), the trend will be continuing for some time. Corporate counsel, take note.

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Kevin Sali, Editor

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AMERICAN BAR ASSOCIATION  
**SECTION OF ENVIRONMENT,  
ENERGY, AND RESOURCES**

**CALENDAR OF SECTION EVENTS**

August 3-5, 2016

**28th Annual Texas Environmental  
Superconference - "It's Like Dejà Vu All  
Over Aagain"**

Primary Sponsor: Environmental and  
Natural Resources Law Section of the  
State Bar of Texas

August 4-9, 2016

**ABA Annual Meeting**

San Francisco, CA

October 5-8, 2016

**24th Fall Conference**

Westin Denver Downtown  
Denver, CO

October 26, 2016

**Criminal Enforcement of Environmental &  
Workplace Safety Laws**

Westin Washington, DC City Center  
Washington, DC

March 28-29, 2017

**35th Water Law Conference**

Loews Hollywood Hotel  
Los Angeles, CA

March 29-31, 2017

**46th Spring Conference**

Loews Hollywood Hotel  
Los Angeles, CA

**For full details, please visit  
[www.ambar.org/EnvironCalendar](http://www.ambar.org/EnvironCalendar)**

*Continued from page 1.*

And that's why we, as a committee, are here: to spot and evaluate trends, provide insight, fuel conversations, and generally enhance the practice in this ever-evolving area. Thanks for joining us. Bring your friends. And stay tuned for more in this space.

*Christine LeBel is Chief Regional Counsel for the Massachusetts Department of Environmental Protection, Western Region. Rich Alonso is a partner in the Environmental Strategies Group for the D.C. office of Bracewell & Giuliani.*

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## REQUEST FOR INFORMATION REGARDING STATE ENVIRONMENTAL CRIME PROSECUTIONS

Professor Susan Mandiberg

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I am seeking information about environmental criminal prosecutions in state courts. I am particularly interested in prosecutions by states with authorized programs under the Clean Water Act and the Resource Conservation and Recovery Act. If you have data or anecdotal information about the use (or absence of use) of state courts for such prosecutions, I would be most interested in communicating with you. Please contact me at [sfm@lclark.edu](mailto:sfm@lclark.edu). Thanks in advance for your help.

*Susan Mandiberg is a Distinguished Professor of Law at Lewis & Clark Law School in Portland, Oregon.*

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## Help spread the word about the MDEP

**Application deadline: August 1.**

The Membership Diversity Enhancement Program (MDEP) is an initiative by the ABA Section of Environment, Energy, and Resources designed to increase the number of government lawyers and diverse lawyers in our Section. These lawyers have typically been under-represented among our members. The program's goal is to have the Section's programs, publications, and other activities reflect the diverse perspectives and interests of all lawyers who practice in the in the environmental, energy, or natural resources law areas.

Applications must be received by **Monday, August 1, 2016.**

A limited number of applicants will be selected. Selection criteria include degree of involvement in these areas and interest in the Section.

[www.ambar.org/EnvironMDEP](http://www.ambar.org/EnvironMDEP)

Selected MDEP participants will receive the following benefits through August 31, 2017:

- 50% payment of your ABA dues and waived Section dues;
- Complimentary registration to one Section conference of your choice, and
- \$400 travel reimbursement to attend a Section conference!

Please note: Consistent with the goal of increased membership diversity, the program especially encourages applicants who are not already ABA or Section members and applicants whose dues are not reimbursed by their employer.

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## EPA'S MITIGATION MEMORANDUM: NEW CHALLENGES IN CIVIL ENFORCEMENT

Carrick Brooke-Davidson

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On November 14, 2012, the Environmental Protection Agency (EPA) issued an enforcement memorandum entitled *Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements* (2nd edition) (“Mitigation Memorandum”) (<https://www.epa.gov/enforcement/2nd-edition-securing-mitigation-memo>). The Mitigation Memorandum directs government enforcement case teams to consider mitigation as an aspect of the case resolution. This policy has significantly changed the landscape on civil enforcement but appears to have flown under the radar of many environmental practitioners.

Traditionally, civil enforcement settlements have consisted of penalties, usually with an economic benefit component designed to recapture the economic benefit due to noncompliance, and a gravity component to provide a deterrent effect. In addition, many settlements include injunctive relief to correct violations.

In addition to these traditional components, supplemental environmental project (SEP) policies have been developed to encourage settling parties to undertake environmentally beneficial projects that are not otherwise required by law or regulation. SEPs are particularly attractive because part of the cost to implement the SEP can be applied to offset the civil penalty.

The EPA Mitigation Memorandum adds a new element to civil enforcement cases—mitigation. While the concept of mitigation has been around under several specific statutory programs—for example, the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Resource Conservation and Recovery Act (RCRA) (*see* Mitigation Memorandum at note 3)—the Mitigation Memorandum expands mitigation as a remedy into new areas, most notably in Clean Air Act (CAA) enforcement.

This expansion of mitigation as a remedy in enforcement cases creates new challenges for parties seeking to resolve alleged environmental violations. This will become more apparent as the policy is examined. Under the policy espoused in the Mitigation Memorandum, mitigation is another form of injunctive relief. Its purpose is to remedy, reduce, or offset past harm. Unlike traditional injunctive relief, which is used to address and correct ongoing violations, mitigation is designed to address possible harm due to past violations.

Under this approach, mitigation is viewed as a remedy that ultimately could be ordered by a court against a liable defendant, and could be sought against a defendant that has already corrected the underlying violations that gave rise to the enforcement action. Thus, even in a “penalties-only” case, i.e., a case in which no ongoing violation exists, the Mitigation Memorandum directs that the government consider injunctive relief in the form of mitigation for past violations.

In looking at mitigation in both theory and practice, it bears a strong resemblance to SEPs. As the previous discussion suggests, however, there are key differences between mitigation and SEPs. First, as noted above, mitigation is viewed as a form of injunctive relief that, in the final instance, can be a remedy ordered by a court. Contrast this to SEPs, which are voluntary and involve projects that are not legally required. Second, under EPA’s Mitigation Memorandum, mitigation remedies must have a closer nexus to the underlying violation. This derives from the underlying legal bases for mitigation, i.e., providing redress for the past violation. SEPs, on the other hand, have less stringent nexus requirements.

Third, and perhaps most importantly, because mitigation is viewed as a form of injunctive relief, there is generally no penalty reduction given for the cost of mitigation. Just as the government will generally not reduce penalties to secure compliance, so it will not reduce penalties to secure mitigation. The memorandum does, however, allow the government to consider various aspects of

litigation risk, including those relating to penalties, injunctive relief, and mitigation, when determining whether to accept a settlement. *See* Mitigation Memorandum at 8.

As set out in the Mitigation Memorandum, the legal bases for mitigation are derived from both the inherent equitable power of courts and the broad statutory language in most environmental statutes giving courts authority to “award any other appropriate relief.” The underlying case support for expansion of mitigation into areas such as the CAA is somewhat sparse. For example, *United States v Cinergy Corp.*, 582 F. Supp. 2d 1055 (S.D. Ind. 2008), is the only case cited in the Mitigation Memorandum as support for the availability of mitigation under the CAA, and even in that case the remedy was not actually ordered by the court. The *Cinergy* decision has been questioned by other courts. *See United States v. EME Homer City Generation, L.P.*, 823 F. Supp. 2d 274, 289–90 (W.D. Pa. 2011).

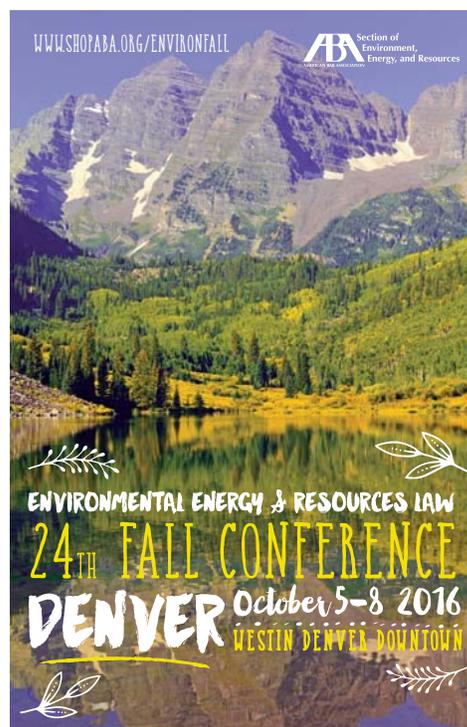
Nonetheless, mitigation has been a significant component of government settlements. A review of EPA settlements through 2011 reveals at least 60 settlements that included mitigation. Many of these settlements involved CAA violations. The costs of mitigation remedies run into millions of dollars. In addition, mitigation projects have dovetailed with EPA’s next generation enforcement initiative. In particular, a mitigation project is the type of activity for which EPA has indicated it will seek third-party compliance verification. Under this approach, the settling party will be required to pay the cost for an independent third party to verify compliance with activities required under a settlement, whether injunctive relief, SEPs, or mitigation. This has already occurred in recent settlements and can be expected to continue.

The Mitigation Memorandum thus presents several challenges to address during settlement. First, as noted, agreeing to undertake mitigation does not result in a reduction in penalty. Mitigation thus becomes a separate, potentially expensive issue to address in settlement. Second, while a

mitigation project is required to have a nexus to the underlying violation, a review of mitigation settlements does not demonstrate that the mitigation remedies are necessarily proportional to the alleged environmental harms. This presents opportunities for disagreement over both these issues, i.e., the magnitude of the harm and the appropriate mitigation approach to address that harm. This seems particularly likely to occur under the CAA, where both elements may be hard to quantify. Third, mitigation projects create more potential for extended-term consent decrees with commensurate oversight and third-party compliance certifications, even for cases that in the past would have been resolved by payment of penalties.

In conclusion, EPA’s Mitigation Memorandum has significantly altered the landscape on enforcement negotiation. Attorneys involved in such cases should be familiar with the Mitigation Memorandum and be prepared to address it in negotiating settlement of EPA enforcement actions.

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## THE ASSIGNABILITY OF CITIZEN SUITS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT

Eric L. Hiser and Brandon J. Curtis

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The Central District of California recently determined that civil suits authorized under the Resource Conservation and Recovery Act (RCRA; see 42 U.S.C. § 6972) are assignable. According to the court's own assertion, it was the first to consider this question. As explained below, this could increase the incidence of citizen enforcement under RCRA.

### The Facts

In *Jim 72 Properties, LLC v. Montgomery Cleaners*, the plaintiff, who had entered into escrow to purchase the subject property, brought an action under RCRA's citizen suit provisions against the owners of a dry cleaning business for contaminating the adjacent property. No. 215CV7543ODWFFMX (C.D. Cal. Dec. 16, 2015). Prior to the plaintiff's purchase, the defendant had operated its dry cleaning business on the adjacent property for several years.

The plaintiff discovered the contamination when he commissioned an environmental investigation during escrow. The investigator reviewed historical records and performed comprehensive soil testing. Relying on the consultant's conclusions contained in the environmental report, the plaintiff believed that the defendant's prior dry cleaning activities on the adjacent property resulted in the release of chlorinated solvents into the soil and groundwater; this contamination then migrated to the soil and groundwater of the subject property.

Subsequent to this discovery, the plaintiff entered into an agreement with the selling landowners to assign to plaintiff "all right, title and interest in any claims or causes of action" arising out of the contamination. With this assignment, the plaintiff brought suit against the neighboring dry cleaning service. Shortly thereafter, the defendant moved to dismiss the complaint for lack of jurisdiction,

arguing that, because escrow had not closed on the subject property and title had not transferred, the plaintiff had not suffered an "injury in fact" and therefore lacked standing to bring suit. The defendant also argued that the assignment was not effective because it was not "absolute in form" and legal title had not "plainly" vested in the assignee. Plaintiff countered that only title to the claims, not to the subject property, was necessary to establish standing.

### The Court's Analysis

The court agreed with the plaintiff that only assignment of the claims and not transfer of title was necessary to establish standing. Consequently, the court's only remaining question was whether the private cause of action created by RCRA's citizen suit provisions was assignable. The court noted that RCRA lacks any provisions to resolve the question and therefore relied on common law principles of survivability. Under the common law, a claim is survivable and therefore may be assigned if the underlying statute is remedial, rather than penal, in nature. To answer this question, the court considered: "1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; 2) whether recovery under the statute runs to the harmed individual or to the public; and 3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered." Statutes that are aimed at redressing individual wrongs, that are intended to grant recovery to the individual, and that authorize recovery that is proportionate to the harm are considered remedial.

First, the court found that the RCRA provisions at issue are aimed at addressing individual harms, a finding that suggested the statute is remedial in nature. The court acknowledged that Congress, in enacting RCRA, identified the large-scale environmental harms the statute was intended to address, such as the dangers of improper waste management to human health and the environment, the hazards of open dumping, and the threat of contaminated drinking water. Putting these large-

scale goals aside, the court found that “it is also abundantly clear that RCRA aims to alleviate the individualized harms people may suffer as a result of toxic waste.” As an example, it pointed to the individualized language of the provision at issue, which authorized claims against a polluter “who has contributed or who 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.” 42 U.S.C. § 6972 (a)(1)(B).

Second, the court found that, although the penalty authorized under the statute would run to the government, the statute was ultimately remedial rather than punitive in nature. The court relied on the principle that, even where fines are paid to the public and not the individual, that cause of action will be survivable if the monetary penalties are not punitive. The court found that RCRA’s civil penalties ultimately served the remedial goal of reimbursing the government for cleanup costs and were not intended to punish the polluter.

Finally, the court concluded that the available recovery weighed in favor of the remedial characterization. The statute authorizes both injunctive and monetary relief. The court noted that injunctive relief is inherently remedial as it halts the polluting behavior. It also reiterated its finding that RCRA’s civil penalties are remedial rather than punitive.

Because the court found that all three factors favored the remedial characterization of the RCRA citizen suit provision, it held that the plaintiff had standing to pursue his claims against the defendant dry cleaner.

## The Implications for Citizen Enforcement

Ultimately, the court’s holding has the potential to increase the durability and availability of citizen suits under RCRA. For the plaintiff in *Jim 72 Properties*, a contrary ruling would have only meant that the plaintiff would have to wait until

the “injury in fact” materialized. This would have occurred when the sale of the property became final. However, the ruling has broader implications than the case immediately presents.

The legal analysis underlying the court’s ruling would appear to allow citizens to assign their “injury in fact” status to completely unrelated parties who have been altogether unaffected by the violations at issue. For example, whereas environmental groups ordinarily have to show that their members would have standing to sue before they can pursue citizen suit claims, *see, e.g., Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 399 F.3d 248, 257 (3d Cir. 2005), such groups can now be assigned claims by citizens who have suffered injuries in fact but are not associated with the group. This assignment is effectively an assignment of the “injury in fact” and may allow groups to establish standing where they could not before. Thus, the assignability of RCRA’s citizen suits may increase the incidence of citizen enforcement under RCRA.

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## CRIMINAL PROSECUTION OF ENVIRONMENTAL AND WORKPLACE SAFETY INCIDENTS THROUGH DOJ'S NEW WORKER ENDANGERMENT INITIATIVE

Steven P. Solow, Lily N. Chinn, and Anne M. Carpenter

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In December 2015, Deputy Attorney General (DAG) Sally Yates announced a Worker Endangerment Initiative that formalizes the trend toward “criminalization” of major environmental and workplace accidents. The Department of Justice (DOJ) memorandum (<https://www.justice.gov/enrd/file/800431/download>) directs responsibility for the prosecution of workplace safety violations to DOJ's Environmental Crimes Section (ECS), or the 93 United States Attorneys' Offices, and guides all federal prosecutors to leverage environmental criminal statutes and title 18 along with relevant worker protection statutes to address workplace safety. The accompanying memorandum of understanding with the Department of Labor (<https://www.justice.gov/enrd/file/800526/download>) sets forth how the two agencies will cooperate to investigate and prosecute worker endangerment violations, including both information sharing and cross-training of inspectors from the Environmental Protection Agency (EPA) and the Occupational Health and Safety Administration (OSHA). At the same time, DOJ announced it would strengthen its civil enforcement of worker safety violations under environmental statutes in an effort to protect workers tasked with handling dangerous chemicals, cleaning up spills, and responding to hazardous releases (<https://www.justice.gov/opa/pr/departments-justice-and-labor-announce-expansion-worker-endangerment-initiative-address>).

The Worker Endangerment Initiative was also announced on the heels of another enforcement proclamation by DAG Yates in 2015 that requires corporations who cooperate with government investigations to share information regarding the culpability of individual employees. Together, the two memoranda signal an important shift in

enforcement focus—toward individual culpability in the prosecution of environmental and workplace violations. To meet the mens rea required for corporate criminal liability in such matters, we may also see increased reliance on the legal theory of collective knowledge.

### The Genesis of the Worker Endangerment Initiative

The government traces the genesis of this initiative back to *United States v. Elias*, the so-called cyanide canary case prosecuted in 2000, and the recent announcement represents the culmination of over a decade of effort by OSHA and DOJ to expand the scope of criminal enforcement in order to address and deter workplace safety violations. These violations have been addressed, in limited number, under the misdemeanor provisions of the Occupational Safety and Health Act (OSH Act), which provides a statutory fine of up to \$10,000 and/or six months in prison for first-time offenders. See 29 U.S.C. §§ 666(e), (f), (g).

In *Elias*, the government used the Resource Conservation and Recovery Act (RCRA) to obtain felony convictions and 17 years in prison for an employer, Allan Elias, who ordered an employee to enter and clean a tank containing phosphoric acid and cyanide without the provision of personal protective equipment or safety training; the employee suffered severe brain damage as a result of the incident. See *United States v. Elias*, No. 4:98-cr-00070 (D. Idaho 2000). A year later, when an explosion and collapse of a highly corroded sulfuric acid tank at a Motiva Enterprises, LLC, facility caused a worker fatality, worker injuries, and a discharge into the Delaware River, the government used both the Clean Air Act's (CAA) negligent endangerment provision and the Clean Water Act's (CWA) prohibition against unpermitted discharges to obtain a \$10 million criminal fine against Motiva. See *United States v. Motiva Enters., LLC*, No. 1:05-cr-00221 (D. Del. 2005).

In the mid-2000s, the government also brought five hybrid environmental workplace

safety prosecutions against the cast-iron pipe manufacturer McWane, Inc., and several of its divisions, including Atlantic States Cast Iron Pipe Co. In the Atlantic States prosecution, the government alleged that McWane had a history of environmental violations, workplace injuries, and fatalities, as well as activities intended to obstruct justice. See *United States v. Atl. States Cast Iron Pipe Co.*, No. 3:03-cr-00852 (D.N.J. 2006). Across the five cases, the government relied on a combination of felony charges under the OSH Act, CWA, CAA, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and RCRA, as well as charges of obstruction and false statements, to obtain criminal penalties totaling almost \$25 million against the McWane entities and jail time for McWane officials. See *id.*; see also *United States v. Union Foundry Co.*, No. 2:05-cr-00299 (N.D. Ala. 2005); *United States v. Tyler Pipe Co.*, No. 6:05-cr-00029 (E.D. Tex. 2005); *United States v. McWane, Inc.*, No. 2:05-cr-00811 (D. Utah 2006); *United States v. McWane, Inc.*, No. 2:04-cr-00199 (N.D. Ala. 2005).

More recently, the EPA's Criminal Investigation Division (EPA-CID), which serves as the environmental criminal investigative arm for the Department of Justice and U.S. Attorney offices, has publicly embraced the presumption that major accidents will be investigated as potential criminal cases. Indeed, last year, Doug Parker, then-director of EPA-CID, stated that EPA-CID would conduct at least a preliminary criminal investigation following any major environmental or workplace accident. See Doug Parker, *Environmental Enforcement*, Panel at the American Bar Association's Twenty-Ninth Annual White Collar Crime Conference (Mar. 4, 2015).

### **The 2015 Yates Memorandum in Tandem: Prosecution of Corporate Executives and Employees Under the Worker Endangerment Initiative**

The initiative follows the September 9, 2015, Yates memorandum to all DOJ criminal and civil branches that sets out "six key steps to strengthen [DOJ's] pursuit of individual corporate

wrongdoing." In environmental criminal matters, prosecutors have routinely exercised their discretion to investigate and prosecute individuals alongside corporations as illustrated above. The September Yates memorandum, however, commands prosecutors to simultaneously concentrate on corporate entities *and* individuals in criminal investigations. In fact, it requires the express approval of the relevant U.S. attorney or assistant attorney general to decline an individual prosecution or to release individuals from civil or criminal liability in a corporate resolution.

Notably, there have been charges against individuals in several recent hybrid environmental workplace safety matters. Following the Deepwater Horizon rig explosion in 2010, there was a spate of individual prosecutions related to the incident. Five individuals were charged with violations ranging from the little-used seaman's manslaughter to obstruction of Congress; three of the individuals pleaded to a single misdemeanor count and two were acquitted. See *United States v. Badalamenti*, No. 2:13-cr-00204 (E.D. La. 2013) (plea); *United States v. Mix*, No. 2:12-cr-00171 (E.D. La. 2015) (plea); *United States v. Kaluza (and Vidrine)*, No. 2:12-cr-00265 (E.D. La. 2015) (plea); *United States v. Rainey*, No. 2:12-cr-00291 (E.D. La. 2015) (acquittal); *United States v. Kaluza*, No. 2:12-cr-00265 (E.D. La. 2016) (acquittal). Similarly, following an explosion at a Massey Energy mine that killed 29 workers in 2010, the government prosecuted former Massey CEO Donald Blankenship. See *United States v. Blankenship*, No. 5:14-cr-00244 (S.D. W. Va. 2015). In what appears to be the first conviction of a high-level corporate executive under a safety statute, the jury found Blankenship guilty of one misdemeanor count of conspiracy to willfully violate the Mine Safety and Health Act, and the court sentenced him to a year in prison.

In light of the recent DOJ memoranda, corporations should expect that the government will initiate a preliminary criminal investigation into both the corporation and its employees after any major environmental or workplace accident.

An increased level of criminal investigation is a change from prior government responses to industrial accidents. This change may create tension with the mandates of the National Transportation Safety Board (NTSB) and the Chemical Safety Board (CSB). These agencies are charged with identifying safety improvements to prevent future accidents and lack any enforcement authority, either civil or criminal. As a result, the increased likelihood of a criminal investigation may raise concerns for individuals and corporations that interact with NTSB and CSB.

### **Corporate Workplace Safety Prosecutions: Use of the Collective Knowledge Doctrine**

Identifying a single individual whose mental state and actions can serve as the basis for corporate criminal liability in a hybrid, environmental workplace safety enforcement can be difficult. This challenge may result in an increase in the government's use of novel legal theories, including corporate collective knowledge, to help prove OSH Act violations (alleged in conjunction with title 18 or traditional environmental criminal charges). Recently, the U.S. District Court for the Northern District of California affirmed the use of this theory in a government instruction to the grand jury regarding the necessary proof to establish the willful mens rea required for an indictment against Pacific Gas & Electric charging violations of the Pipeline Safety Act (PSA). *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175 (N.D. Cal. 2015), ECF No. 219. PG&E was indicted on 27 PSA charges in connection with a 2010 gas line rupture in San Bruno, California that led to the death of eight people, injuries to 58 people, and damage to numerous homes. The court found that “where a corporation has a legal duty to prevent violations, and the knowledge of that corporation’s employees collectively demonstrates a failure to discharge that duty, the corporation can be said to have ‘willfully’ disregarded that duty.” *Id.* at 8. Unique to the ruling is the court’s sanction of the collective knowledge theory to prove not only knowledge *but also* specific intent.

PG&E is not the first time the government has relied on an aggregate of employee knowledge to show specific intent in workplace safety enforcement (and may not be the last). The government relied on the theory in the 2009 OSH Act enforcement of Tyson Foods in connection with the death of an employee exposed to hydrogen sulfide gas (H<sub>2</sub>S) at one of the company’s poultry plants. *United States v. Tyson Foods, Inc.*, No. 4:09-mj-04001 (W.D. Ark. Jan. 6, 2009). The charges, and subsequent plea agreement, recited that management’s collective awareness of the presence of H<sub>2</sub>S at the plant was sufficient to prove the company’s failure to effectively limit exposure of its employees to H<sub>2</sub>S (in compliance with regulation) was willful. The Tyson Foods matter, however, was not litigated, and OSH Act precedent premises corporate liability on discrete and intentional individual acts of disregard for, or plain indifference to, safety regulations. *See, e.g., United States v. Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998); *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975).

Notably, the Tyson Foods prosecution was supervised by Deborah Harris (current DOJ-ECS chief), one of the principal architects of the Worker Endangerment Initiative. Harris participated in the initial wave of prosecutions in the mid-2000s, trained OSHA investigators to detect environmental violations, and has written about the use of environmental criminal provisions in workplace safety matters. With the issuance of the Yates memorandum, under the leadership of Harris, and with the support of DOL and EPA, the government seems ready to move forward with the Worker Endangerment Initiative.

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## DO THESE FOUR THINGS IF YOU WANT YOUR CLIENT TO IMPRESS A REGULATOR

Christine LeBel

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I hate to write articles that are self-evident. However, as an environmental regulator for going on a baker's dozen of years now, I've seen enough breaches of the pointers I'm about to mention that I have to assume they are not as plain as one might think or wish. Read on to see what I've found to be the top four things we, as regulators, will favorably consider to your client's benefit in any given enforcement situation.

### **(1) Self-disclosure/Candor/Cooperation**

You've heard that "honesty is the best policy," but is it really? It's human nature to want to deny responsibility and the obligations and costs it can entail. The hope is that denial will work and we will shake off any consequences like water off a duck's back. In fact, sometimes that can work (hence, the power of this "choice"). However, the reality in the enforcement arena is that there are people who are paid to find out the truth (i.e., regulators and prosecutors). A client can face significant administrative, civil, and criminal penalties for failing to provide information or for providing false and misleading information, whereas such penalties can be mitigated substantially by "coming clean" at the outset—especially before the regulators even come knocking.

In a recent case in my region, the management company for an air-emissions source avoided criminal prosecution by self-disclosing information it had learned through self-audit that indicated that certain individuals had tampered with the facility's continuous emissions monitors and, further, by cooperating with Department of Justice and state environmental officials in the criminal prosecution of the individuals involved. Although the company ultimately paid a seven-figure penalty, its seven figures were many multiples below the prices paid by the others more directly responsible and less forthcoming (who face incarceration, as well as significant fines).

As state-level counsel, when it comes to the assessment of administrative penalties, my colleagues and I have a regulatory mandate to consider "good faith" in calculating amounts. So, yes, when it comes to representing clients before your local, state, or federal regulators, honesty is the best policy in the interests of your clients.

### **(2) Preparation**

One of the most memorable enforcement conferences I ever had with an alleged corporate violator was one in which the representative of the company (a named officer) came in—not only with counsel—but with his environmental manager and outside consultant, all with tabbed notebooks detailing the remedial work they had undertaken since becoming aware of the problem and specifically addressing each item set forth in the agency's notice of violation. Compare that situation to one in which an alleged violator shows up with nothing at all in hand, no consultants engaged, and no work undertaken. Sure, a corporate client likely has more resources than an individual, but even an individual can strengthen his own negotiating position in a case by addressing the alleged problem (or carefully documenting why he believes there is no problem) even before meeting with regulators to discuss the issues. Preparation is very persuasive; it is also respectful of your, your client's and regulators' time because there will be substance to discuss at the meeting and because your client has shown it is taking the matter seriously enough to have done some prior leg work.

### **(3) Respect**

And that brings me to the next pointer: respect. Sure, you and your client may want to curse out the agency bringing enforcement. Maybe the agency's actions seem unfair, inconsistent, or just plain wrong. Maybe your opinion of regulators themselves is negative (e.g., government employees are just lazy and not in touch with the realities of business). Even if not, enforcement presents a stressful situation for anyone, and we regulators are sensitive to that. However, that doesn't mean that swearing and yelling at the

individual agency representatives participating in any meetings with you is ever warranted.

If we all start from the premise that “good people may disagree,” negotiations will be more productive and will remain solidly where they belong: mutually respectful. Regulators often have reasons for bringing enforcement (e.g., consistency across an industry; statutory mandates) that may not have been considered by your client, who may have very different needs (e.g., to protect its reputation in the industry). That being said, the regulators I know and work with also want to be correct; if you have facts that we don’t seem to know that can change the case, we will (or absolutely should) be sensitive to that. In this sense, listening to each other’s concerns will be key to figuring out a resolution, if there is any to be had, and moving forward. And, again hearkening to the basics of human nature, most of us respond better to a “thank you” than an “f-you.”

#### **(4) Follow-up**

Finally, as a corollary to the “preparation” pointer above, please make sure that your client follows up with the agency subsequent to any meetings. Otherwise, it feels to us like we are being “paid lip service” without real progress toward resolution. If we discussed that your client would provide maps subsequent to the meeting, make sure your client provides them by the specified time or (if not specified) within a reasonable time. If there are outstanding questions posed by the regulators, have your client answer them. If your client needs an extension on something, ask. Again, such actions show good faith and respect and will be perceived in that light.

In sum, actions speak louder than words, as they say. And the regulators are listening.

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## **ADDRESSING LEAD CONTAMINATION OF DRINKING WATER IN NEW YORK STATE**

Ria Rana

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Currently in New York State, there is a contradictory approach to the regulation of lead found in paint as opposed to lead found in drinking water. While lead paint has been systematically rooted out through a ban on its use and imposition of severe liability and penalties for property owners or landlords who fail to abate its use, regulation and enforcement regarding lead in tap water has been comparatively lax. Aside from the obvious public health implications, this inconsistency has also made it difficult for practitioners of environmental, real property, and toxic tort law to provide sound advice to their clients.

### **New York’s Tap Water Has Been Repeatedly Contaminated with Lead**

Lead contamination of drinking water caught the public’s attention in 2015 when it was discovered that 6,000 to 12,000 children in Flint, Michigan, had been exposed to dangerously high levels of lead through the city’s drinking water. However, in New York, the issue of lead-contaminated water predates the Flint water crisis. A review of Environmental Protection Agency (EPA) data reveals that since 2013, 82 public and private drinking water systems throughout the state have exceeded the maximum allowable limit of lead (15 parts per billion) at least once. In addition, following Flint, it was discovered that 16 schools and daycares across New York, most of which have private water systems, have supplied to students water with lead in excess of this federally mandated limit. These data are particularly concerning because although no amount of lead is safe to ingest, lead poisoning is especially harmful to the developing brains of young children.

In most parts of the state, New York’s municipal water treatment plants are generally not the sources of lead contamination. Similarly, publicly owned water lines are also typically not culpable. This is

because Congress banned the construction of lead plumbing for public water utilities in 1986 under the federal Safe Drinking Water Act, and since then utilities have been required to replace publicly owned lead service lines with lead-free lines.

However, Congress did not ban the use of lead plumbing on private property. As a result, privately owned pipes, often containing lead, connect public water lines on streets to tap faucets inside homes and buildings. Given that lead can leach into tap water at any point up to its exit from a faucet, the replacement of lead plumbing only on public property has thwarted efforts to eliminate lead from water. In fact, studies show that in the short term, partial pipe replacement can actually worsen the amount of lead present in drinking water. Partial pipe replacements can physically shake loose lead fragments that have accumulated inside of a pipe. These fragments get pushed into the water stream, thereby increasing lead levels. Furthermore, treating water with corrosion-controlling additives does not fully protect against lead leaching. For instance, if grounded wires from an electrical system are attached to the water pipes, corrosion can still occur. Additives can also contribute to other problems such as an overgrowth of algae and weeds in city lakes from excess nutrient and water runoff.

In addition to the existence of lead plumbing on private property, compliance with EPA's lead and copper rule is also an issue. The lead and copper rule (40 C.F.R. pt. 141, subpt. I), as stated above, sets a treatment standard of 15 parts per billion for lead in tap water. However, this is not a health-based standard. In addition, only 90 percent of test samples have to comply with this standard, and neither EPA nor the Centers for Disease Control provide specific guidance on how and when to test the water. As a result, utilities can achieve compliance by selectively choosing which homes they want to sample. Moreover, because lead in tap water is highest in concentration after the water has sat for several hours (for example, first thing in the morning or after one returns home from work or school), test samples can be

inaccurate if the faucet had been used shortly prior to testing. Results can also be manipulated by allowing water to first run for a prolonged period before collecting samples.

Given these issues, one contemplated solution is the enactment of legislation that requires owners of private property and private water systems to remove lead pipes, fixtures, and faucets from their land. In 2001, Madison, Wisconsin, took exactly this step by controversially passing legislation requiring all property owners to replace lead pipes (but not other fixtures) on their property. It took 11 years and \$15.5 million for the city to remove 8000 lead water pipes, and nearly 6000 property owners had to pay an additional \$1300 each on their plumbing bills (half of which the city reimbursed). Today, though, the levels of lead in Madison's tap water are consistently well below EPA limits. Following Madison's example, Lansing, Michigan, is also replacing privately owned lead plumbing.

The passage of such legislation in New York would provide clarity to legal practitioners attempting to navigate this area of law. However, until that happens, attorneys must know how to advise clients concerned about lead contamination in their water as well as those concerned about how to protect themselves from liability for such contamination.

## **Advising Your Clients**

As has been discussed, the main source of lead contamination is privately owned lead plumbing that receives and transports municipal water to homes and buildings. So far, there have been no guiding cases or administrative decisions in New York against private property owners for failing to address lead leaching into water from their lead plumbing. This may be primarily due to the Safe Drinking Water Act's citizen suit provision, which does not allow for actions against private parties, but only against EPA.

However, a possibility for a successful suit against private property owners may exist under the

Resource Conservation and Recovery Act (RCRA). A suit brought under RCRA would have to be grounded in the argument that, once lead leaches from a pipe, it becomes solid waste, permitting application of the statute, specifically section 7002(a)(1)(B). RCRA's section 7002(a)(1)(B) allows a plaintiff to file a federal lawsuit against any person if the plaintiff establishes that (1) lead presents an imminent and substantial endangerment to human health or the environment; (2) lead's danger stemmed from its improper handling, treatment, and/or disposal; and (3) the property owner's actions or inactions contributed to such improper handling, treatment, and/or disposal.

On a smaller note, unlike public utilities that are generally protected from negligence claims through the public duty doctrine, owners of private water systems could be sued under common law negligence principles. While over 90 percent of New York residents are served by municipal water systems, about 1.9 million New York residents use privately owned water systems or wells. In fact, as stated above, many New York schools in which high levels of lead were recently found have their own private water systems. Plaintiffs' attorneys seeking to obtain redress for clients aggrieved by private water lead contamination may choose to analogize lead water poisoning to lead paint poisoning. As mentioned earlier, a defendant property owner or landlord typically faces severe liability for lead paint poisoning. Such a defendant is typically liable for the presence of lead paint if the plaintiff demonstrates that the defendant had notice of the condition and an opportunity to repair it. The plaintiff can establish constructive notice by showing that the defendant knew that the property was constructed before lead-based paint was banned; was aware that paint was peeling on the premises; knew of the hazards of lead-based paint to young children; and knew that a young child was living on the property at the time of injury.

A plaintiff's attorney may use this law to apply to a case of lead-contaminated water. The attorney may be able to reasonably argue that the defendant knew that the property was built before 1986,

when construction of lead plumbing was banned; that those same pipes and fixtures were still in use at the time that plaintiff was lead-poisoned; that defendant knew that water from such pipes was hazardous for young children; and that a child, in fact, lived on the premises. In the absence of controlling legislation, a court would likely entertain this common-law negligence argument.

Therefore, given the potential for litigation, defense attorneys must advise clients to exercise prudence by taking preemptive measures. A property owner is best protected from liability by electing to replace all lead plumbing on the property. Many clients are unaware of the danger posed by lead plumbing, and given its risk, a client may be more than willing to replace lead pipes, fixtures, and faucets with lead-free ones. However, if such a replacement is too financially burdensome, a second, cheaper alternative involves the installation of certified "end of pipe" filtration devices that filter lead from the water when it leaves the faucet. A third measure involves the implementation of a daily maintenance program that flushes piping prior to the water being used each day. These two measures may be used in conjunction with each other, and periodic testing of lead levels must occur to ensure that lead is being effectively removed. As a last resort, if lead levels are too high to be removed by filtration devices and regular flushing, it may be necessary to eliminate the use of tap water and switch to bottled water.

Rather than waiting until a crisis occurs, clients should expeditiously take risk management measures. Due to the public's recently heightened awareness on the issue, legal practitioners may soon see an increase in the number of plaintiffs seeking legal recourse for lead-contaminated water.

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