

“Worker Endangerment” is
Tolerable and ALARP the Future
of Safety Excellence?
How the Department of Justice May Impact Industry

August 28th, 2017



Excellence—Every project. Every day.

Agenda

- Introduction
- The Worker Endangerment Initiative
- Benchmarking through Q&A
- Safety Case
- Next Steps
- Questions



Worker Endangerment Initiative Introduction

- “Yates Memo” announced on December 17, 2015
- Departments of Labor (DOL) and Justice (DOJ) are teaming up to investigate and prosecute worker endangerment violations

Worker Endangerment Initiative



Addressing Environmental and Worker Safety Violations



Environment and Natural Resources Division (ENRD)

- Who are the DOJ's ENRD?
 - Enforce the nation's civil and criminal pollution-control laws
 - Defend environmental challenges to federal agency programs
 - Represent the US in matters concerning the stewardship of the nation's natural resources and public lands
 - Prosecuting and defending cases under the wildlife protection statutes
- ENRD in 2015:
 - Litigated 864 cases and handled a total of 6,729 cases, matters and appeals
 - Recovered over \$2.7 billion in civil and criminal fines, penalties, and costs
 - Obtained an estimated value of federal injunctive relief of \$6.4 billion

Overall, the division achieved a favorable outcome in 96 percent of its cases.

Linking Safety Violations With Environmental Crimes

- Link and prosecute possible environmental crimes committed by companies in conjunction with workplace safety violations.
- Provides a mechanism to turn a workplace safety investigation into an examination of a company's environmental compliance and vice versa.
- DOJ, the U.S. Attorneys' Offices, ENRD, OSHA, and MSHA will work together to increase the frequency and effectiveness of criminal prosecutions of worker endangerment violations.
 - The ENRD is resourced and motivated to investigate and prosecute Worker Endangerment issues
 - The ENRD have proven very successful in prosecuting environmental issues, with very significant fines imposed by courts.

Current OSH Act Enforcement

- Criminal penalties in the worker safety laws inconvenience rather than deterrent
- Criminalizes only three types of violations (misdemeanors only):
 1. Willfully violating a specific safety standard that causes the death of an employee
 2. Giving advanced notice of an OSHA inspection to the targeted facility
 3. 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** and the most serious offense resulting in the **death of a worker** is punishable by no more than **one year in prison** and/or a fine of **no more than \$20,000**



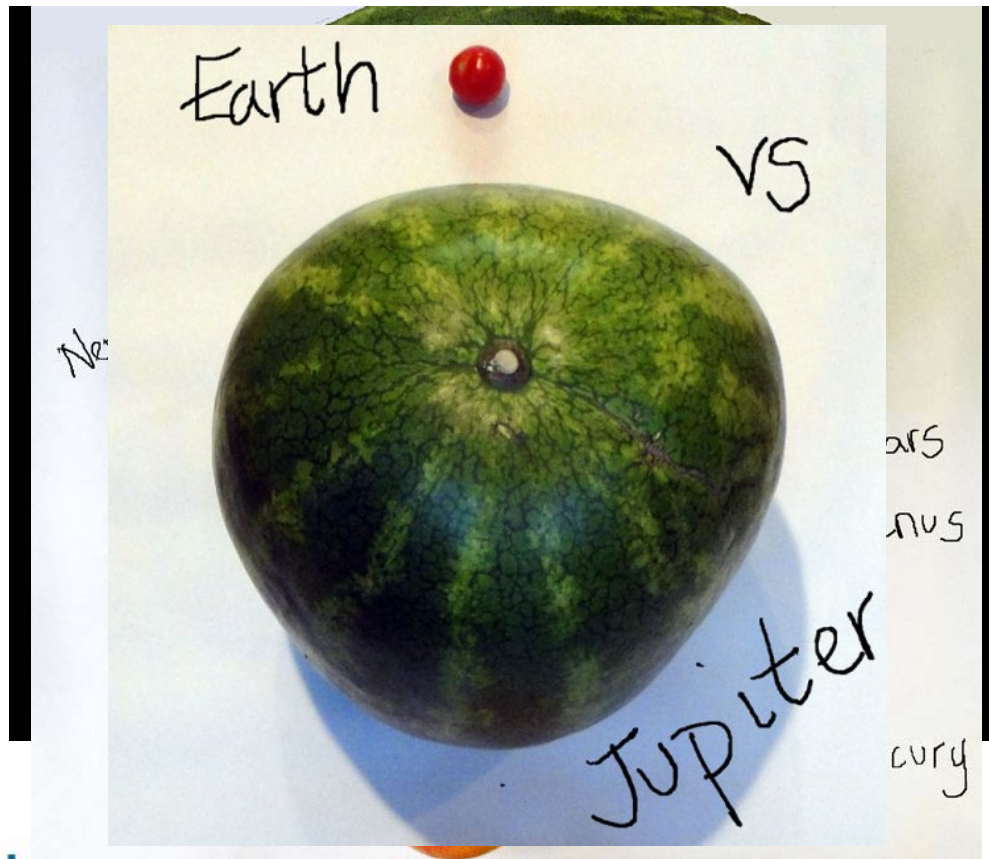
DOJ EHS Enforcement Division

- Major corporations have VP charged with responsibilities for environment, health and safety (EHS)
- DOJ under ENRD is now organized for the first time in a similar fashion
- The **“Yates Memo” on Worker Endangerment** authorizes
 - ENRD to prosecute other serious offenses that often occur in tandem with worker safety violations.
 - 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 imprisonment and carry significant fines (\$millions, not \$thousands!)

Worker Endangerment Summary

- Current OSHA Criminal Penalties versus ENRD's "combined EHS" potential criminal penalties:



What Do You Currently Have In Place? (to prove you're not endangering your workers)

- Do you know what your top risks are?
- Are they in some form of risk register?

Hazard	Severity	Probability	Risk	Mitigation	Residual Risk
MVI	Major	Occasional	High	Defensive Driver Trg.	Medium (Major/Remote)
Slips & Trips	Significant	Occasional	Medium	Trg. and PPE	Low (Significant/Remote)
Falls	Major	Remote	Medium	Fall Protection Trg. & Equip.	Low (Light/Remote)

Is Your Risk Register Plotted Onto a Risk Matrix? (to aid management decision making)

Risk Matrix

	Light	Significant	Major	Critical
Frequent	M	H	VH	VH
Occasional	L	M	H	VH
Remote	L	L	M	H
Improbable	L	L	L	M

Diagram illustrating a Risk Matrix with color-coded cells and arrows indicating risk levels. The matrix is divided into four columns: Light, Significant, Major, and Critical. The rows are: Frequent, Occasional, Remote, and Improbable. The cells are color-coded: Light (Yellow), Significant (Orange), Major (Red), Critical (Dark Red). Arrows indicate risk levels: 1 (High), 2 (Medium), and 3 (Low). A green arrow points from the 'Remote' row to the 'Light' column, and another green arrow points from the 'Remote' row to the 'Significant' column. A green arrow points from the 'Occasional' row to the 'Major' column, and another green arrow points from the 'Occasional' row to the 'Critical' column. A green arrow points from the 'Remote' row to the 'Major' column, and another green arrow points from the 'Remote' row to the 'Critical' column.

**Residual
As Low**

Hazard	Severity	Probability	Risk	Mitigation	Residual Risk
MVI	Major	Occasional	High	Defensive Driver Trg.	Medium (Major/Remote)
Slips & Trips	Significant	Occasional	Medium	Trg. and PPE	Low (Significant/Remote)
Falls	Major	Remote	Medium	Fall Protection Trg. & Equip.	Low (Light/Remote)



TOLERABLE AND AS LOW AS REASONABLY PRACTICABLE (ALARP)

ALARP is essentially the standard measure for risk mitigation

A risk can be said to be ALARP:

- Cost of further mitigation is “grossly disproportionate” to the benefits
- Cost includes financial, time and level of effort to mitigate risk
- Balances total cost of possible further risk mitigation measures with their expected safety benefit
- The more significant the risk then the less weight will be given to the factor of cost

Justifying and recording how ALARP is reached is an important and vital step in safety management.

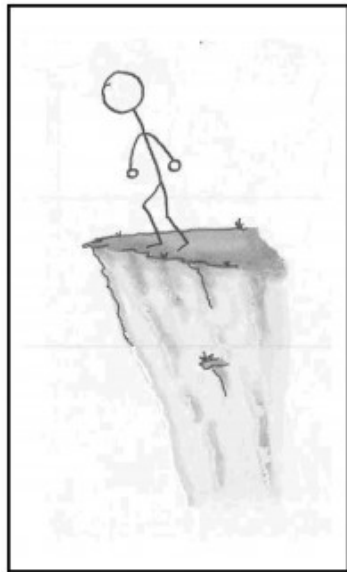
HOW TO ESTABLISH ALARP

- The decisions on whether a risk is tolerable and whether a risk is ALARP are separate, but linked.
 - Based on a cost versus benefit analysis.
 - Cost must include cost to operations and other activities
- Compile an argument (risk register and matrix) that all risks associated with ongoing activity that are to be tolerated have been made ALARP

NOTE: should an incident occur, the validity of this argument can only be decided definitively by the Courts

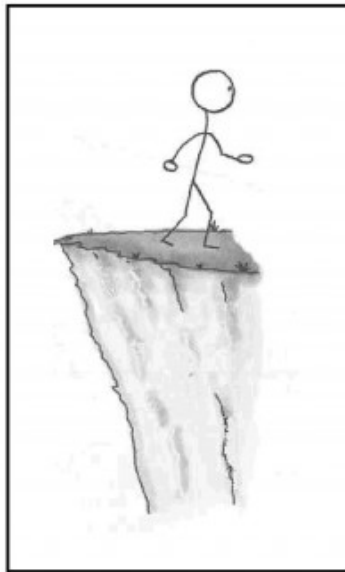
Do You Have a Set Approach to Mitigate Your Risks?

- The 4 T's:

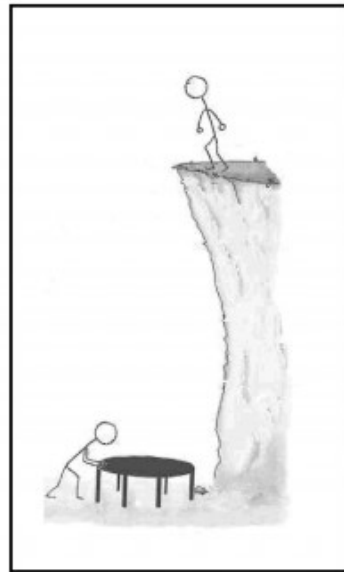


Your project

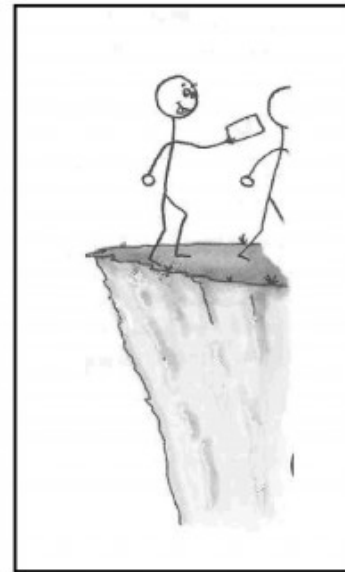
— Tolerate



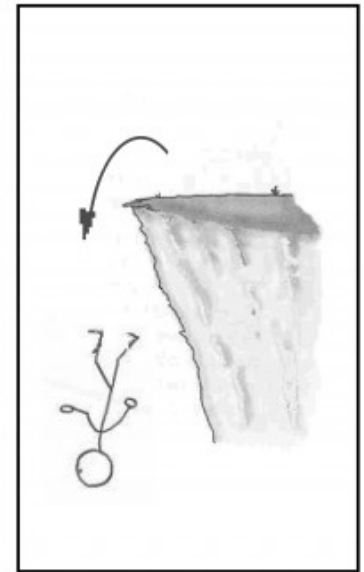
Avoid



Mitigate



Transfer



Accept





The 4Ts of Risk Management

- **Tolerate**
 - A risk is defined as tolerable when the overall risk classification is deemed acceptable after confirming that the benefit gained from continuing the activity merits continuing exposure to the risk (Classic CBA)
- **Treat**, mitigate the risk by reducing:
 - The **exposure** to the occurrence
 - Implement a work from home policy (CBA on productivity?)
 - The **probability** of occurrence
 - Train all employees in defensive driving (effective training?)
 - The **severity** of the occurrence
 - Fit cars with airbags, etc. (doesn't stop occurrence, lessens severity – classic limited benefit of PPE)



The 4Ts of Risk Management (cont...)

- **Transfer**

- It may be possible to insure against the risk (all criteria covered?)
 - Liability and workers compensation insurance covers some or all of the cost to the employer for major injury
 - Not possible to insure against reputational loss
- Up the Duty Holder (DH) chain (**if your company has one!**)
 - Doesn't own any more treat "levers"
 - Reluctant to terminate
 - Unable to tolerate

- **Terminate**

- DHs have an inescapable responsibility to cease the activity if risks are identified that are not demonstrably tolerable and As Low As Reasonably Practicable (ALARP)
- "Worker Endangerment" encourages a proactive approach to hazard and risk identification and management

Note: this approach is not new. Elements of the safety world (aviation) and financial risk management use similar approaches

“Duty Holders”

Do You Have Risk Owners?

<i>Risk Matrix</i>				
	Light	Significant	Major	Critical
Frequent	M	H	VH	VH
Occasional	L	2 M	1 H	VH
Remote	L	L	M	H
Improbable	L	L	L	M

VH = CEO or President (EDH)

H = Division VP (SDH)

M = Division Director (ODH)

L = Office Engineering Manager (DDH)



Safety Case

- Hazard identification and analysis
- Risk Management
 - 4 T's Approach
 - An ALARP Process:
 - Risk Register
 - Risk Matrix
 - Clearly defined Duty Holders
- Note Safety Case sits within your overall Safety Management System
(OSHA Program Management Guidelines, ANSI Z10, OHSAS 18001, ISO 45001)

What You Should Do Now

- Review and revise internal risk assessment protocol to heighten worker safety issues above mere OSHA compliance. Make sure you have a joined up and proactive system
- Objectively assess the company's worker safety track record and vulnerabilities through a Safety Management System Gap Analysis or a Safety and Environmental Management System Gap Analysis
- If necessary, develop ways to demonstrate a stronger commitment to worker safety
 - Process re-design
 - Revised training
 - Internal auditing
 - 3rd party auditing
 - Post-incident improvements



What You Should Do Now (cont...)

- Remove any internal “silos” or barriers that separate environmental issues from worker safety issues
 - Just as DOJ and DOL are joining forces, companies need to take a blended and proactive approach
- Develop or improve an “enforcement-readiness” plan; develop a proactive Safety Management System for your business
 - Prove the risks you are exposing your employees to are both tolerable and as low as reasonably practicable (ALARP)
 - Use in the event of such high-stakes and coordinated investigations
 - it will also keep your people safe and significantly reduce your OSHA recordable and reportable rates! This in turn will improve your retention, morale, quality and bottom line.



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Handout Overview