JUSTICE NEWS

Assistant Attorney General John C. Cruden Delivers Keynote Address at the American Bar Association, Section of Environment, Energy and Resources, Environmental and Workplace Safety Criminal Enforcement Conference

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Remarks as prepared for delivery

Thank you for your kind introduction. I am very pleased to have been invited to speak to you about the work of the Environment and Natural Resources Division (ENRD) of the Department of Justice in the area of worker safety and criminal enforcement.

And I applaud the organizers of this conference, which is the first one focusing on the important issue of workplace safety and criminal enforcement. I am honored to be your keynote and first speaker as I want to help set the tone for the seriousness with which ENRD treats our worker endangerment initiative. The action you are taking by hosting this first conference is a good indicator that industry and the private bar are also taking this environmental and public health issue just as seriously as the Justice Department.

I have seen your agenda, which is very impressive. Later this afternoon you will hear from my Section Chief of the Environmental Crimes Section, Deborah Harris, who is part of the afternoon panel discussing prosecuting environmental and workplace safety cases. Deborah will provide you with the department's and a prosecutor's perspective to approaching these prosecutions.

Here is what I will do today. I will tell you a little about the work of ENRD, but will rapidly turn to my central point today: our emphasis on worker safety. Then, I will turn to the department's recent announcement of new and important responsibilities for ENRD in the area of worker protection. Then, I will turn to what we have been doing recently in that important area and some of our plans for the future. This will include our use of environmental management systems in criminal and civil settlements as a vehicle to achieve not only long term changes to an organization's environmental compliance culture, but to also address its attitude towards worker safety.

ENRD is the "nation's largest environmental law firm."We have nearly 650 employees, including 450 attorneys. ENRD represents the U.S. government in all cases in United States federal courts relating to protection of the environment and natural resources, as well as cases relating to the rights of Native Americans. Our docket of active cases includes over 6,500 cases and we have represented virtually every federal agency in connection with cases arising in all 50 states and the U.S. territories. Our docket is roughly half offensive and half defensive.We will discuss some of our offensive work this morning.A recent example of our defensive work which some of you may have noticed in the press includes representing the U.S. Environmental Protection Agency (EPA) in defending the Agency's Clean Power Plan and their historic regulation of greenhouse gases from existing power plants.This case was recently argued before the D.C. Circuit in a marathon six hour oral argument before a 10 judge panel.

As Assistant Attorney General, I have identified certain priorities for my tenure. Of those priorities, the one that is most pertinent to my remarks today is the priority to enforce the nation's bedrock environmental laws that protect air, land and water for all Americans.While it may not be intuitively apparent now, but I hope it will be when I conclude my remarks, when we enforce the nation's environmental laws we protect not only the environment but our nation's workers.

Within ENRD there are 10 sections, and two of these sections bear the majority of the civil and criminal enforcement load with this priority – the Environmental Enforcement Section and the Environmental Crimes Section.These two

sections are also largely responsible for implementing the division's worker endangerment initiative, with the bulk of the enforcement being criminal prosecutions.

Let me begin by discussing the department's most significant development to enhance its enforcement efforts against violations of the nation's worker safety laws. In December 2015, Deputy Attorney General Sally Q. Yates announced changes to the department's approach for investigating and prosecuting worker safety violations. Specifically, she announced the approval of the amendments proposed by Attorney General Advisory Committee to the U.S. Attorneys' Manual giving responsibility for criminal worker safety prosecutions to ENRD. Now the responsibility for criminal prosecutions under the Occupational Safety and Health Act (OSH Act), Mine Safety and Health Act, Migrant and Seasonal Agricultural Worker Protection Act and the Atomic Energy Act has been transferred to ENRD. This responsibility, shared with the U.S. Attorneys' Offices, is one ENRD had requested and has embraced. This transfer of responsibility to ENRD is a more deliberate approach by the department to address worker safety offenses as these violations have historically been under-enforced.

This realignment of responsibilities makes good common sense. Just as every major corporation has a vice president or significant corporate official charged with responsibilities for environment, health and safety, the Department of Justice is now organized for the first time in a similar fashion. My division, ENRD, has long had all of the environmental responsibilities, as well as related health issues, under its jurisdiction and this change gives us a significant amount of safety responsibilities which we can exercise together. We have long thought that those who mistreat their employees by cutting corners on worker safety laws to maximize production and profit, may also cut corners on environmental compliance.

Also in December, Deputy Attorney General Yates signed an important Memorandum of Understanding (MOU) between the Department of Justice and the Department of Labor on the criminal prosecution of worker safety laws. This initiative is a priority at the highest levels of both departments. This MOU not only describes our respective responsibilities and authorities, but it also clearly outlines how criminal referrals will be coordinated and tracked, how information and data will be shared and how training for both prosecutors and investigators will be developed and disseminated. Our partners within the Department of Labor are the Occupational Safety and Health Administration (OSHA), the Wage and Hour Division and the Mine Safety and Health Administration.

In her announcement, Deputy Attorney General Yates also highlighted a reality that is very familiar to prosecutors, industry and the defense bar. That reality is the criminal penalties in the worker safety laws are woefully inadequate compared to the human injury caused by these violations. As a result, many in industry often treat OSH Act penalties as a cost of doing business and not a deterrent to non-compliance with the laws. For example, the OSH Act criminalizes only three types of violations and even then violations are only misdemeanors. First, willfully violating a specific safety standard that causes the death of an employee. Second, giving advanced notice of an OSHA inspection to the targeted facility and third, falsifying documents filed or required to be maintained under the OSH Act. These misdemeanor crimes are punishable by no more than six months in prison and/or fines up to $10,000.

In 2010 when I was the Deputy Assistant Attorney General for ENRD, I testified before the Committee on Education and Labor's Subcommittee on Workforce Protections, along with David Michaels, the leader of OSHA, in favor of strengthening these important laws. Although that has not happened, it did bring ENRD and OSHA together and we have been sharing information, resources and training.

Now let me tell you a true story that will provide broader context for my remarks today.

In 1996, a 20-year-old young man named Scott Dominquez was working his first job out of high school and went to work one day like any other day. Scott worked at a fertilizer manufacturing facility and the owner ordered Dominquez and his co-workers to clean out an 11-foot-high, 36-foot-long, 25,000 gallon storage tank that had been used as part of a cyanide leaching operation.

Dominquez and a colleague entered the tank, carrying a broom and a fire hose and wearing only jeans and T-shirts. After 15 minutes inside the tank, they realized that the sludge could not be washed out of the small hole in the end of the tank, so they climbed out, both complaining that the fumes inside the tanks hurt their throats and nasal passages. The next morning, the employees explained to the owner, a Wharton graduate and an attorney, their difficulty in getting the sludge out, the health effects they suffered and their need for safety equipment. The owner said that he would

provide the necessary safety equipment, but insisted that they start cleaning the tank. Dominquez and his co-worker then cut a larger hole in the end of the tank and Dominquez and a colleague climbed in without safety equipment. Dominquez collapsed within 45 minutes of entering the tank. He was not rescued for an hour until the fire department arrived because Dominquez's co-workers did not have the necessary rescue equipment. When asked by the fire department and emergency room doctors about the contents of the tank, the owner lied, claiming it was just mud and water. He was asked again and specifically denied that cyanide was in the tank. This was critical information needed to provide proper treatment for Dominquez. Not only did the owner repeatedly lie about the hazardous contents in the tank; he later provided OSHA investigators a forged and backdated OSHA required permit for confined spaces that stated employees had been given safety equipment prior to entering the tank.

As I'll talk more about in a moment, **the owner was not charged or convicted of violations of worker safety laws, but rather violations of environmental laws and Title 18 of the U.S. Code. After a three-week jury trial, the owner was convicted of multiple counts of violating the Resource Conservation and Recovery Act, including illegal disposal of hazardous waste and knowingly endangering his employees and making false statements under Title 18**. In 2000, at the age of 61, the owner was sentenced to 17 years in federal prison, the longest prison term for an environmental crime at that time. This is a case you are probably familiar with – *United States v. Allen Elias*. It has also been referred to as the "cyanide canary case" due to a book by this title that chronicled the investigation and prosecution. It was prosecuted by a friend of mine, David Uhlmann, who became the Chief of the Environmental Crimes Section and is now a distinguished professor at University of Michigan Law School.

Unfortunately, as all of you know, Dominguez's story is not unique. On an average day in the United States, approximately 13 workers die on the job, about 9,000 workers are injured and 150 succumb to occupational diseases like asbestosis and chemical poisoning.

As I mentioned, the *Elias* case was prosecuted based on violations of the Resource Conservation and Recovery Act and Title 18, not for violations of the OSH Act. One fundamental reason there was not an OSH Act criminal charge in the *Elias* case is quite simply that the statute was not criminally violated because Dominguez did not die. Furthermore, even if a worker death occurs as a result of a violation, the OSH Act requires the government to prove a willful mental state as opposed to a knowing mental state, the standard in most criminal cases. This is a very high burden to meet, which in addition to the low criminal penalties, may contribute to the few criminal prosecutions under the OSH Act.

The Deputy Attorney General's memo memorializes what has been ENRD's practice – where appropriate, we prosecute other serious offenses that often occur in tandem with worker safety violations. This may include charging Title 18 offenses such as obstruction of justice, false statements, conspiracy, witness tampering and mail or wire fraud as well as environmental and endangerment crimes. The penalties for these felony crimes range from five to 20 years of imprisonment and carry significant fines.

We use the endangerment provisions of the three major environmental statutes, the Clean Air Act, Clean Water Act and the Resource Conservation and Recovery Act, which are felonies. The Clean Air Act also includes a negligent misdemeanor endangerment offense. Endangerment crimes are those offenses where the defendant knowingly committed the underlying pollution crime and knew this conduct would place another person in imminent danger of death or serious bodily injury as defined in each of the statutes. These felony offenses have a criminal penalty of up to 15 years in prison and up to a $1 million dollar fine for an organizational defendant. The Clean Air Act negligent endangerment provision has criminal penalties of up to one year in prison. The use of the endangerment provisions of these statutes has enabled the United States to prosecute criminal conduct that might go unaddressed under the worker safety laws, such as conduct that did not result in a death of an employee.

Let me provide a recent example of our work with OSHA and EPA. Just two weeks ago, four Texas companies pleaded guilty and agreed in a plea agreement to pay $3.3 million in criminal fines for their violations of the Clean Air Act. In the plea agreement, two of the companies admitted to authorizing two contract workers to perform welding or "hot work" on piping connected to a tank at their Port Arthur, Texas, oil and chemical processing facility. Prior to beginning the welding, the defendants falsified the "hot work" permit and failed to properly drain, isolate and decontaminate the tank and connecting equipment as required by OSH Act regulations. As a result, the welding work ignited vapors causing the tank to explode and release hazardous air pollutants to the environment. Two workers were severely injured by burning product spilled when the exploding tank collapsed. A third worker was tragically killed

when the rails and ladder from the collapsed tank fell on his head. The other two companies failed to monitor leaks of ground-level ozone (smog) producing air pollutants at their chemical processing facility in Crosby, Texas, and admitted they falsified records and reports certifying the facility was in compliance for these Clean Air Act Title V permit requirements to EPA and the Texas regulators. In addition to the criminal fine, the companies will make a $200,000 community service payment to the Southern Environmental Enforcement Network for hazardous air release prevention and emergency response training to state and local environmental and law enforcement agencies.

Let me highlight another recent case to further illustrate our recent work in this area.

United States v. Black Elk Energy Offshore Operation LLC is a case scheduled to go to a jury trial in January 2017. A 12-count superseding indictment was returned by a federal grand jury in November 2015 charging several defendants with involuntary manslaughter and violations of the Outer Continental Shelf Lands Act and Clean Water Act. These charges stem from a November 2012 series of explosions on an oil production platform that resulted in the deaths of three workers, serious burns to several other workers and the discharge to the Gulf of Mexico of approximately 500 barrels of burning oil. Three workers were welding a pipe connected to a tank containing oil. The tank exploded causing two other tanks to explode, with one tank flying over the platform and another destroying the platform crane.

I also mention this pending prosecution, because the allegations contained in the indictment are about the failure of the supervisors to exercise due care and ensure certain actions took place before the welding occurred that we contend would have prevented this explosion. The failure to require pre-work inspections, to ensure safe piping, and to obtain authorization before the welding was performed are part of the allegations at the center of this case.

Earlier I mentioned that the traditional worker safety laws have been under-enforced for multiple reasons, including inadequate penalties. However, I don't want leave you with the impression that these laws are never enforced by the Justice Department. Not all worker safety investigations will involve a potential violation of an environmental statute and worker safety laws may be the only enforcement mechanism. Also, the lack of a law with more significant penalties will not mean the case is not prosecuted. I want to mention two cases recently prosecuted by our partners in the U.S. Attorneys' Office as examples.

First, the U.S. Attorney's Office for the Western District of Virginia negotiated a corporate and an individual criminal plea for violations of the Mine Safety and Health Act in 2012. The company and the company owner were alleged to have given advanced notice of a safety inspection and failed to ensure adequate inspection of tractor trailers, including the braking systems. The owner pleaded guilty to one count of aiding and abetting the willful violation of a mandatory mine health or safety standard by providing advance notice of a safety inspection. The company pleaded guilty to the same aiding and abetting count and to one count of willful violation of the mandatory mine health or safety standard. As part of the plea agreement, the defendants agreed to pay $300,000 in civil penalties, $70,000 in restitution to two former employees of the company and $5,000 in fines. The sentencing is still pending.

The next case is a criminal prosecution in the Northern District of Illinois for willful violations of the OSH Act that resulted in the death of an employee. Behr Iron & Steel Inc. owned a high volume scrap processor facility that recycled metals from things like automobiles and refrigerators. In the plea agreement, the company admitted that it failed to provide lockout/tagout protection and confined space protection for employees cleaning a shredder discharge pit as required by the OSH Act regulations. Specifically, the company admitted these violations caused the death of the employee whose arm was caught in a moving and unguarded conveyer belt while he was cleaning. The employee was pulled into the machine and killed. The company was sentenced to five years' probation and ordered to pay $350,000 in restitution to the victim's estate. The company also paid an OSHA fine of $520,000 prior to sentencing.

These cases are very different in terms of what you may think is a worker safety case the Justice Department or even ENRD in particular may be interested in prosecuting. Not all cases will involve violations of environmental laws or Title 18 offenses, and not all cases will involve mass casualties or catastrophic events.

While ENRD's worker endangerment initiative has primarily focused on criminal prosecutions, we are also enhancing our civil enforcement efforts, led by our Environmental Enforcement Section. We are strengthening our efforts to pursue civil cases that involve worker safety violations under the Clean Air, Clean Water, Resource Conservation and Recovery and Toxic Substances Control Acts. **These statutes contain a number of provisions that establish safety**

measures for chemical handling, toxic releases, or catastrophe prevention; violations of these statutes often have a direct impact on workers tasked with handling dangerous chemicals or cleaning up spills.

I want to highlight four specific actions we are taking as part of our civil enforcement efforts. First, ENRD is coordinating with OSHA in the development of our settlement frameworks and demands for injunctive relief to ensure that our work to address violations of the pollution control statutes also protects those working on the front lines from environmental and health risks. Second, we are cross-training between federal agencies, such as OSHA and EPA, so that we all understand each other's authorities, processes and resources. Third, information sharing has accelerated case development and helped to identify additional industries or industrial activities that may be under an agency's jurisdiction or violations that have historically gone unenforced or under-enforced. Finally, we are making sure that each case referral is reviewed for potential worker safety concerns and, where appropriate, that worker safety issues are investigated and developed alongside other alleged violations.

The Environmental Enforcement Section's work has produced results and there are several pending civil cases with worker safety components.

The last topic I want to discuss with you is the use of environmental management systems (EMSs) to address worker safety violations, which I will illustrate with an example. Most of you are familiar with the use of EMSs, most frequently in civil settlements and sometimes in criminal cases as a special condition of probation to address organization-wide environmental non-compliance. The use of EMSs has usually focused on achieving long-term environmental compliance and changing organizational compliance culture. However, I want you to expand your thinking on this as it is important for everyone to remember that environmental laws protect public health, including workers, as well as the environment.

Workers in industries subject to regulation under environmental laws are often involved in work that exposes them to substances that can be highly toxic or hazardous -- such as in the oil and gas industry, fertilizer and chemical manufacturing, and energy production. The environmental laws generally regulate the handling, release, storage, transport and disposal of such materials. When an EMS is required to ensure organization-wide environmental compliance, the EMS usually ensures added safety and health protections for the workers who are in direct contact with these potentially dangerous materials. A key part of any EMS is employee awareness about environmental compliance. Ensuring employee awareness can involve training, performance evaluations and specific communication mechanisms for employees to report compliance issues, such as hotlines. Any efforts that increase employee awareness also impact worker safety.

Not every case resolution that includes an EMS will be linked to the department's efforts under the worker endangerment initiative. However, most of the cases that have an EMS as part of the settlement will provide added worker protection.

Let me provide you with an example of a case that you should be well-known to you but not from a worker safety standpoint, the BP criminal prosecution resulting from the Deepwater Horizon oil spill.

In April 2010, the Deepwater Horizon oil rig located 50 miles from the Louisiana coast was destroyed by an explosion and fire caused by a catastrophic blowout of the Macondo well. Eleven workers aboard the oil rig were killed and more than three million barrels of oils were spilled into the Gulf of Mexico over an 87-day period. The criminal allegations against BP included 11 felony manslaughter charges for the workers killed in the explosion and fire, a felony charge for obstruction of Congress and charges under the Clean Water Act and Migratory Bird Treaty Act. In November 2012, the department announced the largest criminal resolution in U.S. history - $4 billion dollars.

Most in the environmental field focus on the environmental claims and the environmental impacts of the spill, which were significant and rightly so. However, this environmental disaster is not generally thought of as also being a worker endangerment case, but it is. The manslaughter and obstruction charges specifically prompted the United States to require a special condition as part of the probation terms that is often overlooked that I want to draw your attention to.

BP admitted in its plea agreement that two supervisors negligently caused the deaths of the 11 workers and the spill. BP specifically admitted the two supervisors observed clear indications that the Macondo well was not secure and oil

and gas were flowing into the well and causing the pressure to build within the well, but did nothing to prevent the blowout.

While the criminal sanction included a significant fine to punish the crimes, it more importantly included measures to repair the harm and change BP's corporate behavior. First, the criminal resolution was specifically structured so that more than half of the monies would directly benefit the Gulf of Mexico region. Second and most important to my remarks, the plea agreement required that BP hire certain subject matter experts to address BP's conduct. BP was required to conduct Safety and Environmental Management System audits for all of its platforms, platform rigs and contracted drilling rigs. BP also had to agree to retain a process safety and risk management monitor and an independent auditor to oversee BP's process safety, risk management and drill equipment maintenance for its Gulf of Mexico operations. Additionally, BP had to retain an ethics monitor to improve BP's code of conduct to ensure BP's future candor with the U.S. government.

These probation special conditions were further developed and enhanced as part of the subsequent historic civil settlement. However, including these requirements as part of the probation conditions was very significant as additional criminal sanctions could apply for any failure to comply.

I want to close by emphasizing that worker safety is a priority at ENRD and the Justice Department will use all available enforcement tools to address violations that impact worker safety. On the ENRD public webpage, there is an entire section dedicated to the worker endangerment initiative where you can find the documents I mentioned today, as well links to press releases about the initiative and prosecutions in this area. Protecting public health and the environment is a cornerstone of ENRD's law enforcement responsibilities and that explicitly includes protecting the American worker through vigorous criminal and civil enforcement of the worker safety, environmental and criminal laws. Good luck with the rest of the conference.

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