



Department of Justice

STATEMENT

OF

JOHN C. CRUDEN
DEPUTY ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

ENTITLED

"POSSIBLE MODIFICATIONS TO THE CRIMINAL PENALTY PROVISIONS
OF THE OCCUPATIONAL SAFETY AND HEALTH ACT

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TESTIMONY OF

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I. Introduction

Thank you, Chairwoman Woolsey, Congresswoman McMorris Rodgers, and Members of the Committee, for holding this hearing today and inviting me to testify. I am pleased to be testifying with David Michaels, Assistant Secretary of Labor for Occupational Safety and Health.

My name is John C. Cruden. I am a Deputy Assistant Attorney General (DAAG) in the Environment and Natural Resources Division (ENRD) of the United States Department of Justice. I have served in that position since 1995. The Division's mission is to enforce civil and criminal environmental laws to protect the health of our citizens and our environment, and to defend suits challenging environmental and conservation laws. We represent the United States in matters involving the Nation's natural resources and public lands, wildlife protection, Indian rights and claims, and the acquisition of federal property.

One of my responsibilities as DAAG is to supervise our Environmental Crimes Section (ECS). ECS attorneys prosecute criminal violations of the country's environmental and wildlife

laws, including the Clean Air Act (CAA), the Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA). ECS attorneys usually work in tandem with Assistant U.S. Attorneys on environmental crimes cases in nearly every federal judicial district in the nation. ECS also conducts extensive training on environmental crimes and serves as a nationwide clearinghouse for environmental crimes information.

ECS works closely with criminal investigators from many other federal government agencies on cases involving vessel pollution, violations of federal wildlife laws and smuggling, and interdiction. Specifically, ECS often works on its cases with the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS), the Coast Guard, the National Oceanic and Atmospheric Administration (NOAA), and the Occupational Safety and Health Administration (OSHA). ECS also initiates and participates in a number of environmental criminal enforcement task forces among federal, state and local agencies.

My testimony today will describe our experience in prosecuting companies and their officials for illegal conduct which either resulted in a worker death or injury or knowingly put workers at risk of death or injury. According to the most recent statistics from the Bureau of Labor Statistics, an average of sixteen workers dies every day at job sites in the United States from workplace injuries. Every year, over four million workers suffer a recordable illness or injury at work. ECS launched its Worker Endangerment Initiative (the "Initiative") in 2005 to highlight that environmental crimes frequently put our country's workers at risk of death or serious bodily injury while they are on the job. The Initiative's driving goal is to prosecute companies and company officials who systematically violate both federal environmental laws and worker safety laws. Since its advent, the Initiative has produced a number of significant

prosecutions resulting in sentences of imprisonment and tens of millions of dollars in fines.

While ECS has successfully prosecuted environmental crimes in which workers were injured or killed, that success is based more on the availability of strong enforcement provisions and deterrent value of federal environmental statutes, as well as provisions of Title 18 of the United States Code, rather than the criminal provisions of the Occupational Safety and Health Act (“OSH Act”) of 1970 (29 U.S.C. § 666). As set forth more fully in my testimony, the disparities between the OSH Act and environmental and Title 18 penalties is clear. For these reasons, the Department of Justice supports the strengthening of the OSH Act’s criminal penalties to make those penalties more consistent with other criminal statutes and further the goal of improving worker safety.

II. Overview of the Worker Endangerment Initiative

The Initiative is a coordinated effort between EPA, DOJ and OSHA to prosecute employers who commit environmental crimes that endanger employees. The Initiative has two core principles: (1) environmental crime can lead to worker injuries and death; and (2) employers who do not comply with environmental laws may also be ignoring or avoiding worker safety laws. The Initiative involves not only investigations and prosecutions of these cases, but also inter-agency training and docket review.

One key component of the Initiative is to develop additional resources to identify and investigate environmental crimes by offenders whose conduct results in worker injuries or death.

ECS attorneys travel throughout the country to provide government officials with criminal investigative and environmental training to identify indications of serious environmental crimes.

ECS attorneys train OSHA compliance officers and senior managers, Department of Labor

solicitors, and other federal prosecutors at U.S. Attorneys' Offices. Over the last six years, ECS prosecutors have trained nearly two thousand government officials.

Another component of the initiative involves a docket review. Docket review consists of federal prosecutors, EPA agents and OSHA compliance officers collectively discussing information about companies identified by OSHA as potential violators of environmental and worker safety laws. Government officials review information about companies to determine whether any of them merit further investigation and/or prosecution.

III. Criminal Provisions of Major Environmental Protection Statutes

Most of the worker safety cases brought by ECS charge violations of the environmental protection laws and the general criminal provisions of Title 18 statutes. Before addressing the details of our cases, however, it is helpful to provide some background regarding the criminal provisions, including the mental state standards and available penalties, of the major environmental protection statutes and other criminal statutes we use in our cases.

A. The Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992, regulates hazardous waste "cradle to grave," that is, from its creation through its disposal. RCRA makes it illegal to store, treat or dispose of hazardous waste without a permit. 42 U.S.C. § 6928(d). RCRA also regulates the transportation of hazardous waste, establishing stringent requirements for documenting and labeling hazardous waste shipments.

Many of our RCRA cases involve the illegal dumping of hazardous waste. For example, in *U.S. v. Marchbanks*, Case No. 2:07-CR-00099 (N.D. Miss.), Randy Marchbanks and two of his employees were convicted in 2008 of RCRA violations for dumping hazardous paint and

solvents generated or used in Marchbanks' business. This dumping occurred at five different, unpermitted sites in northern Mississippi.

RCRA also includes a "knowing endangerment" felony provision which provides for a term of imprisonment of up to 15 years and/or a fine of up to \$250,000 (for individuals) or \$1,000,000 (for organizations). 42 U.S.C. § 6928(e) and (f). The provision applies when a defendant's mishandling of hazardous waste creates a serious risk to the health of others. 42 U.S.C. § 6928(e). Specifically, a defendant must knowingly transport, treat, store, dispose of, or export hazardous waste (the predicate offense), and at the time of the offense know that his or her conduct places another person in imminent danger of death or serious bodily injury. 42 U.S.C. § 6928(e) and (f).

B. The Clean Water Act

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, makes it illegal to discharge any pollutant into a water of the United States from a point source without a permit, or to violate the terms of a permit that contains limits on discharges. CWA violations typically involve polluters that dump secretly (*i.e.*, without a permit). An example of a defendant convicted and sentenced based on a CWA violation is Gordon Tollison who was sentenced to a year and a day in prison for intentionally discharging untreated and under-treated sewage into state waterways despite numerous administrative orders and repeated admonitions. *United States v. Gordon Tollison*, Case No. 3:04-CR-00158 (N.D.Miss.). Those who violate the criminal provisions of the CWA often face prison sentences.

In addition to felony charges for knowing violations, the statute contains a "knowing endangerment" provision for defendants whose violations under the Act create a serious risk of

injury or death. 33 U.S.C. § 1319(c)(3). Like RCRA, the penalty for CWA knowing endangerment is up to fifteen years in prison and a fine of up to \$250,000, or both. *Id.* The CWA incorporates a responsible corporate officer doctrine which makes company managers criminally liable for illegal conduct they knew about and could have prevented, but failed to prevent. *See* 33 U.S.C. § 1319(c)(3) & (6).

C. The Clean Air Act

The criminal provisions of the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671, make it illegal to emit air pollutants in excess of permit limitations or without a permit. CAA regulations also govern the removal and handling of asbestos, an air pollutant which can cause fatal lung disease. ECS attorneys prosecute property owners and their contractors who operate illegally, often putting our workers and communities at risk. For example, in 2007 Branko Lazic was convicted of violating the CAA by improperly removing asbestos from an elementary school in Ambler, Pennsylvania. *United States v. Branko Lazic*, Case No. 2:07-CR-00324, (E.D.Pa.). Also, in *United States v. Construction Personnel, Inc.*, Case Nos. 1:00-CR-529, 1:00-CR-143, 1:00-CR-405 (D. Colo.), the president, vice president, project manager and secretary of the company were convicted of several Title 18 offenses arising out of their use of unauthorized, untrained and unprotected aliens in asbestos abatements. The defendants induced unauthorized aliens to enter and remain in the United States to perform illegal abatements. These aliens were not properly trained or certified to perform the work. As part of its sentence, the corporation set up a fund in excess of \$325,000 for use by the Department of Health and Human Services to track and treat employees exposed to asbestos. The individuals received sentences of up to 15 months’ incarceration and up to \$7,500 in fines each.

Like RCRA and the CWA, the CAA includes a knowing endangerment felony provision. 42 U.S.C. § 7413(c)(5). The CAA also creates a misdemeanor for negligent endangerment. *Id.* § 7413(c)(4). The CAA holds corporate officials criminally liable if they had actual knowledge of the endangerment or if the defendant took affirmative steps to be shielded from relevant information. *Id.* § 7413(c)(5)(B).

D. Other Relevant Statutes

ECS's authority is not limited to prosecution of crimes committed under federal environmental statutes. ECS attorneys also make extensive use of the general criminal provisions set out in Title 18 of the United States Code – those that prohibit the more conventional crimes of lying, cheating, and stealing. The Title 18 provisions utilized by ECS involve crimes such as making false statements, obstruction of justice, and conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs. *See* 18 U.S.C. § 371 (conspiracy to defraud); 18 U.S.C. § 1001 (false statements); and 18 U.S.C. §§ 1505, 1512 and 1519 (obstruction of justice).

ECS also has brought cases under the OSH Act's criminal provisions (29 U.S.C. § 666(e)). As discussed in more detail later in my testimony, the penalties under that statute are significantly different than the other statutes in that they provide only up to 6 months maximum imprisonment for a criminal violation and require a worker death. Serious worker injury is not sufficient conduct to result in even a misdemeanor violation.

IV. ENRD's Prosecution Experience Involving Worker Endangerment

Under the current criminal provisions of the OSH Act, ECS attorneys prosecuting worker safety incidents also examine post-injury or post-death acts of concealment or deception through

Title 18 offenses in order to successfully prosecute these cases. In all cases we have examined, the potential punishment for either the environmental or Title 18 crimes significantly exceeds the maximum penalty under the current OSH Act.

A. Pre-Initiative Cases

Prior to the Initiative, ECS often litigated environmental crimes which directly led to worker injuries or death. We found, however, that even in environmental cases that raise severe worker safety issues, there was a substantial disparity between the remedies available to us under our environmental laws and those available to OSHA. One of the most notable examples of the disparity between the criminal provisions of the OSH Act and the environmental laws was in the case of *United States v. Allen Elias* (1999), in the District of Idaho. The case garnered national attention and led to, at the time, the longest sentence in an environmental crimes case. Allen Elias, the owner of a fertilizer company, ordered employees to remove cyanide-laced sludge from the interior of a 25,000 gallon railroad car. He did so without telling the employees what was inside the tank, and without providing the personal protective equipment they requested. When one of the workers collapsed in the tank and was taken to the hospital, Elias lied about the contents of the tank to rescue workers at the scene and to the treating physician. Elias's criminal conduct caused that twenty-year-old employee to suffer permanent brain damage. Despite the egregiousness of his conduct, however, Elias could not be prosecuted under the criminal provisions of the OSH Act for worker injuries, no matter how severe, because the OSH Act provides criminal penalties only for cases of death, and even then provides no more than six months of incarceration. In contrast, upon conviction for violations under RCRA's knowing endangerment and hazardous waste storage and disposal provisions, as well as making false

statements under 18 U.S.C. § 1001, Elias was sentenced to a seventeen-year prison term and over \$6 million in restitution and clean up costs.

Another notable case is *United States. v. Hansen* (1999), in the Southern District of Georgia, in which the defendants were the CEO, vice president and plant manager of Hansen, a chemical company that manufactured bleach, soda, gas, and acid. In *Hansen*, the defendants were charged and convicted under the CWA for knowingly endangering employees who often stood knee-deep in contaminated wastewater while working in the plant. Again, the OSH Act's criminal provision provided no recourse because, fortunately, no employees were killed. Upon conviction under the CWA, the three defendants were sentenced to 108-month, 46-month, and 78-month prison terms.

B. The OSH Act

While ECS has had success in prosecuting environmental crimes which led to worker death or injuries, those cases were brought under environmental statutes and Title 18 rather than the OSH Act's criminal provisions. The primary criminal provision of the OSH Act provides a misdemeanor:

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, 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; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both.

29 U.S.C. § 666(e).

As compared to environmental statutes and Title 18 crimes, the primary criminal provision of the OSH Act (1) has a higher mental state requirement; (2) only applies in limited

circumstances; and, (3) has a significantly lesser penalty. In addition, a violation of the statute requires the death of an employee as a prerequisite. Thus, under the criminal provisions of the OSH Act, if a worker dies because of the willful act of his or her employer, that employer faces a maximum conviction for a misdemeanor and only up to six months in jail. In contrast, if that same employer knowingly endangers the health or safety of its employees or the community by violating the nation's environmental protection laws, that employer may spend up to 15 years in jail.

While the worker endangerment initiative has been successful, that is largely the product of the application of environmental statutes. If a worker safety case does not involve the illegal handling of hazardous waste, or the unlawful release of hazardous pollutants into the air or illegal discharges of pollutants into waters of the United States, that case may not be prosecuted under the criminal environmental laws.

As a practical matter, the misdemeanor violations in the OSH Act provide little incentive for prosecutors and other law enforcement personnel who must reserve their limited resources for those crimes that Congress has deemed most egregious by designating them as felonies. The relatively low monetary penalties currently available to OSHA mean that unscrupulous companies may view such violations as an acceptable cost of doing business. Accordingly, the Department of Justice supports the strengthening of the OSH Act's criminal penalties so that they are more consistent with other criminal statutes.

C. Worker Endangerment Initiative Cases

Although OSHA currently has limitations on the remedies available to it to address workplace safety issues, we have been able to address some of these issues indirectly through

our environmental laws. The Initiative cases further demonstrate the principle that employers who do not comply with environmental laws may also be ignoring or avoiding worker safety laws. In prosecuting these cases, ECS has drawn upon the environmental statutes and Title 18 offenses, working with EPA and OSHA investigators. *United States v. Motiva Enterprises* (D. Del.) is an example of a case developed during the Initiative in which the prosecution was based solely on environmental violations. Motiva Enterprises LLP is the fifth largest oil refiner in the United States. On July 17, 2001, a 415,000 gallon tank containing spent sulfuric acid exploded at Motiva's Delaware City Refinery. The explosion killed one worker, injured numerous others, and resulted in a spill to the Delaware River that killed nearly 3,000 fish and crabs. In 2005, Motiva pleaded guilty to negligent endangerment of its workers under the CAA and to a knowing discharge under the CWA. Motiva was sentenced to pay a fine of \$10 million and to serve 3 years' probation.

ECS's worker endangerment initiative gained significant attention in its prosecution of McWane, Inc. (McWane). McWane is a large, privately-held cast iron pipe manufacturer with facilities across the nation. In January 2003, the New York Times and PBS's *Frontline* featured stories on the many deaths, injuries, and environmental violations occurring in McWane facilities nationwide. After investigation, ECS filed indictments against five divisions of McWane: McWane Cast Iron Pipe Inc. in Birmingham, Alabama; Union Pipe and Foundry in Anniston, Alabama; Tyler Pipe Company in Tyler, Texas; Pacific States Cast Iron Pipe Company, Provo, Utah; and Atlantic States Cast Iron Pipe Co. in Phillipsburg, New Jersey. These prosecutions involved charges of both environmental statutes and Title 18 crimes.

The most notable of the McWane cases involved the Atlantic States Cast Iron Pipe Co.,

Inc. (Atlantic States) in New Jersey. For years, the company systematically violated the CWA and CAA by discharging petroleum waste products from its facility directly into the Delaware River, and carbon monoxide and other pollutants into the air. Moreover, the company systematically ignored worker safety laws and impeded OSHA in its efforts to ensure compliance with the OSH Act and to investigate accidents. Worker injuries presented in the indictment included a death from being crushed by a forklift, the loss of an eye and a crushed skull from removal of a saw blade guard, finger amputations caused by by-pass of cement mixer safety devices, and second and third degree burns caused by negligence and left untreated. In 2003, the grand jury returned a multi-count indictment against the company and five of its managers, alleging conspiracy to defraud OSHA and the EPA, false statement and obstruction of justice counts, and violations of the CWA and CAA. During an eight month trial from September 2005 to April 2006, the government called 50 witnesses including OSHA safety inspectors and industrial hygienists who had been repeatedly thwarted in their attempts to inspect and regulate Atlantic States. Atlantic States was convicted on 32 of the 33 counts on which the jury reached a verdict. Four of the managers were also convicted of conspiracy and various related offenses.

After extensive, post-verdict litigation, the court in 2009 sentenced the managers to 70, 41, 30, and 6 months' imprisonment. The company was placed on four years' monitored probation and ordered to pay an \$8 million fine. The terms of the probation require the company to submit biannual compliance reports to the court and pay for a court-appointed monitor. The case is currently on appeal to the Third Circuit Court of Appeals.

Shortly after the jury returned its guilty verdicts in *Atlantic States*, OSHA asked ECS to

assist in its examination of BP Products North America, Inc. (BP), regarding a 2005 explosion at BP's Texas City plant that killed fifteen people. The explosion occurred when hydrocarbon vapor and liquid improperly released to the open air reached an ignition source. As a result of the joint efforts of ECS and the U.S. Attorney's Office in Houston, the company pleaded guilty to a criminal violation of the Clean Air Act's General Duty Clause, 42 U.S.C. § 7412(r)(7), and paid a record \$50 million fine. This was the first criminal prosecution under this section of the CAA.

Under the worker endangerment initiative, ECS litigated two cases which charged violations of the OSH Act. The first was another prosecution of McWane involving a worker death at its Union Foundry plant in Alabama, and the second was the prosecution of Tyson Foods involving a worker death at its River Valley Animal Foods plant in Arkansas.

In *United States v. Union Foundry Co.* (N.D. Ala.), this division of McWane pleaded guilty in 2005 to both RCRA and OSH Act violations that led to the death of an employee. The Union Foundry facility in Anniston, Alabama, manufactures iron pipe fittings (elbows, flanges, etc.) for industry. Among the many environmental violations at the facility, the company illegally stored and treated particulate matter, carbon monoxide, and lead from its baghouse, a pollution control device, without a permit. Additionally, from March 17, 2000, until August 22, 2000, Union Foundry allowed employees to work on a conveyor belt that did not have the required safety guard. As a result, employee Reginald Elston was caught in a pulley and crushed to death.

Union Foundry was sentenced to pay a \$3.5 million fine and serve a three-year term of probation. In addition, the company was ordered to propose a community service project valued

at \$750,000 and directed toward environmental remediation in the Anniston area.

In our case against Tyson Foods, Inc., the company was convicted of violations that led to the death of an employee. Tyson's River Valley plants recycled poultry products into protein and fats for the animal food industry. Employees at the Tyson facilities often were exposed to hydrogen sulfide gas, a toxic gas produced by decaying feathers, when working on or near feather processors. In March 2002, a Tyson employee was hospitalized with hydrogen sulfide poisoning caused by exposure to the gas while performing maintenance on one of these feather processors.

As of October 2003, despite the fact that corporate safety and regional management were aware that hydrogen sulfide gas was present in the River Valley facilities, Tyson Foods did not take sufficient steps to implement controls or protective equipment to reduce exposure within prescribed limits or provide effective training to employees on hydrogen sulfide gas at the Texarkana facility. On October 10, 2003, River Valley maintenance employee Jason Kelley was overcome with hydrogen sulfide gas while repairing a leak from the same feather processor involved in the March 2002 incident. Mr. Kelley later died from his injuries. Another employee and two emergency responders were hospitalized due to exposure while attempting to rescue Kelley and two additional employees were treated at the scene. The company was sentenced to pay the maximum fine of \$500,000 and serve a term of probation for willfully violating worker safety regulations that led to Mr. Kelley's death.

D. Conclusion

A strong criminal enforcement program serves several purposes. First, it levels the economic playing field for law-abiding companies that often devote significant resources to

compliance with worker safety and environmental laws. While most companies in the United States comply with these laws, such companies will find themselves at a competitive disadvantage against those companies that disobey these laws and consequently have lower costs because they choose not to devote financial resources to compliance.

Second, a strong criminal enforcement program strengthens administrative and civil enforcement programs. An aggressive criminal enforcement program makes civil and administrative enforcement efforts more effective. A comprehensive enforcement program provides an important deterrent to illegal activity, safeguards the nation's work force, and enforces the law.

In sum, adding felony provisions to the OSH Act, as proposed, would provide important tools to prosecute those employers who expose their workers to the risk of death or serious injury, whether charged in conjunction with environmental crimes or charged alone. The Department of Justice supports the strengthening of OSHA's criminal penalties to make it more consistent with other criminal statutes and further the goal of improving worker safety.

Thank you for the opportunity to share the experiences of ENRD with the subcommittee. I look forward to answering any questions you may have.