Pipeline Safety 101: Regulatory Update & Strategy

(as of October 2016)
Overview/Introduction

- Understanding a Safety Program in Transition
- Practical Advice from PHMSA Leadership
- Regulatory Update – Major Themes and Specific Issues
- Enforcement of Pipeline Safety Rules and Recent Trends
- Preparing For and Responding To Incidents
- Conclusion – Developing a Compliance Strategy for Imminent Changes
- Questions and Discussion
A Peek Inside the DOT Executive Board Room
The New Math

3 Million Miles of Pipeline +
Small Responsible Federal Agency +
High Profile Incidents +
Congressional Scrutiny =

New Regulations \( \times \) Enhanced Enforcement
PHMSA Legislative/Regulation Background

• Fairly New Federal Sub-agency (although statutory authority dates back to 1968)
• Pipeline Safety, Regulatory Certainty & Job Creation Act of 2011
• Expected New Authorization Legislation (“PIPES Act”)
• 49 CFR Part 190-199
• State Certifications and Agreements
A View From The Top

- Difficulty of Rulemaking Process
- Compliance/Enforcement All Starts with Record Keeping and Good Data
- Collaboration with Stakeholders is Essential – 20% Increase in Staff isn’t Enough
- Emergency Order Authority
Legal Leadership Perspective

• Engagement with Field and HQ Regulators
  – Verifiable Documentation
  – Training and the Safety Culture
  – History of Offenses Erodes Confidence

• Enforcement Attitude (all subject to change)
  – Regional Priorities Differ Per Expertise w/in the Region
  – Remediation > Penalties
  – Referrals to DOJ (more later)
Legal Leadership Perspective

• Longer-Term Beneficial Involvement
  – Rulemaking Participation
  – FACA Committees
  – Third-Party Organizations
PHMSA Enforcement: Past & Future

- How System Works
- Recent Trends and Examples
- Best Advice? See “A View From the Top” Slide!
Overall Trends and Directions

• Identifying and Managing Risk
  – Similarities to Other, New(er) Safety Programs (BSEE, FTA)

• Increased Federal Jurisdiction and Priorities

• Data-Driven Enforcement (ideal and reality)
Review of Proposed/Expected New Regulations
Focusing on Pipelines: Two Major New Regulatory Initiatives


• Genesis in accidents; public and congressional attention on pipeline safety; legislation

San Bruno explosion and fire (2010) www.oilpro.com
Gas Pipeline Rule
Affects virtually all aspects of pipeline operations regulated by PHMSA
Gas Pipeline Rule: Major Changes on the Way

• Expanded integrity management ("IM") testing in high-consequence areas ("HCAs") and other non-IM requirements
  – Mandatory inspection after extreme weather events (72 hours)
  – Material documentation plans
  – Reporting requirements for maximum allowable operating pressure ("MAOP") exceedances
  – New safety features in certain facilities
  – New internal and external corrosion management requirements (incl. cathodic protection)
Gas Pipeline Rule: Major Changes on the Way

• Jurisdictional Expansion to new “Medium Consequence Areas” (“MCA”)
  – “an...area that is within a potential impact circle...containing five (5) or more buildings intended for human occupancy, an occupied site, or a right-of-way for a designated interstate [or FHWA-defined highway]”
  – Regulations that apply in MCAs include: (1) periodic integrity assessments; (2) material documentation and verification; and (3) MAOP verification
Gas Pipeline Rule: Establishing MAOP

• Operators must establish a **new** MAOP for pipelines in HCA, MCA, or Class 3 or 4 Areas that either:
  (1) experienced a “reportable in-service incident” since most recent pressure test; or
  (2) Were previously exempt for age
    - If inline testing is not possible, increases risks for buried pipe
Gas Pipeline Rule: Establishing MOAP

- Operators of transmission pipelines in HCAs, MCAs, or Class 3 or 4 Areas must confirm and record physical and operational characteristics (incl. MAOP) if “adequate records” are currently unavailable.

- Pipe operating at hoop stress level of ≥30% specified minimum yield strength which has integrity threats that cannot be tested in-line or via direct inspection must be hydrostatically tested to establish MAOP.

- Only modern pipelines with no known defects can establish MAOP via pressure test.
Gas Pipeline Rule: Gathering Lines

- Most gathering lines are currently exempt from PHMSA regulation.
- Proposal greatly expands jurisdiction in response to shale development and 2014 GAO report identifying risks.
  - Triples amount of gathering lines subject to PHMSA jurisdiction from 20,000 mi. to 61,000 mi.
  - Most additions are Type A lines in Class 1 areas ≥ 8” diameter.

Source: Energy Information Administration, Office of Oil & Gas, Natural Gas Division, Gas Transportation Information System
Gas Pipeline Rule: MOC Emphasis

- Admonishes operators to establish culture of monitoring, verification, and safety
- Each operator must evaluate and mitigate, as necessary, risks to the public and environment as an integral part of managing pipeline design, maintenance, and integrity
- Requires that MOC processes include technical, design, physical, environmental, procedural, operational maintenance, and organizational changes to the pipeline or processes, whether permanent or temporary
- Potentially enforceable
Gas Pipeline Rule: Slated for Future Regulatory Action

- Leak detection requirements
- Incident mitigation
- HOWEVER:
  - Leak detection and hazardous leak repairs required for certain gathering lines
  - For pipelines in HCAs, operators must perform semi-annual instrumented leak surveys (or quarterly surveys on unprotected or cathodically-protected pipelines) where indirect assessments are impractical
  - Monthly, weekly, or semi-weekly leak detection inspections required under certain MAOP methodologies
  - Leakage surveys required at 4-month intervals for unprotected or cathodically protected pipe that are outside HCAs; every 18 months identify and remediate areas of active corrosion by evaluating leak, repair, and maintenance-related documentation
## Gas Pipeline Rule: Implementation

### Deadlines

<table>
<thead>
<tr>
<th>Material Documentation Plans</th>
<th>MAOP Testing / Verification</th>
<th>Gathering Lines</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Proposed 49 C.F.R. § 192.607</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 180 Days from the effective date of the rule</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Proposed 49 C.F.R. §§ 192.619 and 192.624</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Plan within one year</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 8 years from the effective date of the final rule to test 50% of the pipelines</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 15 years from the effective date of the rule to test 100% of the pipelines</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 49 C.F.R. §§ 192.3 and 192.8-192.9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 2 years to bring all newly-regulated gathering lines into compliance</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Non-HCA Pipeline Assessments

| Pipeline assessments outside HCAs must be complete within 15 years from effective date, and periodic reassessments every 20 years thereafter |

---

*Pipeline Safety 101: Regulatory Update & Strategy*
Hazardous Liquids (“HL”) Pipeline Rule
Smaller Rule. Bigger Effect?
HL Pipeline Rule: Significant Jurisdictional Expansion

- Extends reporting requirements to ALL HL gravity and gathering lines, which were previously exempt (annual, safety-related condition, and incident reports)
  - 90% increase in amount of gathering lines subject to reporting requirements
  - Will use the information to determine whether to regulate further in the future
- Requires periodic inline integrity (“ILI”) assessments of ALL HL Pipelines, not just those in HCAs
- Requires leak detection systems on certain HL pipelines that “could affect” HCAs
- Significantly modifies IM repair criteria and applies criteria to non-IM (non-HCA) pipeline repairs to ensure immediate action
HL Pipeline Rule: Additional Substantive Changes

- Requires all pipelines in HCAs and “areas that could affect an HCA” to be made capable of accommodating ILI tools within 20 years, unless basic construction of pipeline cannot accommodate ILI
- Like gas pipeline rule, requires inspections of pipelines in areas affected by extreme weather, natural disasters, and other events
- Requires increased integration of analyzed inspection information and annual verification of segment IDs
- Requires IM analysis and verification of non-pipe systems
### Hazardous Liquids Pipeline Rule: Major Implementation Deadlines

<table>
<thead>
<tr>
<th>IM Program for Non-IM (HCA) Pipeline</th>
<th>Periodic NON-IM ILI Assessment / Inspections</th>
<th>Leak detection systems</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Baseline assessments must be complete either: (1) before the pipeline begins operation; or (2) within 5 years of discovering newly classified area</td>
<td>• At least once every 10 years; 90-day notice to OPS before conducting assessment</td>
<td>• Implementation date unclear; may be immediate</td>
</tr>
<tr>
<td>• Condition discovery / determination period 180 days</td>
<td>• ILI Accommodation Period</td>
<td>• Post-weather disaster inspections</td>
</tr>
<tr>
<td>• Immediate and 270-day repair conditions</td>
<td>• 20 years from effective date of rule</td>
<td>• Within 72 hours of event cessation</td>
</tr>
<tr>
<td>• Covered segments must be verified annually</td>
<td>• Pipeline Remediation</td>
<td>• Remedial action as needed with no firm deadlines</td>
</tr>
<tr>
<td></td>
<td>• Varies: “immediate,” 18 month, and “reasonable time”</td>
<td></td>
</tr>
</tbody>
</table>
The Enforcement Playbook: What Makes Certain Pipeline Violations Go Criminal?

Continuing the Conversation
Different Professional Lens/Perspective
Different Perspective

• My Background
  – Former: Environmental Crimes Prosecutor
  – Current:
    ◦ Criminal Defense Attorney
    ◦ Compliance Counselor

• Current Focus in Private Practice:
  – Preventing Fires
  – Putting Them Out
  – Rebuilding
Overview of This Discussion

• Help Your Team To:
  – Better Understand What Makes a Pipeline Violations Turn Criminal
  – Think More Like a Prosecutor – to Strengthen Your Prevention, Response and Defense
  – Review Recent Changes in DOJ’s Enforcement Playbook
    ◦ Yates Memo – Individual Accountability
    ◦ Worker Endangerment
    ◦ Heightened Corporate Compliance Expectations
Quick Review of Fundamentals to Put Recent Developments in Context

• Risk Assessment Variables
  – External Factors
  – Internal Factors

• Realities of Government Enforcement
  – Broad Discretion
  – Increased Transparency of Factors/Criteria
    ◦ “Government’s Playbook”

• Distillation of Policies (“Cheat Sheet”)
  - “Swords & Shields” Handout
Quick Application to Pipeline Prosecutions

- Potential for Catastrophe?
  - Spills
  - Explosions
- Risk of Significant Harm? Environment
  - Workers
- Hazardous?
- High Volume?
- Heavily Regulated?
  - Past NOV’s/Fines?
- False Statements?
Sampling of Federal Criminal Prosecutions Involving Pipelines

- Key Factors in Pipeline Prosecutions
- Targets
- Typical Criminal Charges and Penalties
# Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>Discharged oil from a pipeline that ruptured</td>
<td>Refuse Act (Misdemeanor)</td>
</tr>
<tr>
<td>Shell Pipeline Corp.</td>
<td>Release of 863K gallons of crude oil into rivers</td>
<td>$200K fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$800K restitution</td>
</tr>
</tbody>
</table>
# Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 1996</td>
<td>• Pipeline rupture released 1M gallons of diesel fuel into Reedy River (34-mile stretch)</td>
<td>• Clean Water Act (Misdemeanor)</td>
</tr>
<tr>
<td>─ Colonial Pipeline Company</td>
<td>• Caused significant fishkill (35K) and groundwater contamination</td>
<td>• Rupture arose after company knew that pipe in river was exposed, rusted, and missing protective coating</td>
</tr>
</tbody>
</table>

- $7M in fines
- 5-year corporate probation
## Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 1997</td>
<td>• Discharged oil from a pipeline when construction equipment struck the pipeline during the illegal removal of rock from Forest Service Land • Release of oil into river</td>
<td>• Clean Water Act – Negl./Misdemeanor • 6 months jail • $5,000 fine</td>
</tr>
<tr>
<td>– Edward Hanousek (railroad supervisor)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- 1997
  - Edward Hanousek (railroad supervisor)
## Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 2001</td>
<td>• Rupture of petroleum pipeline</td>
<td>• Hazardous Liquid Pipeline Safety Act</td>
</tr>
<tr>
<td>– Olympic Pipeline Company</td>
<td>• Subsequent gasoline explosion/fire</td>
<td>• Clean Water Act</td>
</tr>
<tr>
<td>– Equilon Pipeline Company (Parent)</td>
<td>• Release of 236K gallons into creek</td>
<td>• Olympic</td>
</tr>
<tr>
<td>– Three executives</td>
<td>• Three deaths</td>
<td>– $11M criminal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>– Equilon</td>
</tr>
<tr>
<td></td>
<td></td>
<td>– $10M civil</td>
</tr>
<tr>
<td></td>
<td></td>
<td>– $15M criminal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• 5-year corporate probation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• $75M in inspections and improvements</td>
</tr>
</tbody>
</table>
Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 2001</td>
<td>• Investigation</td>
<td>• Clean Water Act</td>
</tr>
<tr>
<td></td>
<td>Revealed Various</td>
<td>Felony</td>
</tr>
<tr>
<td></td>
<td>Violations:</td>
<td>$22M criminal fine</td>
</tr>
<tr>
<td></td>
<td>− Improper crossing</td>
<td>• Individuals received:</td>
</tr>
<tr>
<td></td>
<td>− Failed to install,</td>
<td>− 4-6 months jail</td>
</tr>
<tr>
<td></td>
<td>− Failed to inspect,</td>
<td>− $30K fine</td>
</tr>
<tr>
<td></td>
<td>− maintain erosion</td>
<td></td>
</tr>
<tr>
<td></td>
<td>control devices</td>
<td></td>
</tr>
</tbody>
</table>

- Iroquois Pipeline Operating Co. (Natural Gas)
- Four Employees and/or Consultants
## Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
</table>
| • 2004 (1999 Incident & 5-year Investigation)  
  – Colonial Pipeline Company | • Rupture of diesel fuel pipeline  
  • Release of 1,275 barrels of diesel fuel into air, onto nearby houses, into Goose Creek, and ultimately into Tennessee River | • Hazardous Liquid Pipeline Safety Act  
 • Clean Water Act  
 • $400K penalties  
 • $50,000 fine  
 • $350,000 for env. education/incident response |
## Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 2005</td>
<td>• Failure to notify NRC of a large diesel spill</td>
<td>• California State Crimes</td>
</tr>
<tr>
<td>- SFpp, LP (Subsidiary of Kinder Morgan Energy Partners LP)</td>
<td>• Company noticed pressure drop on a 14-inch pipeline, but failed to report.</td>
<td>• 36 months corporate probation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• $2.3M in restitution</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• $2.8M state fine</td>
</tr>
</tbody>
</table>
### Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 2007</td>
<td>• Two different crude oil leaks in pipeline on North Slope of Alaska</td>
<td>• CWA (Negligence)</td>
</tr>
<tr>
<td>‒ BP Exploration Alaska, Inc.</td>
<td>• Release of between 200K-270k gallons of crude oil into tundra area and a lake</td>
<td>• Leak caused by unrepaired pipeline corrosion</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Company failed to heed red flags and warning signs of internal corrosion</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• 36-month corporate probation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• $12M federal fine</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• $4M restitution</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• $4M SEP (for funding)</td>
</tr>
</tbody>
</table>
# Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>Catastrophic explosion at the BP Texas City refinery that killed 15 employees and injured 170 others</td>
<td></td>
</tr>
<tr>
<td>BP Exploration Alaska, Inc.</td>
<td></td>
<td>CAA Felony</td>
</tr>
<tr>
<td></td>
<td>Explosion resulted from ignition of hydrocarbon liquid and vapor that was released from a blowdown stack during start-up of unit used to increase octane content in unleaded gasoline</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Company had ignored required steps during the start-up (after it has undergone repairs)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$50M fine</td>
<td></td>
</tr>
</tbody>
</table>

Pipeline Safety 101: Regulatory Update & Strategy
## Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 2007</td>
<td>• Pipeline break at Kansas City facility</td>
<td>• CWA Felony</td>
</tr>
<tr>
<td></td>
<td>• Released 19K gallons of gasoline onto ground and into storm sewer</td>
<td>• $1M fine</td>
</tr>
<tr>
<td></td>
<td>• Investigation revealed two prior spills of ammonia, with had resulted in a fishkill</td>
<td></td>
</tr>
</tbody>
</table>
# Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 2010</td>
<td>• Explosion of a natural gas pipeline</td>
<td>• Natural Gas Pipeline Safety Act</td>
</tr>
<tr>
<td>– Pacific Gas &amp; Electric (“PG&amp;E”)</td>
<td>• 8 people killed</td>
<td>• Knowing and willful violations of PSA and its regulations on “integrity management” practices and record keeping</td>
</tr>
<tr>
<td></td>
<td></td>
<td>– Failing to address and investigate threats</td>
</tr>
<tr>
<td></td>
<td></td>
<td>– Failing to address record-keeping deficiencies</td>
</tr>
<tr>
<td></td>
<td></td>
<td>– Inaccurate records</td>
</tr>
</tbody>
</table>
# Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>• Pipeline release in Santa Barbara</td>
<td>• Indictments on May 16, 2016 - California State Crimes</td>
</tr>
<tr>
<td>- Plains All-American</td>
<td>• Released 2,934 barrels of crude oil on land and beaches and into Pacific Ocean</td>
<td>- Company</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Employee (env. regulatory specialist)</td>
</tr>
</tbody>
</table>

- Pipeline release in Santa Barbara
- Released 2,934 barrels of crude oil on land and beaches and into Pacific Ocean
## “Other” Themes from Sampling of Pipeline Prosecutions

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Incident/Trigger</th>
<th>Crimes/Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 2010</td>
<td>• Investigation</td>
<td>• Submitting False Statements on Documentation Associated with Pipeline Safety Testing (welding)</td>
</tr>
<tr>
<td>– Edna Stoner (Technician)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• 2014</td>
<td>• Investigation</td>
<td>• Making False Statements to DOT / PHMSA (safety tests)</td>
</tr>
<tr>
<td>– Randy Jones (Corrosion Coordinator)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Internal Decision-Making

• Broad Discretion / Choices
  – Internal Resource Allocations
  – Juggling Competing Corporate Goals
    ◦ Objectives
    ◦ Risks
    ◦ Constraints
  – Structural / Governance
  – Production & Compliance
Why Is This Important?

“The Playbook”:
The Criteria By Which You Will Be Judged
Recent Changes in The Government’s Playbook

The First Yates Memo: Individual Accountability
The First Yates Memo: “Individual Accountability for Corporate Misconduct”

- September 10, 2015: DOJ announces policy changes to prioritize pursuit of individual executive accountability
- Takes effect immediately
- Memo “designed to ensure that all attorneys...are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.”
Six Key Points

1. To qualify for cooperation credit, corporations must provide to DOJ all relevant facts relating to individuals responsible for the misconduct

2. Criminal and Civil investigations should focus on individuals from the beginning

3. Criminal and Civil attorneys should be in routine communication with one another
Six Key Points

4. DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with the corporation.

5. DOJ attorneys should not resolve matters with corporations without a plan to resolve individual cases.

6. Civil attorneys should focus on individuals and companies based on considerations beyond an individual’s ability to pay.
Change Regarding Cooperation

New change to both civil and criminal matters:

• To receive any consideration for cooperation under Sentencing Guidelines, the company must “completely disclose” to DOJ all relevant facts about individual misconduct”—no partial credit
Corporate Resolutions Can No Longer Provide Protection for Individuals

- Absent Extraordinary Circumstances or Approved Departmental Policy (Anti-trust Leniency Policy)
- Applies to both Civil and Criminal divisions
- Process set forth for declinations
Recent Changes in The Government’s Playbook

The Second Yates Memo: Worker Endangerment Initiative
The Second Yates Memo “Worker Endangerment”

- December 17, 2015: DOJ and DOL announce expansion of Worker Endangerment Initiative
- Federal effort to prosecute companies and officials who violate environmental and worker-safety laws
- Limited criminal enforcement under OSH Act
Occupational Safety & Health Act

- Safety/health standards for private sector
- State Plans
- Criminal sanctions only for:
  - Willful OSHA violation, causing death
  - Advance notice of OSHA inspection
  - Falsification of documents
- Misdemeanors, $10,000 max fine
- Few criminal prosecutions
Worker Endangerment Initiative

• EPA, OSHA, Environmental Crimes Section
• Indirect worker-safety enforcement through:
  – Environmental crimes (knowing violations, “knowing endangerment”)
  – Title 18 offenses (“lying, cheating, stealing”)
• Stiffer penalties, death not required, less-stringent mental state for enviro. crimes
• ECS trains OSHA inspectors
• OSHA refers cases to ECS
The New Plan

• Higher priority for worker-safety prosecutions
• Deputy AG memo to U.S. Attorneys
  – Cooperation with DOL
  – Encourages use of enviro. and Title 18 offenses
  – ECS now responsible for OSH Act, Mine Act, MSPA
• DOL-DOJ Memorandum of Understanding
  – Coordination, info sharing, training
• No new regs
• No new $$$
Implications

• Major Change in Playbook of Regulator / Prosecutor
Follow-up by DOJ ENRD: John Cruden

- Highlighted DOJ’s Worker Safety Initiative
- Worker Safety Violations Have Been Historically Under-Enforced
- Now Given Highest Priority at DOJ/DOL
- Improved Coordination & Case-Screening
- We will prosecute worker safety violations in tandem with environmental crimes
- We will vigorously prosecute safety violations that threaten workers
Consistent with EPA’s Priorities for Criminal Prosecution

• EPA is focusing its limited resources on the most pressing environmental crimes, targeting cases involving:
  – Death or serious injury
  – Hazardous substances and wastes
  – Human exposure or other threats to community health
  – Repeat offenders/multiple violations
  – A large or significant corporate enterprise

• EPA-CID currently categorizes over 60% of our cases as Tier 1 or Tier 2
EPA’s Criminal Case Tier Methodology

Death/Injury = Tier 1

Human Health and Environmental Impacts

Death
Serious Bodily Injury
### II. EPA’s Criminal Case Tier Methodology

<table>
<thead>
<tr>
<th>Tier 1 = Three Categories Out of Four</th>
<th>Tier 2 = Two Categories Out of Four</th>
<th>Tier 3 = One Category Out of Four</th>
<th>Tier 4 = Zero Category out of Four</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Category I</strong></td>
<td><strong>Category II</strong></td>
<td><strong>Category III</strong></td>
<td><strong>Category IV</strong></td>
</tr>
<tr>
<td>Release &amp; Discharge Characteristics</td>
<td>Hazardous/Toxic</td>
<td>Public Exposure</td>
<td>Ongoing, Repetitive, Continuing, Multi Location</td>
</tr>
<tr>
<td>O R</td>
<td>O R</td>
<td>O R</td>
<td>O R</td>
</tr>
<tr>
<td><strong>Category II</strong></td>
<td>Environmental Impact</td>
<td>Substantial Corporation / Government</td>
<td></td>
</tr>
<tr>
<td>Human Health and Environmental Impacts</td>
<td>greater then $1 million mitigation/remediation/restitution</td>
<td>(i.e., 100 (+) employees or $5 million (+) Sales Revenue or Illegally-gotten Gains)</td>
<td></td>
</tr>
<tr>
<td>O R</td>
<td>O R</td>
<td>Subject: Mid-Mgmt. or Higher</td>
<td></td>
</tr>
<tr>
<td><strong>Category III</strong></td>
<td>Environmental Impact</td>
<td>Enforcement History</td>
<td>An overwhelming justification</td>
</tr>
<tr>
<td>Subject Characteristics</td>
<td>greater then $1 million mitigation/remediation/restitution</td>
<td>(e.g., Formal Enf. Action, Prior Criminal Conviction, Unpermitted)</td>
<td></td>
</tr>
<tr>
<td>O R</td>
<td>O R</td>
<td>O R</td>
<td>O R</td>
</tr>
</tbody>
</table>

- Tier 1: Three Categories Out of Four
  - Tier 2: Two Categories Out of Four
  - Tier 3: One Category Out of Four
  - Tier 4: Zero Category out of Four

**Pipeline Safety 101: Regulatory Update & Strategy**
Implications - Generally

• More criminal prosecutions under OSH Act?
  – High priority for ECS prosecutors and OSHA inspectors

• More enviro. prosecutions?

• More convictions?
  – Worker-safety violations increase jury impact
Concerns: Heightened Consequences

- Increased Likelihood of Prosecution
  - Company
  - Individuals
- Increased Difficulty of Defending Charges
  - Past Incidents = Knowledge
  - Funding Cuts = Indifference
  - Emotional Kicker = Worker Injuries/Risks
- More Severe Punishments
Implications - “3 Levels” of Attack
Strategic Advantage to Government

- Emotional Hooks: Human Impacts
- Process Crimes: Lying, Cheating, Stealing
- Technical Violations: Statutory & Regulatory

Pipeline Safety 101: Regulatory Update & Strategy
Concerns:
Increased Likelihood of Detection

• Heightened Governmental Enforcement Priority on Worker Endangerment / Environmental Violations
  – Increased Coordination
  – Better Training
  – More Qualified Review/Scrutiny at DOJ ECS

• Internal Whistleblower Complaints

• Heightened Scrutiny Due to Past Incidents
Implications: Substantially Higher Punishment
Environmental Crimes “Boosters” – Higher Felonies & Sentencing

• Endangerment:
  – Knowing
  – Negligent

• Proof Elements:
  – A person
  – Knows of an existing circumstance / violation
  – That put another person in imminent danger of death or serious bodily injury
Various Methods of Proving “Knowledge”

• Direct Evidence
  – Witnesses
  – Documents/Emails
• Willful Blindness/Conscious Avoidance
• Circumstantial Evidence
• “Responsible Corporate Officer” Doctrine
Environmental Sentencing “Boosters”

- Increased Punishments
  - Statutory Maxima: Knowing Endangerment
    - 15 years maximum
  - Federal Sentencing Guidelines (2Q1.1)
    - Base Offense Level = 24 (vs. 8)
    - Additional Enhancements
Recent Changes in The Government’s Playbook

Heightened Expectations for Corporate Compliance Effectiveness
Self-Governance: Transparent & Documented

Prevention

Continuous Improvements

Detection

Correction

Response

Continuous Improvements

Detection

Response

Correction
Government Expectations for Effective Compliance

- Basic 7 Elements in Federal Sentencing Guidelines
  - Written Plan
  - Proper Oversight
  - Background/Qualifications
  - Adequate Training
  - Monitoring/Auditing
  - Proper Response
  - Continual Improvements
Government Expectations for Effective Compliance

• Newer Criteria / Higher Hurdle
  – Voluntary Reporting/Self-Disclosure
  – Full Cooperation
  – Remediation
Government Expectations for Effective Compliance

• Newer Criteria / Higher Hurdle
  – Strong/Positive Culture of Compliance?
    ◦ What to you Fund? What do you Measure?
  – Sufficient Compliance Resources?
  – Quality & Experience of Compliance Leadership?
  – Independence of Compliance Function?
  – Effective Risk Assessment?
Government Expectations for Effective Compliance

• Newer Criteria / Higher Hurdle
  – Adequacy of Compliance Compensation/Promotions?
  – Auditing of Compliance Program?
  – Reporting Structure Within the Company?
  – Appropriate Discipline?
  – Learning from Root Causes to Prevent Recurrence
Particular Implications for Pipelines: Increased Focus/Scrutiny

• New Regulations
• Significant Potential Risks
  – Environmental
  – Human/Worker
• Newsworthy “Incidents”
• Political Pressures
  – Administration/Agencies
  – NGO
In the aftermath of an incident...

...this is what you are.
Like it or not...

...this is how you will be judged.
Are you prepared for the spotlight?
Quick Questions. . .

- How many have been involved in a post-incident investigation?

- How many have been through a criminal investigation?
How To Spot Red Flags?
Post-Incident Scenario

• Investigation Starts
  – Interviews: What will EE’s say?
    ◦ Current
    ◦ Former
  – Regulatory Relationships? Friend/Foe?
  – Subpoenas: What will documents reveal?
Post-Incident Scenario

• Central Questions?
  – What happened?
  – How foreseeable?
  – What were root causes?
  – Who know what, and when?
  – Who was “responsible,” and why?
  – What enforcement response “fits” the facts?

• What legal tools are used to answer them?
Practical Application: Be Prepared to Provide & Defend

• Focus of Interviews and Subpoenas:
  – Facts surrounding this incident
  – Any past similar incidents
  – Regulatory history (generally)
  – Corrective measures taken in response to past incidents
  – Budget/Resource trends
  – Past training and improvements
  – Organizational Charts / Management Chain
Government Perception Controls

What “should” be prosecuted?

What “can” be prosecuted?

BROAD DISCRETION
Government Perception Controls

So How Do You Influence That Discretion?

• Show Good Corporate Citizenship
  – Before
  – During
  – After

• Using Government’s Playbook
Individual Culpability: Who Will Be Targeted?

• Individuals who:
  – Authorized the Violations
  – Participated in the Violations
  – Were Aware of the Violations
  – Made Resource Cuts in Midst of “Red Flags”

• Under the new Yates Memo, the Company will be incentivized to provide DOJ with the results of the internal investigation that reveals “all relevant information” relating to any individual who have any culpability.”
Individual Culpability Zone

“Authority” (The Ability to Correct or Fund)

“Designated Felon”

“Knowledge” (Awareness of Facts/Trends)
Application of Principles

- Review Past Incidents / Track Record
- Oversight Alignment
- Budget Cuts/Scaling Efforts/Cost Savings
Concerns: Self-Governance Gaps

- Increased “Signals” or “Red Flags”
- Decreased Funding/Resources
Recommendations

• Review internal risk-assessment protocol
• Comprehensive compliance program assessments
• Review past OSHA & Environmental Compliance History
Recommendations

• Show commitment through enhanced training, auditing, incident response
• Remove internal barriers between enviro. & worker-safety compliance
• Develop an “enforcement-readiness” plan

BE PROACTIVE!