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WHEN BUSINESS CONDUCT TURNS VIOLENT:  
BRINGING BP, MASSEY, AND OTHER SCOFFLAWS  
TO JUSTICE

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# INTRODUCTORY ARTICLE

## WHEN BUSINESS CONDUCT TURNS VIOLENT: BRINGING BP, MASSEY, AND OTHER SCOFFLAWS TO JUSTICE

Jane F. Barrett\*

*“When an explosion occurs at a refinery or mine that has been repeatedly fined for health and safety violations, one question that ought to be asked is just how unexpected was that event.”*<sup>1</sup>

*“The burden of these catastrophes is uniquely and unfairly borne by the victims, their families, and their friends . . . men and women who were providing a livelihood for themselves and their families. These victims were fathers and mothers, husbands and wives, sons and daughters, and friends.”*<sup>2</sup>

April 2010 was a deadly month. Forty-seven people died violently.<sup>3</sup> They did not die because they were shot, knifed, drugged, or killed in an armed conflict. They died simply because they went to work and were doing their jobs. From all indications, they died because someone gambled<sup>4</sup> with their lives.

On April 2nd, a blast at Tesoro Corporation’s oil refinery in Anacortes, Washington took the lives of seven workers.<sup>5</sup> On April 9th, twenty-nine miners working at the Massey Energy Company Big Branch Mine in West Virginia died in

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1. Leo W. Gerard, *Wrongful Fatalities, Failed Worker Protections*, LEO W. GERARD BLOG (Apr. 9, 2010, 6:21 PM), <http://blogs.alternet.org/leowgerard/2010/04/09/wrongful-fatalities-failed-worker-protections/> (Leo W. Gerard, President of United Steelworkers International, commenting after the Tesoro and Massey Energy explosions).

2. JAMES A. BAKER, III ET AL., *THE REPORT OF THE BP U.S. REFINERIES INDEPENDENT SAFETY REVIEW PANEL* i (2007), available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/SP/STAGING/local\\_assets/assets/pdfs/Baker\\_panel\\_report.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/SP/STAGING/local_assets/assets/pdfs/Baker_panel_report.pdf) [hereinafter BAKER REPORT].

3. See *infra* text accompanying notes 5–7 (describing the deaths of forty-seven people in various industrial catastrophes).

4. “Gamble” has been defined in the following ways: “to bet on an uncertain outcome . . . to stake something on a contingency,” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 513 (11th ed. 2008); “to take a risk in the hope of gaining an advantage or a benefit; to engage in reckless or hazardous behavior.” THE AMERICAN HERITAGE DICTIONARY 744 (3d ed. 1992).

5. See Kim Murphy, *Refinery Explosion Kills 4*, L.A. TIMES, Apr. 3, 2010, at A10 (reporting the four immediate deaths, and noting that three additional workers were critically injured); Vicki Vaughan, *Seventh Tesoro Blast Victim Dies*, SAN ANTONIO EXPRESS-NEWS, Apr. 27, 2010, at 2C (reporting the explosion’s final fatality).

the worst mining accident in the United States in twenty-five years.<sup>6</sup> On April 20th, eleven people were killed when the BP Deepwater Horizon rig exploded in the Gulf of Mexico—an explosion that, in addition to killing people, injured seventeen others and created an ecological and economic nightmare for the region.<sup>7</sup> To date, no actual person has been held accountable for any of these deaths,<sup>8</sup> and, unless there is a seismic change in the government's response to these types of deadly events, it is fair to wonder if any *person* ever will be.<sup>9</sup>

Industries such as the oil, gas, chemical, and mining sectors of our economy, are

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6. David A. Fahrenthold & Kimberly Kindy, *Mine Safety's Black Hole*, WASH. POST, Oct. 5, 2010, at A1; see also Jerry Markon & Ed O'Keefe, *Justice Dept. Probing Upper Big Branch Mine Explosion*, WASH. POST, May 1, 2010, <http://washingtonpost.com/wp-dyn/content/article/2010/04/30/AR2010043001590.html> (detailing the Massey Energy explosion and subsequent investigation).

7. See, e.g., Sharon Begley et al., *What the Spill Will Kill*, NEWSWEEK, June 14, 2010, at 24 (discussing the spread of crude oil and methane both across the ocean's surface and through its depths); Bettina Boxall, *Chemical in Dispersants Endured Long After Gulf Oil Spill, Study Finds*, L.A. TIMES, Jan. 26, 2011, <http://articles.latimes.com/2011/jan/26/nation/la-na-gulf-dispersants-20110127> (discussing the potentially harmful spread of 771,000 gallons of dispersants used to break up the oil spill over an area of nearly 200 miles); Darren Goode, *Barack Obama's Spill Panel Urges Congress to Strengthen Drilling Oversight*, POLITICO, (Jan. 26, 2011 6:34 PM), <http://www.politico.com/news/stories/0111/48258.html> (discussing the government's clean-up response to the disastrous spill of 4.9 million barrels of oil).

8. But cf. Jerry Markon, *Massey Official Charged with Lying to FBI in Mine Investigation*, WASH. POST, Feb. 28, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/28/AR2011022803552.html> (discussing arrest of Massey security chief for alleged false statements and obstruction of justice during criminal investigation into Massey's Big Branch Mine explosion). This arrest typifies the sort of action I believe law enforcement needs to adopt in order to curtail criminal business conduct. See discussion *infra* Section II.

9. As of the date this article was submitted for publication, criminal investigations of all three of these incidents had begun. See, e.g., Stewart M. Powell, *Estimating Spill May be More Law than Science*, HOUSTON CHRON., Jan. 14, 2011, at 2 (noting criminal investigation in addition to other legal effects of the BP Deepwater Horizon explosion); Vicki Vaughan, *Tesoro Focus of Criminal Probe*, SAN ANTONIO EXPRESS-NEWS, Nov. 8, 2010, <http://www.mysanantonio.com/business/local/article/Tesoro-focus-of-criminal-probe-804169.php> (announcing the EPA's criminal investigation into Tesoro); Letter from R. Booth Goodwin, Ass't U.S. Att'y, U.S. Dep't of Justice, to Douglas N. White, Assoc. Reg'l Solicitor, U.S. Dep't of Labor (May 14, 2010), available at <http://wvgazette.com/static/coal%20tattoo/criminalprobeletter.pdf> (confirming the U.S. Attorney's office criminal investigation of violations that occurred at the Massey Energy Big Branch mine); see also Tesoro Corp., Quarterly Earnings Report for the Period Ending Sept. 30, 2010, at 52 (Nov. 5, 2010), available at <http://www.sec.gov/Archives/edgar/data/50104/000095012310101504/d76834e10vq.htm> ("The U.S. Chemical Safety and Hazard Investigation Board ('CSB') and the U.S. Environmental Protection Agency ('EPA') are also conducting investigations concerning the fire. As a result of the fire, seven employees were fatally injured. We cannot predict with certainty the ultimate resolution the appeal of the [Washington State Department of Labor & Industries] citations and are unable to predict the CSB's findings or estimate what actions the EPA may require or what penalties they might assess.").

The CSB, authorized by the Clean Air Act Amendments of 1990, has been operational since January 1998. See 42 U.S.C. § 7412 (2006). Although authorized by the Clean Air Act, it operates "completely independent[ly] of the rulemaking, inspection, and enforcement authorities of EPA and [the Occupational Safety and Health Administration ("OSHA")]." *History*, U.S. CHEMICAL SAFETY BOARD, <http://www.csb.gov/about/history.aspx> (last visited Mar. 20, 2011). The CSB is charged with investigating "accidents to determine the conditions and circumstances which lead up to an event and to identify the cause or causes so that similar events might be prevented." *Id.* (internal citations omitted).

It is to be expected that a thorough criminal investigation of these incidents will take more time than has currently elapsed. The focus of this article is on the need for prosecution of individuals rather than simply corporate entities.

inherently dangerous and create risks that can, and sadly too often do, result in death, serious bodily injury, and the destruction of public and private property. Our society's concern about the potential harm these industrial activities can cause is reflected in the development of numerous laws and regulations designed to hold businesses accountable when they fail to adequately control these risks.<sup>10</sup> Over the course of the last twenty years, the government and the private sector have spent significant resources to develop sophisticated risk and process safety management systems designed to minimize fires, explosions, and other hazards in these regulated industries.<sup>11</sup> Companies in these high-risk industries are required by law to comply with these regulations.<sup>12</sup> Unfortunately, too many do not comply and this results in an unacceptably large number of preventable deaths and grievous bodily injuries.<sup>13</sup>

Approximately forty years ago, our nation awoke to the reality that industrialized society was creating hazards that seriously affect the public's health, and damage our surrounding environment. New agencies<sup>14</sup> were created between 1970 and the mid-1980s, and Congress enacted a number of laws aimed at protecting the health and safety of the general public, including the American workforce.<sup>15</sup>

One hallmark of all of these regulatory programs is the requirement that regulated industries inspect, monitor, and report back to regulatory agencies on the

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10. See, e.g., Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (2006); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387); Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601–9675 (2006); Clean Air Act Amendments of 1970 (“CAA”), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.); Resource Conservation and Recovery Act of 1976 (“RCRA”), Pub. L. 94-580, 90 Stat. 2795 (current version at 42 U.S.C. §§ 6901–6992k).

11. See 29 C.F.R. § 1910.119 (2010); 40 C.F.R. §§ 68.150–.185 (2010).

12. 40 C.F.R. § 68.10 (2010).

13. The case examples in this article focus on the oil, gas, and mining industries. Unfortunately, there are other segments of our industrialized society where corporate executives and managers gamble with the lives of the public without being held accountable. For a compelling summary of the problems of food and drug contamination in the United States and a call for increased criminal penalties, see Rena Steinzor, *High Crimes, Not Misdemeanors: Detering the Production of Unsafe Food*, 20 HEALTH MATRIX 175 (2010).

14. See, e.g., Occupational Safety and Health Act § 651 (creating the Occupational Safety and Health Administration (“OSHA”)); Mine Safety and Health Act of 1977, Pub. L. No. 91-173, 83 Stat. 742 (codified as amended in scattered sections of 30 U.S.C.) (creating the Mine Safety and Health Administration (“MSHA”)); National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321, 4331–4335, 4341–4347) (creating the EPA).

15. These statutes include the Occupational Safety and Health Act, §§ 651–678; Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (2006); National Environmental Policy Act of 1969; Resource Conservation and Recovery Act (RCRA) of 1976, Pub. L. 94-580, 90 Stat. 2795 (current version at 42 U.S.C. §§ 6901–6992k); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.); Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), Pub. L. 99-499, 100 Stat. 1728 (codified as amended at 42 U.S.C. §§ 11001–11005, 11021–11023, 11041–11050).

status of compliance at their facilities.<sup>16</sup> Congress understood at the outset that, given the scope and breadth of our industrialized society, it would be impossible for either the federal or state governments to implement these laws without relying on self-monitoring by the industries themselves.<sup>17</sup> These laws require industries to describe in detail their operations—including procedures they have in place to protect their employees and communities.<sup>18</sup>

Refineries, oil and gas exploration facilities, manufacturing facilities, mines, and pipelines are very complex operations that deal with inherently dangerous substances. For example, in chemical manufacturing facilities and refineries, a delicate balance must be maintained in order to keep high-pressure equipment channeling toxic, reactive, and explosive materials throughout a plant while maintaining safe operations. Similarly, mining operations and hazardous substance pipelines require ongoing maintenance and safety procedures to safeguard against devastating explosions. Not only must company employees be attentive to the needs of proper equipment maintenance and repair, it is equally critical that employees be trained in both process operations and process safety. Despite these obvious facts, it took a series of horrific events beginning in 1984 to refocus attention on the dangers to the public inherent in these operations.

A catastrophic failure at a pesticide manufacturing plant located in Bhopal, India on December 3, 1984 released a cloud of highly reactive and toxic chemicals over the densely populated city, killing approximately 3,000 people and injuring hundreds of thousands more.<sup>19</sup> That incident, together with a string of others that occurred during the following years,<sup>20</sup> led to legislative and regulatory changes designed to protect the American public from the lethal consequences of industrial

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16. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW SCIENCE, AND POLICY 1012–13 (6th ed. 2009).

17. H.R. REP. NO. 101-490, at 69–70 (1990), *reprinted in* ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, U.S. SENATE, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 (1993).

18. 40 C.F.R. §§ 68.150–.185 (2011).

19. *See* PAUL SHRIVASTAVA, BHPAL: ANATOMY OF A CRISIS, 64–67 (1987) (describing the event); Rama Lakshmi, *7 Former Union Carbide Officials Sentenced to 2 Years for Bhopal Gas Tragedy*, WASH. POST, June 8, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/07/AR2010060700570.html> (describing the penalties faced as a result of the event).

20. In August 1985, another of Union Carbide's plants released the same chemical into the community of Institute, West Virginia. Over 400 workers and residents were affected. In a follow-up inspection, OSHA found over 200 health and safety violations at the facility. *See* Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 J. LAND USE & ENVTL. L., 217, 218–219 (1996). Other disasters noted by the United States government in its regulatory changes included "the October 1989 Phillips Petroleum Company, Pasadena, TX, incident resulting in 23 deaths and 132 injuries; the July 1990 BASF, Cincinnati, OH incident resulting in 2 deaths[;] and the May 1991 IMC, Sterlington, LA incident resulting in 8 deaths and 128 injuries." U.S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, PROCESS SAFETY MANAGEMENT 1 (2002), *available at* <http://www.osha.gov/Publications/osha3132.pdf>.

activity.<sup>21</sup> For instance, in 1992, OSHA promulgated standards for “Process Safety Management of Highly Hazardous Chemicals.”<sup>22</sup> Additionally, the 1990 Clean Air Act Amendments imposed upon stationary sources<sup>23</sup> the general duty to “prevent accidental releases of regulated substances,”<sup>24</sup> and required EPA to promulgate “release prevention, detection, and correction requirements” to prevent the accidental releases of chemicals that could harm the public.<sup>25</sup> These regulations are collectively known as the Risk Management Plan (“RMP”) regulations.<sup>26</sup>

Thus, for almost twenty years, industrial facilities that deal with hazardous materials have been required to develop process safety management systems.<sup>27</sup> These include performing process hazard analyses,<sup>28</sup> developing and implementing RMPs and process safety management (“PSM”) requirements, ensuring the mechanical integrity of equipment,<sup>29</sup> developing standard operating procedures, and properly training employees both in the operation of equipment and the response to emergencies.<sup>30</sup> These documents, prepared by the owners and operators of the facilities, are designed to protect workers and the general public from the consequences of fires, explosions, and other catastrophes by ensuring the safe operation of very dangerous equipment and materials.<sup>31</sup> These requirements are no longer new or experimental; they are basic legal requirements for the safe and effective functioning of any high-risk industrial operations.<sup>32</sup>

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21. H.R. REP. NO. 101-490, at 69–70 (1990), *reprinted in* ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, U.S. SENATE, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 134 (1993).

22. Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356 (Feb. 24, 1992) (to be codified at 29 C.F.R. § 1910.119).

23. The term “stationary source” means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle. 42 U.S.C. § 7602(z) (internal citations omitted).

24. 42 U.S.C. § 7412(r)(7) (2006).

25. § 7412(r)(7)(A).

26. 40 C.F.R. §§ 68.150–.185 (2010).

27. Certain activities, including well drilling or servicing operations, are not covered by the Process Safety Management Standard. 29 C.F.R. § 1910.119(a)(2)(ii).

28. “Process Hazard Analysis” refers to “a thorough, organized, systematic approach to identifying, evaluating and controlling the hazards of a covered process.” 29 C.F.R. § 1910.119(e)(1).

29. “Mechanical Integrity” means to “maintain critical process equipment to insure proper design and the equipment operates properly.” Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, *supra* note 22.

30. 29 C.F.R. § 1910.120 (2008).

31. *Id.* at § 1910.120(b).

32. *Cf.* 2 GUIDE TO EMPLOYMENT LAW AND REGULATION § 18:65 (2011) (“OSHA’s most fundamental mission in safeguarding employee health and safety is to set forth basic standards on specific workplace standards that employers must observe.”). Industry representatives actively participated in the development of the regulatory requirements. The OSHA process safety management standard, for example, cites process safety guidance developed by the Center for Chemical Process Safety of the American Institute of Chemical Engineers, the American Chemistry Council (formerly known as the Chemical Manufacturers Association) and the American Petroleum Institute. *See* 55 Fed. Reg. 29,150 (July 17, 1990) (notice of proposed rulemaking).

Unfortunately, anyone who takes the time to peruse the Chemical Safety and Hazard Investigation Board (“CSB”),<sup>33</sup> OSHA, or MSHA websites will find many cases of worker deaths and serious bodily injuries caused, in whole or in part, by the failure of companies to: (1) follow process safety and risk management requirements, their own policies and procedures, or standard industry practices; (2) spend money on preventive maintenance and repair of critical equipment; or (3) adequately train employees on procedures needed to prevent catastrophic failures or to respond to a crisis when one occurs.<sup>34</sup>

These cases, as well as the Tesoro refinery explosion,<sup>35</sup> the BP Texas City

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33. The U.S. Chemical Safety and Hazard Investigation Board, authorized by the Clean Air Act Amendments of 1990 (“CAA”), has been operational since January 1998. See 42 U.S.C. § 7412. Although authorized by the CAA, it operates “completely independently of the rulemaking, inspection and enforcement authorities of EPA and OSHA.” CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD, <http://www.csb.gov> (last visited March 21, 2011). The CSB is charged with investigating “accidents to determine the conditions and circumstances which lead up to an event and to identify the cause or causes so that similar events might be prevented.” S. Rep. No. 100-231 at 218 (1990), reprinted in 1990 CAA Leg. Hist., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 9436, 9723 (1993).

34. See, e.g., *CSB Issues Report on 2008 Bayer CropScience Explosion: Finds Multiple Deficiencies Led to Runaway Chemical Reaction; Recommends State Create Chemical Plant Oversight Regulation*, NEWS RELEASE (U.S. Chemical Safety Board), Jan. 11, 2011, available at <http://www.csb.gov/newsroom/detail.aspx?nid=361> (announcing CSB Chairman Dr. Rafael Moure-Eraso’s determination that the deaths of two workers in a waste tank explosion at the Bayer CropScience chemical plant in Institute, West Virginia on August 28, 2008 was principally caused by the plant managers’ failure to implement required standard operating procedures for the start-up of the unit and provide adequate training for employees, even where the plant managers knew that a safety-interlock designed to stop workers from introducing a highly reactive material into a tank was bypassed); U.S. CHEMICAL SAFETY HAZARD INVESTIGATION BOARD, INVESTIGATION REPORT: SUGAR DUST EXPLOSION AND FIRE (2008), [http://www.csb.gov/assets/document/Imperial\\_Sugar\\_Report\\_Final\\_updated.pdf](http://www.csb.gov/assets/document/Imperial_Sugar_Report_Final_updated.pdf) (explaining that inadequate maintenance of the sugar and cornstarch conveying equipment at the Imperial Sugar manufacturing facility in Port Wentworth, Georgia caused the release of sugar and sugar dust into the work area, which led to the deaths of fourteen workers and the injury of thirty-six others in an explosion that would not have occurred if Imperial Sugar had “enforced routine housekeeping policies and procedures”) (emphasis added); U.S. CHEMICAL SAFETY HAZARD INVESTIGATION BOARD, INVESTIGATION REPORT: XCEL ENERGY HYDROELECTRIC PLANT PENSTOCK FIRE (2007), [http://www.csb.gov/assets/document/Xcel\\_Energy\\_Report\\_Final.pdf](http://www.csb.gov/assets/document/Xcel_Energy_Report_Final.pdf) (finding that Xcel Energy’s failure to conduct company-required hazard evaluations and to adhere to American Society of Civil Engineering safety guidelines promoting escape routes in the event of an emergency resulted in a chemical fire that killed five workers at Xcel Energy’s hydroelectric plant and injured three more); *U.S. Department of Labor’s OSHA Cites Speedy Rooter Inc. of South Sioux City, Neb., Following Double Fatality in Sewer Manhole*, OSHA NEWS RELEASE (U.S. Dep’t of Labor, Office of Public Affairs), Jan. 4, 2011, available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=19068](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19068) (announcing OSHA area director Tom Deutscher’s conclusion that Speedy Rooter Inc. of South Sioux City, Nebraska “blatantly disregarded industry-recognized hazards and safe work practices by exposing [two] workers to dangerous sewer gases that ended their lives”) (emphasis added).

35. Tesoro Corporation (Tesoro) is an independent refiner and marketer of petroleum products. *About Tesoro*, TESORO CORPORATION, <http://www.tsocorp.com/tsocorp/AboutUs/PRIMARYPAGE> (last visited Mar. 20, 2011). On April 2, 2010, a 40-year old heat exchanger at Tesoro Corporation’s Anacortes, Washington refinery blew apart, killing seven refinery workers. *L&I Issues Record Fine in Deadly Tesoro Explosion*, L&I NEWS (Wa. State Dep’t. of Labor & Indus.), Oct. 4, 2010, available at <http://www.lni.wa.gov/news/2010/pr101004b.asp> [hereinafter L&I NEWS]; see also *supra* note 5 and accompanying text. This was the deadliest industrial disaster in thirty-seven years in the state of Washington. L&I NEWS. On October 4, 2010, the Washington state Department of Labor & Industries (“L&I”) announced the findings of their investigation, concluding that the deadly explosion could have

refinery explosion, Massey Mine Big Branch disaster, and the BP Deepwater Horizon catastrophe, share common themes: all involved heavily regulated industries engaged in inherently dangerous activities that were required to have operation and maintenance procedures designed to prevent the very crisis that occurred. In all of these cases, safety procedures were bypassed or standard operating procedures were ignored due to pressures on plant personnel to save time and/or money.<sup>36</sup> And in all cases, the brunt of the consequences was borne by those who did not share in the economic rewards of the corporate non-compliance.<sup>37</sup> Not only were BP and Massey repeat offenders,<sup>38</sup> but their corporate criminal convictions (without any prosecution of individuals), and “biggest ever” corporate fines did not deter subsequent violations.<sup>39</sup> Given the reported financial statuses of these organizations,<sup>40</sup> these fines were really nothing more than a “cost of doing

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been prevented. *Id.* L&I cited Tesoro for thirty-nine “willful” violations and five “serious” violations, and fined the company \$2.39 million, the largest fine in the agency’s history. *Id.* L&I found that the plant failed to: (1) properly inspect the heat exchanger according to manufacturer’s recommendations, good engineering practices, and prior operating experience; (2) develop and implement written procedures for equipment start-up as required by process safety management regulations; (3) train newly-assigned employees on the process and unit operating procedures; and (4) give employees the proper personal protective equipment for the type of operation. *Id.* As Judy Schurke, L&I Director, noted, “[t]his explosion and the deaths of these men and women would never have occurred had Tesoro tested their equipment in a manner consistent with standard industry practices, their own policies and state regulations.” *Id.*

36. See, e.g., Statement of Facts at 9, *United States v. BP Prods. of N. Am.*, No. 4:07-cr-434 (S.D. Tex. Oct. 24, 2007), available at [http://www.justice.gov/usao/txs/initiatives/Court%20Documents/071025\\_BP\\_Statement%20of%20Facts.pdf](http://www.justice.gov/usao/txs/initiatives/Court%20Documents/071025_BP_Statement%20of%20Facts.pdf) [hereinafter DOJ Statement of Facts] (“[B]ecause use of the 3-pound venting system extended the duration of startup, BP Products supervisory operations personnel allowed . . . operators instead to use an 8-inch bypass valve . . . even though this was not authorized under the SOP.”); L&I NEWS, *supra* note 35.

37. See *supra* notes 1–4 and accompanying text (describing the fatalities caused by corporate non-compliance, and describing such catastrophes as being unfairly borne by the workers).

38. See, e.g., Lucia Graves, *BP Defends Record as “Safe and Reliable” Despite Hundreds of Egregious Violations*, HUFFINGTON POST, July 12, 2010, [http://www.huffingtonpost.com/2010/07/11/bp-defends-record-as-safe\\_n\\_641498.html](http://www.huffingtonpost.com/2010/07/11/bp-defends-record-as-safe_n_641498.html) (detailing numerous health and safety violations by BP); Mike Hall, *MSHA Report: Massey Mine Had ‘Significant’ History of Safety Violations*, AFL-CIO BLOG (Apr. 16, 2010), <http://blog.afcio.org/2010/04/16/msha-report-massey-mine-had-significant-history-of-safety-violations/> (detailing numerous health and safety violations by Massey). As used in this article, “repeat offenders” refers to both prior criminal convictions as well civil and administrative violations, and treats prior convictions of subsidiaries as prior convictions of the parent entity.

39. See, e.g., Steven Greenhouse, *BP Faces Record Fine for ‘05 Refinery Explosion*, N.Y. TIMES, Oct. 30, 2009, <http://www.nytimes.com/2009/10/30/business/30labor.html> (detailing the largest fines ever imposed by OSHA and under the Clean Air Act in response to the BP Texas City Refinery explosion); *Massey Energy to Pay Largest Civil Penalty Ever for Water Permit Violations*, NEWS RELEASE (EPA), Jan. 17, 2008, available at <http://yosemite.epa.gov/opadmpress.nsf/b1ab9f485b098972852562e7004dc686/6944ea38b888dd03852573d3005074ba!OpenDocument> (detailing the largest fines ever imposed under the Clean Water Act in response to Massey’s wastewater discharge permit violations). Both companies continued to violate safety, health, and environmental regulations. See sources cited *supra* note 38.

40. BP P.L.C., ANNUAL REVIEW 2009 24 (2010), [http://www.bp.com/assets/bp\\_internet/globalbp/globalbp\\_uk\\_english/set\\_branch/STAGING/common\\_assets/downloads/pdf/BP\\_Annual\\_Review\\_2009.pdf](http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/set_branch/STAGING/common_assets/downloads/pdf/BP_Annual_Review_2009.pdf) [hereinafter BP 2009 ANNUAL REPORT] (reporting \$16.8 billion in profit in 2009); MASSEY ENERGY, WHAT IT TAKES: 2009 ANNUAL REPORT 18 (2010), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Mzc3MzgZGFENoaWxkSUQ9Mzc2MjJExfFR5cGU9MQ==&t=1> (reporting \$10.4 billion in profit in 2009).



business.”

The focus of this Article is on the use of criminal law to hold accountable those responsible for business conduct that leads to violent explosions, spills, eruptions, collapses, and fires that devastate lives. For too long, industrial disasters have been ignored or minimized, labeled as unfortunate and unpreventable accidents, with no one responsible for either the event or the consequences. The government’s response to regulatory violations that cause death or serious bodily injury needs to change. In order to deter the corporate conduct of scofflaw companies like those discussed in this Article, the U.S. Department of Justice (“DOJ”) needs to prioritize the prosecution of business conduct that results in the death or serious bodily injury of workers or the general public. Specifically, DOJ should focus more resources on prosecuting the individuals whose conscious choices (whether manifested through action or inaction) set the stage for disasters such as the three that played out in April 2010. Although the criminal provisions of the substantive statutes that cover this type of conduct are flawed, DOJ has other tools in Title 18 that it should use more aggressively to combat blatant disregard for worker and public safety. The key is for DOJ to look beyond the substantive worker safety and environmental laws, and use the prosecutor’s best friends—the obstruction of justice and false statement statutes.<sup>41</sup>

In Section I, this Article reviews two egregious case examples that illustrate the repetitive nature of the conduct that leads to catastrophes, and the ineffectiveness of corporate criminal fines as the sole deterrent to this conduct. Section II discusses individual accountability as a critical part of the criminal enforcement of health, safety, and environmental laws. Section III surveys the criminal provisions of existing health, safety, and environmental statutes and goes on to highlight Title 18 statutory provisions that can be used to more effectively prosecute these cases. Finally, the Article suggests in Section IV that an 1838 statute, the Seaman’s Manslaughter Law,<sup>42</sup> can be used as a model for new legislation that would be targeted specifically at those whose conscious conduct results in the death or serious bodily injury of workers or the general public.<sup>43</sup>

## I. CASE EXAMPLES

As the following examples illustrate, management decisions that result in

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41. 18 U.S.C. §§ 371, 1001, 1341, 1343, 1505, 1519 (2006). For more information on these statutes, see generally the FALSE STATEMENT AND FALSE CLAIMS and OBSTRUCTION OF JUSTICE Articles in this Issue.

42. Act of July 7, 1838, sec. 12, 5 Stat. 304, 306; see *infra* note 251 and accompanying text for a full discussion of this statute.

43. My views on these issues are informed not only by my research but also by more than thirty years of practice in this area. This includes time spent counseling, negotiating, and litigating these issues while working for a federal regulatory agency, as a state and then a federal prosecutor, and as a white-collar criminal defense attorney.

systemic failures to adhere to industry safety standards<sup>44</sup> lead to higher-than-necessary or even illegal risk-taking which can then lead to both preventable deaths and preventable grievous bodily injuries. These cases also illustrate that extraordinarily high criminal corporate fines cannot alone effectively change corporate behavior.

#### A. *BP p.l.c.*

BP p.l.c., (also referred to as BP, BP Group, or BP Global) is one of the world's largest energy companies. In 2009, its sales and other operating revenues totaled \$236 billion.<sup>45</sup> It operates across six continents, including North America.<sup>46</sup> BP Group's U.S. operations include five refineries<sup>47</sup> and approximately 9,000 miles of pipelines;<sup>48</sup> it is the "number one producer of oil and gas in the deepwater Gulf of Mexico."<sup>49</sup> During the last ten years, BP subsidiaries have been convicted of multiple environmental and worker safety crimes which resulted in worker deaths and untold damage to natural resources. BP's corporate misconduct during the last decade led to the following events:

- The March 31, 2001 explosion at the BP AMOCO plant in Augusta, Georgia that killed three people. The CSB investigated this incident and concluded that the plant failed to properly investigate earlier near-miss incidents that preceded the explosion, and also operated units where it had failed to identify hazards from unintended and uncontrolled reactions.<sup>50</sup>
- In 2001, an internal BP Operational Integrity Review of its Greater Prudhoe Bay operations concluded that the company valued production and profits ahead of safety and maintenance.<sup>51</sup> Five years later, this corporate decision-making framework led to two oil spills on Alaska's North Slope.<sup>52</sup>

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44. The term "industry safety standards" is used throughout this article to mean those policies and procedures that are either mandated by law or generally accepted within the particular industry to be critical for the safe operation of that industrial segment. These include, but are not limited to, Process Safety Management ("PSM") and Risk Management Plan ("RMP") regulations. See regulations cited *supra* notes 22 & 26 (establishing PSM and RMP requirements).

45. BP 2009 ANNUAL REPORT, *supra* note 40, at 26.

46. *Where We Operate*, BP P.L.C., <http://www.bp.com/sectiongenericarticle.do?categoryId=6&contentId=7019358> (last visited Mar. 20, 2011).

47. *Refineries*, BP P.L.C., <http://www.bp.com/sectiongenericarticle.do?categoryId=9030203&contentId=7055766> (last visited Mar. 20, 2011).

48. *Pipelines*, BP P.L.C., <http://www.bp.com/sectiongenericarticle.do?categoryId=9030201&contentId=7055756> (last visited Mar. 20, 2011).

49. *BP in the United States*, BP P.L.C., <http://www.bp.com/sectiongenericarticle.do?categoryId=488&contentId=2000734> (last visited Mar. 20, 2011).

50. U.S. CHEMICAL SAFETY & HAZARD INVESTIGATION BOARD, INVESTIGATION REPORT: THERMAL DECOMPOSITION INCIDENT, BP AMOCO POLYMERS, INC. (2001), [http://www.csb.gov/assets/document/BP\\_Investigation\\_Report.pdf](http://www.csb.gov/assets/document/BP_Investigation_Report.pdf).

51. BP P.L.C., REVIEW OF OPERATIONAL INTEGRITY CONCERNS AT GREATER PRUDHOE BAY 9, 13, 45 (2001), <http://www.propublica.org/documents/item/2001-bp-operational-integrity-report>.

52. The first spill occurred in March 2006 from an oil transfer pipeline and resulted in a spill of approximately 212,000 gallons of oil to the tundra; the second spill occurred in August 2006 and resulted in the spill of 1,000 gallons of oil to the tundra. Complaint at 8–9, *United States v. BP Exploration (Alaska), Inc.*, No. 3:07-cr-00125-

- In March 2005, an explosion at BP's Texas City refinery killed 15 and injured more than 170.<sup>53</sup> As discussed below, BP pled guilty and paid more than \$130 million in criminal, civil, and administrative fines in connection with this incident.<sup>54</sup>
- In March 2006, a pipeline burst in Prudhoe Bay, Alaska, resulting in the spill of approximately 6,400 bbl of oil.<sup>55</sup> In November 2007, British Petroleum Exploration Alaska ("BPXA")<sup>56</sup> pled guilty to a criminal misdemeanor under the Clean Water Act and paid a criminal fine of \$12 million and an additional \$4 million in restitution payments.<sup>57</sup>
- In January 2008, there was yet another explosion at the Texas City refinery that killed one person.<sup>58</sup>
- In 2009, BP Products was cited for failing to take corrective actions to fix safety hazards similar to those found at the Texas City facility after the 2005 explosion.<sup>59</sup> In addition, OSHA found 439 *new* "willful"<sup>60</sup> violations for "failures to follow industry-accepted controls on the pressure relief systems and other process safety management violations."<sup>61</sup>

Despite these facts, not a single individual employee, agent, officer or director of any BP subsidiary, or the parent organization, has been charged, much less convicted of a crime.

In hindsight, the Deepwater Horizon disaster was not a surprise considering the decade-long pattern of BP corporate mismanagement and repeated violations of safety laws and industry standards. Rather than an aberration, the Deepwater Horizon disaster can be seen as the inevitable result of a BP corporate culture that apparently approved of repeated violations of safety laws and standard industry

TMB (D. Alaska Oct. 25, 2007), available at [http://emerginglitigation.shb.com/Portals/f81bfc4f-cc59-46fe-9ed5-7795e6eea5b5/BPXA\\_complaint.PDF](http://emerginglitigation.shb.com/Portals/f81bfc4f-cc59-46fe-9ed5-7795e6eea5b5/BPXA_complaint.PDF).

53. BP P.L.C., FATAL ACCIDENT INVESTIGATION REPORT: ISOMERIZATION UNIT EXPLOSION, FINAL REPORT, (2005), [http://www.bp.com/liveassets/bp\\_internet/us/bp\\_us\\_english/STAGING/local\\_assets/downloads/t/final\\_report.pdf](http://www.bp.com/liveassets/bp_internet/us/bp_us_english/STAGING/local_assets/downloads/t/final_report.pdf) [hereinafter FINAL REPORT].

54. See *infra* notes 63–100 and accompanying text.

55. Glenn Hess, *BP Shuts Down Largest U.S. Oilfield*, CHEM. & ENGINEERING NEWS, Aug. 8, 2006, <http://pubs.acs.org/cen/news/84/i33/8433bp.html>.

56. BPXA is a subsidiary of BP p.l.c.

57. See Graves, *supra* note 38 (noting that BP also paid \$4 million to the National Fish and Wildlife Foundation to support research and activities on the spill-affected North Slope).

58. See LOREN C. STEFFY, DROWNING IN OIL: BP AND THE RECKLESS PURSUIT OF PROFIT 138–40 (2011).

59. Graves, *supra* note 38.

60. The term "willful" within the meaning of OSHA is defined as "either an intentional violation of the Act or plain indifference to its requirements." Ann K. Wooster, Annotation, *What constitutes "willful" violation for purposes of §§ 17(a) or (e) of Occupational Safety and Health Act of 1970 (29 U.S.C.A. § 666(a) or § 666(e))*, 161 A.L.R. FED. 561 (2009).

61. Stipulation and Agreement at 28, *Solis v. BP Prods. N. Am. Inc.*, OSHRC Nos. 09-1695 & 09-1787 (Aug. 12, 2010), [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=CWSA&p\\_id=2002](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=CWSA&p_id=2002). BP settled these violations by paying a \$50,610,000 fine. *Id.* at 5.

practices to maximize production and, ultimately, profit.<sup>62</sup>

### 1. BP Products's<sup>63</sup> Texas City Refinery

A catastrophic explosion occurred at the Texas City Refinery on March 23, 2005<sup>64</sup> when hydrocarbon vapor and liquid were ignited in the Isomerization unit.<sup>65</sup> This explosion resulted in the deaths of 15 contract employees<sup>66</sup> and injured at least 170 other workers.<sup>67</sup> A review of the Texas City Refinery explosion provides an eerie and chilling preview of the corporate decision-making and prioritization that led to the nightmare now known as the Deepwater Horizon catastrophe.

Reports and court pleadings from numerous federal, state, and private investigations paint a simple picture of what happened on March 23, 2005.<sup>68</sup> Hydrocarbon liquid flowing down a blowdown stack formed an explosive vapor cloud that was ignited, probably by a running truck engine parked nearby.<sup>69</sup> As the following summary illustrates, had BP Products personnel complied with the law, the explosion could have been prevented.

Gasoline components, whether they are in the process of refining, or have been

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62. The Center for Public Integrity analyzed OSHA data and found that since 2007, BP received 760 "egregious and willful" safety violations compared to one such citation issued to its competitors during the same time period. Jim Morris & M.B. Pell, *Renegade Refiner: OSHA Says BP Has "Systemic Safety Problem": 97% of Worst Industry Violations Found at BP Refineries*, CENTER FOR PUBLIC INTEGRITY (May 16, 2010), <http://www.publicintegrity.org/articles/entry/2085/>.

63. BP Products North America Inc. is a subsidiary of BP p.l.c.

64. Even before March 2005, BP's refineries had a track record of safety problems that led to deaths. Between 1995 and 2005 there were twenty-two deaths at BP refineries in the United States—more than a quarter of the deaths in all other refineries nationwide. Lisa Olsen, *BP Leads Nation in Refinery Fatalities*, HOUSTON CHRON., May 15, 2005, <http://www.chron.com/disp/story.mpl/special/05/blast/3182510.html>. Prior to 1998, the Texas City refinery was owned and operated by Amoco; in December 1998, Amoco was acquired by BP and became one of its subsidiaries. DOJ Statement of Facts, *supra* note 36, at 2; see also Youssef M. Ibrahim, *British Petroleum is Buying Amoco in \$48.2 Billion Deal*, N.Y. TIMES, Aug. 12, 1998, <http://www.nytimes.com/1998/08/12/business/british-petroleum-is-buying-amoco-in-48.2-billion-deal.html> (announcing purchase of Amoco by BP).

65. FINAL REPORT, *supra* note 53. Isomerization Units are designed to increase the octane in a component of gasoline. See BP P.L.C., FATAL ACCIDENT INVESTIGATION REPORT: ISOMERIZATION UNIT EXPLOSION, INTERIM REPORT 7 (2005), <http://www.acusafe.com/Newsletter/Stories/BP%20Inv%20Interim%20Report.pdf> (describing history of Texas City Isomerization Units and Raffinate Splitter).

66. The workers killed were: Glenn Bolton, Lorena Cruz-Alexander, Rafael Herrera, Daniel Hogan, Jimmy Hunnings, Morris King, Larry Linsenhardt, Arthur Ramos, Ryan Rodriguez, James Rowe, Linda Rowe, Kimberly Smith, Susan Taylor, Larry Thomas, and Eugene White.

Anne Belli, *Horror in Trailer Bonds BP Blast Survivors*, HOUSTON CHRON., Nov. 7, 2005, <http://www.chron.com/disp/story.mpl/special/05/blast/3486021.html>.

67. FINAL REPORT, *supra* note 53.

68. See, e.g., DOJ Statement of Facts, *supra* note 36 (describing explosion of March 23, 2005); FINAL REPORT, *supra* note 53 (describing events leading up to explosion of March 23, 2005); see also U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD, INVESTIGATION REPORT: REFINERY EXPLOSION AND FIRE (Mar. 2007), <http://www.csb.gov/assets/document/CSBFinalReportBP.pdf> [hereinafter CSB REPORT] (announcing the CSB's final conclusions as to the causes and chain of events of the explosion).

69. DOJ Statement of Facts, *supra* note 36, at 8.

refined, are known within the industry as “raffinate.”<sup>70</sup> Units that process raffinate are at high risk for explosion if not maintained and operated properly and sources of ignition must be strictly controlled.<sup>71</sup> Start-up of the Raffinate Splitter is one of most dangerous operational times for the unit.<sup>72</sup> BP had written Standard Operating Procedures (“SOPs”) that took into account the hazardous nature of the operation.<sup>73</sup> SOPs are detailed instructions concerning safe operation of equipment during various stages in the refining process. For example, typically, there are SOPs for start-up and shut-down operations, for steady state operations, and for maintenance and repair of equipment that is done while the unit is still operating. Common sense dictates that the more dangerous the operation, the more important it is to *follow* the SOP.

BP’s written operating procedures required release of excess hydrocarbon vapors from the Raffinate Splitter to a flare<sup>74</sup> that would burn the vapors off.<sup>75</sup> In order to *save time* during start-up, BP Products personnel routinely ignored the SOPs and bypassed the flare option which heightened the probability of a release of hydrocarbon vapors and liquids that could then cause an explosion.<sup>76</sup>

Unfortunately, BP Products did not maintain equipment in accordance with either its own or regulatory standards.<sup>77</sup> BP Products personnel also did not complete the required instrument checks prior to the March 23rd start-up ignoring their own SOP, despite prior knowledge of an existing problem with a visual sight glass on the tower.<sup>78</sup> Two days before the explosion, BP personnel also learned that critical alarms on the system had not been properly inspected in accordance with

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70. DOJ Statement of Facts, *supra* note 36, at 4.

71. See DOJ Statement of Facts, *supra* note 36, at 4 (noting raffinate at the Texas City Refinery was referred to as a “light end hydrocarbon,” and “was highly volatile and could ignite easily”).

72. DOJ Statement of Facts, *supra* note 36, at 6.

73. *Id.*

74. “Flare means an open-flame fuel gas combustion device used for burning off unwanted gas or flammable gas and liquids.” 40 C.F.R. § 60.101a (2010). The definition of flare has been stayed indefinitely. 73 Fed. Reg. 78,549 (Dec. 22, 2008).

75. DOJ Statement of Facts, *supra* note 36, at 4.

76. DOJ Statement of Facts, *supra* note 36. Instead of burning off the excess hydrocarbons, BP vented vapors to a blowdown stack and drum. DOJ Statement of Facts, *supra* note 36. The blowdown stack and drum, if not operated, designed, and properly maintained (as in the case here) can further increase the risk of an explosion. DOJ Statement of Facts, *supra* note 36. BP failed *for five years* to perform a relief valve study needed to determine if the blowdown stack had the capacity to safely release excess hydrocarbons, an omission clearly contrary to industry standards. DOJ Statement of Facts, *supra* note 36, at 9–11.

77. In April 2003, BP personnel inspected the F-20 blowdown drum and stack and discovered a broken “quench system” (designed to cool hydrocarbon vapors in the drum and convert the vapors to liquid) and corroded and broken baffles (baffles are designed to reduce the quantity of hydrocarbon vapor released from the stack). Statement of Facts at 10–11, *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655 (S.D. Tex. 2009) (No. 4:07-cr-434). BP failed to follow its written Standard Operating Procedures that required instruments in the raffinate splitter tower to be functioning properly before startup, a common sense requirement given the potential for explosion. *Id.* at 12.

78. *United States v. BP Prods. North America Inc.*, 610 F. Supp. 2d 655, 665 (S.D. Tex. 2009).

BP's own written maintenance inspection requirements and SOPs.<sup>79</sup>

There were additional failures related to the raffinate tower process safety start-up. BP failed to implement written procedures designed to ensure the safe placement of contractor trailers on the site: American Petroleum Institute Standard 521<sup>80</sup> required an evaluation of the risk of fire and explosion to personnel located within 350 feet of the blowdown stack<sup>81</sup> but this risk assessment was never completed.

The CSB was the first to complete its investigative report concluding that “[t]he Texas City disaster was caused by organizational and safety deficiencies at all levels of the BP Corporation. Warning signs of a possible disaster were present for several years, but company officials did not intervene effectively to prevent it.”<sup>82</sup> The CSB also found that “[c]ost-cutting, failure to invest and production pressures from BP Group executive managers impaired process safety performance at Texas City.”<sup>83</sup> These wide-spread failures to adhere to industry safety standards indicate a pervasive corporate culture of ignoring basic safety precautions which included BP plant managers and operators as well as corporate executives charged with plant oversight.

OSHA's investigation was equally damning. It uncovered 328 health and safety violations<sup>84</sup> and BP Products was fined \$21,361,500.<sup>85</sup> In addition, pursuant to a settlement agreement, BP Products was required, among other things, to hire a third party process safety management expert to audit safety standards, conduct mandatory safety and health training for all employees, including management, and abate all hazardous conditions.<sup>86</sup>

As a result of the EPA investigation, BP Products was fined \$15 million for violations of the Clean Air Act (“CAA”) chemical accident prevention regulations, the largest fine ever imposed for these types of violations.<sup>87</sup> In addition, in February 2009, BP Products entered into a civil settlement with EPA stemming

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79. Statement of Facts at 10–11, *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655 (S.D. Tex. 2009) (No. 4:07-cr-434).

80. The American Petroleum Institute develops consensus standards for the oil and gas industry. *See Standards*, AMERICAN PETROLEUM INSTITUTE, <http://www.api.org/Standards/> (last visited March 21, 2011).

81. Statement of Facts at 13, *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655 (S.D. Tex. 2009) (No. 4:07-cr-434).

82. U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD, 2005-04-I-TX, INVESTIGATION REPORT: REFINERY EXPLOSION AND FIRE 18 (2007).

83. *Id.* at 25.

84. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, CITATION AND NOTIFICATION OF PENALTY: BP PRODUCTS NORTH AMERICA, INC. (2005), available at <http://www.osha.gov/as/oc/FinalCitation308314640.pdf>; OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, CITATION AND NOTIFICATION OF PENALTY: BP PRODUCTS NORTH AMERICA, INC. (2005), available at <http://www.osha.gov/as/oc/2ndCitation308314988.pdf>.

85. *B.P. Oil Prods. N. Am.*, 610 F. Supp. 2d at 667.

86. *Id.*

87. Press Release, Department of Justice, BP Products to Pay Largest Single-Facility Clean Air Act Penalty for Releases of Hazardous Pollutants at Texas City Refinery, (September 30, 2010) available at <http://www.justice.gov/opa/pr/2010/September/10-enrd-1103.html>.

from a consent order entered into in 2001.<sup>88</sup> BP Products also pled guilty to violating the CAA<sup>89</sup> and entered a guilty plea on October 24, 2007<sup>90</sup> for knowingly violating the CAA by failing to implement prevention, detection and correction requirements of the RMP regulations whose sole purpose was to prevent explosions.<sup>91</sup>

The CSB found conditions at the Texas City Refinery so troubling that it recommended a study of safety and management issues at all of its U.S. refineries. As a result of this recommendation BP commissioned the BP U.S. Refineries Independent Review Panel (Independent Panel) that was chaired by James A. Baker, III.<sup>92</sup> The Independent Panel was directed to:

[M]ake a thorough, independent, and credible assessment of the effectiveness of BP's corporate oversight of safety management systems at its five U.S. refineries and its corporate safety culture. The charter further directs the Panel to produce a report examining and recommending needed improvements to BP's corporate safety oversight, corporate safety culture, and corporate and site safety management systems.<sup>93</sup>

The Independent Panel conducted interviews in 2006 at BP's five U.S. refineries and found similar issues to those identified as causing the explosion at Texas City *present at all of their refineries*. They also compared the 2005 Texas City refinery to three major process incidents in 2000 at BP's Scotland refinery. The Independent Panel concluded that:

Although the incidents occurred five years apart at different sites in different countries, many of the underlying deficiencies identified after the incidents appear to be the same, especially as they relate to evaluating process safety performance and then taking corrective actions.<sup>94</sup>

The Board of Directors of BP p.l.c. has not ensured, as a best practice, that BP's management has implemented an integrated, comprehensive and effective process safety management system for BP's five U.S. refineries.<sup>95</sup>

The overwhelming conclusion one is led to after reviewing all of the reports,

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88. This new settlement agreement required the company to "spend more than \$161 million on pollution controls, enhanced maintenance and monitoring, and improved internal management practices at the refinery, as well as pay a \$12 million civil penalty and spend \$6 million on a supplemental project . . ." *Id.*

89. Clean Air Act ("CAA"), 42 U.S.C. §§ 7401–7671 (2006).

90. *BP Prods. N. Am. Inc.*, 610 F. Supp. 2d at 670.

91. 42 U.S.C. § 7412(r)(7)(A) (2006); 40 C.F.R. 68.12(d)(3) (2011).

92. "BP p.l.c. conducts its U.S. refinery operations through BP Products at five different locations: Texas City, Texas; Carson, California; Whiting, Indian; Cherry Point, Washington; and Toledo, Ohio." BAKER REPORT, *supra* note 2, at A-2 n1.

93. *Id.* at ix. The Panel was specifically directed to not "seek to affix blame or apportion responsibility for any past event" and not duplicate the investigative work of the Chemical Security Board. *Id.*

94. *Id.* at 183–84.

95. *Id.* at 234.

settlement agreements and criminal pleadings is that BP chose to ignore both industry standards and the law with respect to operation and maintenance of its refineries. BP's disregard of process safety SOPs and preventive maintenance can only be seen as a financial decision: they gambled the safety of their workers and the environment by cutting operation costs to maximize profits. The CSB determined that the 2005 Texas City Refinery explosion was linked to corporate spending decisions in the 1990s when economic conditions led to the cutback on maintenance, employee training and operator positions at the facility.<sup>96</sup>

Unfortunately, despite criminal, civil, and administrative fines totaling \$137 million for the Texas City explosion,<sup>97</sup> BP still didn't get the message. In January 2008 there was yet another explosion at the Texas City refinery that killed one person.<sup>98</sup> Furthermore, four years after the original explosion that killed fifteen people, BP Products was cited for failing to take corrective actions to fix safety hazards similar to those found at the facility after the 2005 explosion. In addition, OSHA found 439 *new* "willful"<sup>99</sup> violations for failures to follow industry-accepted controls on the pressure relief systems and other process safety management violations.<sup>100</sup>

Despite 15 deaths, 170 injuries and hundreds of millions of dollars spent by both the government and BP investigating this case, the clear indication is that BP has not addressed its corporate culture that prizes economic profits over compliance with regulations that save lives.

## 2. Prudhoe Bay Oil Spills

The impact of a corporate culture that inculcates a "money driver" or "risk/reward" mentality is further illustrated by a review of BP's Prudhoe Bay Alaska pipeline operations. BP Exploration Alaska, Inc. ("BPXA") operates approximately 1,600 miles of pipelines that are used to transport crude oil and other

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96. See, e.g., U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD, 2005-04-I-TX, INVESTIGATION REPORT: REFINERY EXPLOSION AND FIRE (2007).

97. "With today's settlement, the federal government will have recovered approximately \$137 million in criminal, civil and administrative fines related to process safety violations at the Texas City refinery." Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, BP Products to Pay Largest Single-facility Clean Air Act Penalty for Releases of Hazardous Pollutants at Texas City Refinery (Sept. 30, 2010), available at <http://www.justice.gov/opa/pr/2010/September/10-enrd-1103.html> (last visited Mar. 24, 2011).

98. See LOREN C. STEFFY, DROWNING IN OIL: BP AND THE RECKLESS PURSUIT OF PROFIT 138-40 (2011).

99. "A Notification of Failure to Abate for violation of two provisions of the 2005 settlement agreement with a penalty of \$50,700,000 was issued as a result of 270 separate violations." U.S. Dep't of Labor, *OSHA Fact Sheet: BP History Fact Sheet, Occupational Health and Safety Administration*, <http://www.osha.gov/dep/bp/bphistory.html> (last visited Mar. 28, 2011). The term "willful" within the meaning of OSHA is defined as "either an intentional violation of the Act or plain indifference to its requirements." Wooster, *supra* note 60.

100. Stipulation and Agreement at 28, *BP Prods. North America Inc.*, Nos. 09-1695 & 09-1787 (OSHRC Aug. 12, 2010). BP settled these violations by paying a \$ 50,610,000 dollar fine. *Id.* at 6.



materials generated or used during oil field operations at Prudhoe Bay.<sup>101</sup> On March 2, 2006, a leak was discovered in a portion of the pipeline and resulted in a spill of approximately 4,800 barrels near a caribou crossing. A second oil spill occurred in August 2006 spilling 1,000 gallons of oil to the tundra.<sup>102</sup>

Investigators concluded that BPXA's failure to properly maintain and inspect the pipelines caused the oil spills. BPXA knew about the age of the pipeline, and was warned about the corrosion, the need for additional pipeline inspections, and the potential for a catastrophic failure years in advance.<sup>103</sup> As Admiral Thomas Barrett of the Department of Transportation testified, "[g]iven the multiple risk factors for corrosion in the Prudhoe Bay environment . . . it is mystifying" why BP didn't clean the lines on a regular basis.<sup>104</sup> Another spill on BP's Prudhoe Bay line occurred in August 2006. And in December 2009, oil spilled yet again from BPXA's Prudhoe Bay pipeline.<sup>105</sup>

In 2001, an internal BP Operational Integrity Review of BP's Prudhoe Bay operations concluded that the company focused on production and ignored safety and maintenance requirements.<sup>106</sup> Five years later, this unchanged corporate decision-making framework led to two oil spills on Alaska's North Slope.<sup>107</sup> BP pled guilty to criminally negligent violations of the Clean Water Act, paid a \$12

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101. "We manage about 1,600 miles of pipeline on the North Slope." *BP Responds to ProPublica Corrosion Report*, ALASKA DISPATCH (Nov. 8, 2010), <http://www.alaskadispatch.com/article/bp-responds-propublica-pipeline-corrosion-report>, (publishing unaltered statement of BP Alaska spokesman in response to report concerning North Slope pipeline corrosion).

102. Complaint at 9, *United States v. BP Exploration (Alaska), Inc.*, No. 3:07-cr-00125 (D. Alaska Oct. 25, 2007), available at [http://emerginglitigation.shb.com/Portals/f81bfc4f-cc59-46fe-9ed5-7795e6eea5b5/BPXA\\_complaint.PDF](http://emerginglitigation.shb.com/Portals/f81bfc4f-cc59-46fe-9ed5-7795e6eea5b5/BPXA_complaint.PDF).

103. Nelson Schwartz, *Can BP Bounce Back?*, CNN MONEY (October 31, 2006, 10:48 AM), [http://money.cnn.com/magazines/fortune/fortune\\_archive/2006/10/16/8388595/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2006/10/16/8388595/index.htm).

104. *BP Pipeline Failure: Hearing Before the Committee on Energy and Natural Resources*, 109th Cong. 6-7 (2006) (statement of Vice Admiral Thomas Barrett, U.S. Coast Guard (Retired), Administrator, Pipeline and Hazardous Materials Safety Admin., U.S. Department of Transportation), available at [http://energy.senate.gov/public/\\_files/Barrett.doc](http://energy.senate.gov/public/_files/Barrett.doc).

105. This most recent spill is being reviewed to determine whether it violated the terms and conditions of BP's 2007 plea agreement. See Lisa Demer, *BP May Face Third Criminal Violation After Recent Slope Spill*, ANCHORAGE DAILY NEWS (Dec. 20, 2009, 10:49), <http://www.adn.com/2009/12/19/1063296/bp-may-face-third-criminal-violation.html> (noting that the federal judge ordered a hearing to determine whether the 2009 spill violated the probation from the 2006 spills); Eric Hornbeck, *Feds Say Alaska Spill Violates BP's Probation*, LAW 360 (Nov. 19, 2010), <http://www.law360.com/topnews/articles/210567/feds-say-alaska-spill-violates-bp-s-probation> (stating that United States District Court Judge Ralph R. Beistline ordered BP to appear in U.S. court); Cassandra Sweet, *Judge Orders BP Hearing on Petition to Revoke Probation, BP Pleads Not Guilty to Alaska Probation Violation*, ABC NEWS/MONEY (Dec. 20, 2010), <http://abcnews.go.com/Business/wireStory?id=12445224> (reporting that BP pled not guilty to probation violation, and the next hearing date has not yet been set).

106. Report, BPXA, Review of Operational Integrity Concerns at Greater Prudhoe Bay 6 (Sept. 25, 2001), available at <http://s3.documentcloud.org/documents/4364/2001-bp-operational-integrity-report.pdf>.

107. The Department of Justice filed a complaint in U.S. District Court for the District of Alaska alleging "BPXA illegally discharged more than 200,000 gallons of crude oil from its pipelines onto the North Slope of Alaska during two major oil spills in the spring and summer of 2006." Press Release, United States Dep't of Justice, United States Files Civil Lawsuit Against BP Exploration for Oil Spills on North Slope in Alaska (March 31, 2009) available at <http://www.justice.gov/opa/pr/2009/March/09-enrd-287.html>.

million fine and an additional \$8 million in restitution and community service payments. BP was also placed on probation for a period of three years.<sup>108</sup> A year after the spill, and six years after the 2001 investigation, another investigation was conducted and investigators discovered that BP's Alaska operations still were not maintaining safety equipment properly. In the 2007 follow-up study, "[n]early 80 percent of the workers interviewed . . . said that gas and fire detection systems—perhaps the most important equipment to saving lives and among the most critical in preventing an environmental disaster—were either not functioning or were obsolete."<sup>109</sup> Marc Kovac, a BP employee who was part of the original BP 2001 review team, reported that:

[Fifty] percent of everything that was originally brought up was not fixed, it was ignored . . . BP plays the time game. People forget and they know that. So as long as they file reports and do investigations and produce paperwork, they know that people will eventually go on with their business.<sup>110</sup>

Kristjan Dye, the leader of the United Steelworkers local at Prudhoe Bay told *Fortune* reporters that "[t]he catchword we heard was 'managed risk' . . . . If you pointed out problems, you weren't told to shut up. You could bring it up—but it might not get fixed."<sup>111</sup> *Fortune* also obtained a March 2002 letter written by Bill Herasymiuk, an inspection and quality-assurance specialist, in which he "warned superiors in BP's corrosion, inspection, and chemical team of a potential 'catastrophe' . . . ."<sup>112</sup>

Nor was this attitude limited to the Prudhoe Bay operations. Current and former BP employees recounted examples of shortcuts taken at both the Texas City refinery and the Prudhoe Bay site. "One current BP employee who worked at both Prudhoe Bay and in Texas and spoke to *Fortune* on condition of anonymity says no one should be surprised by what eventually occurred. "The mantra was, Can we cut costs 10%?"<sup>113</sup>

Sadly, as reported by the President's Deepwater Horizon Commission, BP's proclivity for cutting costs and taking unreasonable risks with people's lives and the environment in order to save time and money continued at least through April 20, 2010.<sup>114</sup>

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108. Press Release, U.S. Dep't of Justice, British Petroleum to Pay More Than \$370 Million in Environmental Crimes, Fraud Cases (Oct. 25, 2007), available at [http://www.justice.gov/opa/pr/2007/October/07\\_ag\\_850.html](http://www.justice.gov/opa/pr/2007/October/07_ag_850.html).

109. Abraham Lustgarten, *New Documents Show BP Made Little Progress on Alaska Safety Issues From 2001 to 2007*, PROPUBLICA (June 18, 2010, 2:28), <http://www.propublica.org/article/new-documents-show-bp-made-little-progress-on-alaska-safety-issues-from-2001>.

110. *Id.*

111. Schwartz, *supra* note 103.

112. *Id.*

113. *Id.*

114. Similar attitudes are reflected in an infamous "Run Coal" memo, written by Massey CEO Don Blankenship on October 19, 2005 that was addressed to "All Deep Mine Superintendents." He warned them that "[i]f any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do

### 3. *Deepwater Horizon Catastrophe*

When the Deepwater Horizon rig exploded on April 20, 2010, sixteen people died and seventeen others were seriously injured.<sup>115</sup> They weren't the only victims, just the first. As the disaster unfolded, environmental and economic devastation spread, impacting countless people across an entire region of the country.<sup>116</sup>

This horrific event led to multiple government investigations,<sup>117</sup> as well as

anything other than run coal (i.e.— build overcasts, do construction jobs, or whatever) you need to ignore them and run coal. This memo is necessary only because we seem not to understand that coal pays the bills." Margret Cronin Fisk, Brian K. Sullivan and Karen Freifeld, *Mine Owner's CEO fought Regulators, Town, Even Maid*, BLOOMBERG (Apr. 9, 2010, 1:51 PM), <http://www.bloomberg.com/news/2010-04-09/massey-s-blankenship-fought-regulators-town-as-coal-mine-operator-s-chief.html>. Blankenship also openly admitted that he didn't pay attention to the number of violations Massey's mining operations received. Bernard Condon, *Not King Coal*, FORBES (May 26, 2003), [http://www.forbes.com/forbes/2003/0526/080\\_print.html](http://www.forbes.com/forbes/2003/0526/080_print.html).

115. Jason Anderson, Aaron Dale Burkeen, Donald Clark, Stephen Curtis, Roy Wyatt Kemp, Karl Kleppinger, Gordon Jones, Blair Manuel, Dewey Revette, Shane Roshto, Adam Weiss. William M. Welch & Chris Joyner, *Memorial Service Honors 11 Dead Oil Rig Workers*, USA TODAY (May 25, 2010, 11:59), [http://www.usatoday.com/news/nation/2010-05-25-oil-spill-victims-memorial\\_N.htm](http://www.usatoday.com/news/nation/2010-05-25-oil-spill-victims-memorial_N.htm). See also David Barstow et al., *Deepwater Horizon's Final Hours*, N.Y. TIMES, Dec. 26, 2010, at A1; Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES, Apr. 21, 2010, at A13.

116. Report from John W. Tunnell Jr. for Kenneth R. Feinberg, Claims Administrator, Gulf Coast Claims Facility, An Expert Opinion of When the Gulf of Mexico Will Return to Pre-spill Harvest Status Following the BP Deepwater Horizon MC 252 Oil Spill 1, 36 (Jan. 31, 2011), available at <http://graphics8.nytimes.com/packages/pdf/national/20110131-GCCF-Final-Report.pdf>; Impact Analysis; Dunn and Bradstreet, *2010 Deepwater Horizon Oil Spill Preliminary Business Impact Analysis for Coastal Areas in the Gulf States*, 1 (June 7, 2010), available at [http://www.dnb.gov/pdf/DNB\\_Gulf\\_Coast\\_Oil\\_Spill\\_Impact\\_Analysis.pdf](http://www.dnb.gov/pdf/DNB_Gulf_Coast_Oil_Spill_Impact_Analysis.pdf); MATTHEW R. LEE & TROY C. BLANCHARD, HEALTH IMPACTS OF DEEPWATER HORIZON OIL DISASTER ON COASTAL LOUISIANA RESIDENTS (2010), available at [http://www.lsu.edu/pa/mediacenter/tipsheets/spill/publichealthreport\\_2.pdf](http://www.lsu.edu/pa/mediacenter/tipsheets/spill/publichealthreport_2.pdf).

117. Government investigations include:

1. The U.S. Coast Guard and the Bureau of Ocean Management launched a joint investigation entitled the Regulation and Enforcement Deepwater Horizon Joint Investigation. See DEEPWATER HORIZON JOINT INVESTIGATION: THE OFFICIAL SITE OF THE JOINT INVESTIGATION TEAM, <http://www.deepwaterinvestigation.com/go/site/3043/> (last visited Feb. 26, 2010).
2. Additionally, the Chemical Safety Board Investigation is conducting an investigation. See Transcript, U.S. Chemical and Safety and Hazard Investigation Board, Public Hearing: Regulatory Approaches to Offshore Oil and Gas Safety (Dec. 15, 2010), available at [http://www.csb.gov/assets/document/Transcript\\_of\\_Public\\_Meeting\\_12\\_15\\_2010.pdf](http://www.csb.gov/assets/document/Transcript_of_Public_Meeting_12_15_2010.pdf).
3. Furthermore, B.P. conducted its own investigation. See B.P., DEEPWATER HORIZON INVESTIGATION REPORT (2010), available at [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/incident\\_response/STAGING/local\\_assets/downloads\\_pdfs/Deepwater\\_Horizon\\_Accident\\_Investigation\\_Report.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf).
4. Finally, Congress has released various Congressional inquiries. Examples of these congressional inquiries include:
  - a. *Outer Continental Shelf Oil and Gas Strategy and Implications of the Deepwater Horizon Rig Explosion: Parts 1 and 2: Hearing Before the H. Comm. on Natural Res.*, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56675/pdf/CHRG-111hhrg56675.pdf>.
  - b. *Our Natural Resources at Risk: The Short- and Long-Term Impacts of the Deepwater Horizon Oil Spill: Hearing Before the Subcomm. on Insular Affairs, Oceans and Wildlife of the H. Comm. on Natural Res.*, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56977/pdf/CHRG-111hhrg56977.pdf>.

numerous lawsuits.<sup>118</sup> On January 12, 2011, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (National Commission)<sup>119</sup> released its report on the Deepwater explosion.<sup>120</sup> One commentator reviewing the report has concluded that:

[T]he oil spill in the Gulf of Mexico was an *avoidable* disaster caused in part by a series of cost-cutting decisions made by BP and its partners . . . “[M]any of the decisions that BP, Halliburton, and Transocean made that *increased the risk* of the Macondo blowout *clearly saved those companies significant time (and money)*.”<sup>121</sup>

In the report, the National Commission charted nine decisions made by BP and

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- c. *Ensuring Justice for the Victims of the Gulf Coast Oil Disaster: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57558/pdf/CHRG-111hhrg57558.pdf>.
  - d. *The Deepwater Horizon Incident: Are The Minerals Management Service Regulations Doing the Job?: Hearing Before the Subcomm. on Energy and Mineral Res. of the H. Comm on Natural Res.*, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56979/pdf/CHRG-111hhrg56979.pdf>.
  - e. *Deepwater Horizon Liability: Hearing Before the S. Comm on Energy and Natural Res.*, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg61828/pdf/CHRG-111shrg61828.pdf>.

118. On December 15, 2010, the U.S. government filed a civil complaint alleging that, among other things, the defendants failed to take necessary precautions to control the Macondo Well prior to April 20th; failed to use best available and safest drilling technology to monitor the well's conditions; failed to maintain equipment and material that were available and necessary to ensure the safety and protection of people and natural resources; failed to comply with federal regulations and industry standards expressly incorporated therein; failed to properly inspect and maintain key equipment. See Complaint, United States. v. BP Exploration, NO. 2:10-cv-04536 (E.D. La. Dec. 15, 2010), available at <http://legaltimes.typepad.com/files/complaint-1.pdf>); *MDL-2179 Oil Spill by the Rig "Deepwater Horizon,"* U.S. DIST. COURT FOR THE E. DIST. OF LA., <http://www.laed.uscourts.gov/OilSpill/Intro.htm> (last visited Mar. 9, 2011).

119. Established as a bipartisan commission on May 22, 2010 by President Obama, the President's Commission was charged with "providing recommendations on how we can prevent—and mitigate the impact of—any future spills that result from offshore drilling." They were also directed to be "focused on the necessary environmental and safety precautions we must build into our regulatory framework in order to ensure an accident like this never happens again . . ." See Press Release, The White House, Weekly Address: President Obama Establishes Bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (May 22, 2010), available at <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-establishes-bipartisan-national-commission-bp-deepwa>. The National Commission was required to submit its report within six months of its establishment. *Id.*

120. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 125 (2011), available at [http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER\\_ReporttothePresident\\_FINAL.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf) [hereinafter PRESIDENTIAL REPORT].

121. Suzanne Goldenberg, *BP Cost-Cutting Blamed for "Avoidable" Deepwater Horizon Oil Spill*, GUARDIAN.CO.UK, (Jan. 6, 2011), <http://www.guardian.co.uk/environment/2011/jan/06/bp-oil-spill-deepwater-horizon> (quoting, PRESIDENTIAL REPORT, *supra* note 120, at 125) (emphasis added).

its partners<sup>122</sup> that led up to the explosion. BP made at least six (and perhaps more) of these decisions that increased the risk while potentially saving time. In response to a series of flawed and fatal management decisions, including BP's failure to do adequate risk assessments,<sup>123</sup> found by the Commission, one commentator concluded that the "die had been cast by the buildup of risk from the series of managerial decisions leading up to the actual blowout."<sup>124</sup>

Although the investigations are far from over, what has been revealed so far suggests that BP once again chose to ignore its own and industry standard operating procedures,<sup>125</sup> and failed to do necessary inspection and maintenance of

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122. Based on my experience in environmental criminal law, I anticipate that, although this Article focuses on the conduct of BP, other individuals and organizations may have criminal exposure for conduct relating to the Deepwater Horizon catastrophe.

123. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, at 118. ("Based on evidence currently available, there is nothing to suggest that BP's engineering team conducted a formal, disciplined analysis of the combined impact of these risk factors on the prospects for a successful cement job.")

124. David Hammer, *Oil Rig Blowout Stemmed from Systemic Management Problems*, *Oil Spill Commission Says*, NOLA.COM (Jan. 5, 2011, 8:55 PM), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/oil\\_spill\\_commission\\_blowout\\_s.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/01/oil_spill_commission_blowout_s.html).

125. Examples of the many times BP chose to bypass or ignore their own policies and procedures and industry standards include the following:

1. The decision by BP officials Kaluza and Vidrine to use more than double the amount of spacer fluid in the well in order to circumvent EPA hazardous waste regulations and save BP the cost of proper on-shore disposal of the waste. Leo Lindner, Drilling Fluid Specialist, M-I SWACO, Testimony at U.S. Coast Guard and Bureau Of Ocean Energy Management Investigation into the Marine Casualty, Explosion, Fire, Pollution, and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico 309–11 (July 19, 2010), *available at* <http://www.deepwaterinvestigation.com/external/content/document/3043/856483/1/7-19-10.pdf>.
2. The decision to use only six centralizers on the well even though a Halliburton report warned that the use of fewer than seven centralizers could result in a "severe gas flow problem". This critical report was sent to the Well Site leaders, and a number of BP executives in Houston, including John Guide (Wells Team Leader, BP). Alexander John Guide, Wells Team Leader, BP, Testimony at U.S. Coast Guard and Bureau Of Ocean Energy Management Investigation into the Marine Casualty, Explosion, Fire, Pollution, and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico 270–71 (Jul. 22, 2010), *available at* <http://www.deepwaterinvestigation.com/external/content/document/3043/856503/1/7-22-10.pdf>.
3. The decision to go forward with the operation despite the fact that BP did not have negative test data that established the well's integrity. "It is now undisputed that the negative-pressure test at Macondo was conducted and interpreted improperly . . . The failure to properly conduct and interpret the negative-pressure test was a major contributing factor to the blowout." PRESIDENTIAL REPORT, *supra* note 120, at 119.
4. MMS regulations require a "good" negative test prior to beginning displacement. Since both tests failed, displacement of the well should not have begun. Nonetheless, two BP "company men," Kaluza and Vidrine, gave approval to the test results. In addition, a number of Transocean employees told Kaluza that the pressure in the drill pipe during the test (sign of a failing test) was "not uncommon." *Id.* at 165, 230.
5. The decision to run a long string instead of a liner and a tieback when securing the final 1,192 feet of the well. A tieback provides greater protection against the risk of gas flowing up space that surrounds the casing of the well. The decision to use a long string liner saved BP between

critical equipment<sup>126</sup> because the company wanted to save time and millions of dollars.<sup>127</sup>

This pattern of conduct is a repeat of that documented at Texas City and Prudhoe Bay. Nor are these failures limited to these three cases, but rather illustrate a pervasive problem that reflects decisions and choices made by individuals within the BP chain of command.

\$7,000,000 and \$10,000,000 and was clearly a decision driven by a “risk reward equation.” PRESIDENTIAL REPORT, *supra* note 120, at 95–96, 115–16.

6. The failure to run a cement bond log (CBL) to evaluate the effectiveness of the cement job performed by Halliburton which John Guide admitted was cheaper for BP and which was a risk based decision. Alexander John Guide, Wells Team Leader, BP, Testimony at U.S. Coast Guard and Bureau Of Ocean Energy Management Investigation into the Marine Casualty, Explosion, Fire, Pollution, and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico 396 (Jul. 22, 2010), *available at* <http://www.deepwaterinvestigation.com/external/content/document/3043/856503/1/7-22-10.pdf>.

126. BP and Transocean officials also ignored important maintenance issues. For example:

1. The Blow Out Preventer (BOP) was “well past its required OEM and API inspection dates of every three to five years.” Ronald W. Sepulvado, Well Site Leader, BP, Testimony at U.S. Coast Guard and Bureau Of Ocean Energy Management Investigation into the Marine Casualty, Explosion, Fire, Pollution, and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico 34 (Jul. 20, 2010), *available at* <http://www.deepwaterinvestigation.com/external/content/document/3043/856499/1/7-20-10.pdf>.
2. In addition, there was a documented pilot leak on the BOP. *Id.* at 26. Sepulvado claimed that he notified John Guide (his direct superior), of the BOP leak. According to BP protocol and the regulations, Guide should have informed MMS and BP should have suspended “further drilling operations until that station or pod is operable.” *Id.* at 31–32 (July 20, 2010); MMS Regulation 250.451D).
3. Two of the rig’s engines were well past their scheduled maintenance dates. In December 2009 during an inspection conducted by a third-party auditor, it was discovered that multiple engines had hydraulic leaks and were past their scheduled maintenance. Arinjit Roy, Surveyor, Am. Bureau of Shipping, Testimony at U.S. Coast Guard and Bureau Of Ocean Energy Management Investigation into the Marine Casualty, Explosion, Fire, Pollution, and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico, 216, 242 (May 26, 2010). In February, maintenance reports noted: “Number 2 thruster is out of service . . . number 4 engine down.” To date, there is no evidence that these maintenance issues were corrected prior to April 20, 2010. Transcript of the Joint U.S. Coast Guard/Bureau of Ocean Energy Management Investigation into the Marine Casualty, Explosion, Fire, Pollution and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico, 123 (July 22, 2010) *available at* <http://www.deepwaterinvestigation.com/external/content/document/3043/856503/1/7-22-10.pdf>.

127. As the National Commission noted, “There is nothing inherently wrong with choosing a less-costly or less-time-consuming alternative—as long as it is proven to be equally safe. The problem is that, at least in regard to BP’s Macondo team, there appears to have been no formal system for ensuring that alternative procedures were in fact equally safe. None of BP’s (or the other companies’) decision [listed in Figure 4.10 of the report] appear to have been subject to a comprehensive and systematic risk-analysis, peer-review, or management of change process.” PRESIDENTIAL REPORT, *supra* note 120 at 125.

### B. Massey Energy

Massey Energy, one of the largest bituminous coal producers in the United States, with mines in Virginia, West Virginia, and Kentucky,<sup>128</sup> is clearly another chronic repeat violator.<sup>129</sup> On April 5, 2010, disaster struck at Massey's Upper Big Branch Mine, killing twenty-nine miners.<sup>130</sup> Civil, administrative and criminal investigations are still ongoing<sup>131</sup> but it is clear that the deaths occurred at a mine owned and operated by one of the most flagrant violators of mine safety laws in the United States.<sup>132</sup>

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128. *Mining Operations*, MASSEY ENERGY, <http://www.masseyenergyco.com/about/operations.shtml> (last visited March 19, 2011).

129. Other examples of cases in the mining industry where failure to follow industry standards killed people include:

1. The Tri-Star Mining April 2007 fatalities. The Mine Safety and Health Administration (MSHA) concluded that Tri-Star failed to follow industry standards and company policy in April 2007 and therefore failed to conduct an "adequate examination," and "failed to examine the highwall face." CHARLES THOMAS ET AL., DEP'T OF LABOR: MINE SAFETY AND HEALTH ADMINISTRATION, REPORT OF INVESTIGATION: SURFACE COAL MINE 14 (2007), available at <http://www.msha.gov/FATALS/2007/FTL07c0506.pdf>. MSHA determined that an adequate examination, according to industry standards and company policy, was one factor that led to the deaths of two workers. *Id.* at 16–17.
2. The Darby Mine No. 1 May 2006 Explosion. Five miners died and another was seriously injured because, among other things, "[m]ine management failed to ensure that safe work procedures were used while employees attempted to make corrections to an improperly constructed seal." THOMAS E. LIGHT ET AL., DEP'T OF LABOR: MINE SAFETY AND HEALTH ADMINISTRATION, REPORT OF INVESTIGATION: FATAL UNDERGROUND COAL MINE EXPLOSION MAY 20, 2006 1, 55 (2006), available at <http://www.msha.gov/FATALS/2006/Darby/FTL06c2731.pdf> (emphasis added).
3. The Sago Mine January 2, 2006 Explosion. Twelve miners died after lightning struck the facility and ignited methane gas. RICHARD GATES ET AL., DEP'T OF LABOR: MINE SAFETY AND HEALTH ADMINISTRATION, REPORT OF INVESTIGATION: FATAL UNDERGROUND COAL MINE EXPLOSION JANUARY 2, 2006 1 (2006), available at <http://www.msha.gov/Fatals/2006/Sago/ftl06C1-12wa.pdf>. In its investigation the MSHA identified "safety standard violations . . . SCSR training, emergency notification to MSHA and mine rescue teams, lightning arresters and various other violations" that led the agency to determine that the facility was not compliant with "approved ventilation plan requirements . . ." *Id.* at 190.

130. Performance Coal, which operates the Upper Big Branch mine, is only one of many Massey subsidiaries. Another Massey subsidiary, Martin County Coal Corporation, oversaw a coal slurry impoundment dam failure in 2000 that sent approximately two hundred and fifty million gallons of slurry into Kentucky waterways. Peter T. Killborn, *A Torrent of Sludge Muddies a Town's Future*, N.Y. TIMES, Dec. 25, 2000 at A1.

131. See Press Release, U.S. Attorney's Office: S. Dist. W. Va., Statement of the United States Attorney Regarding Investigation Into Upper Big Branch Mine Explosion (Apr. 12, 2010), available at [http://www.justice.gov/usao/wvs/press\\_releases/2010/apr10/041210a.html](http://www.justice.gov/usao/wvs/press_releases/2010/apr10/041210a.html); *Upper Big Branch Mine South Disaster Information Single Source Page*, MINE SAFETY AND HEALTH ADMIN., <http://www.msha.gov/performancecoal/performancecoal.asp> (last visited March 1, 2011).

132. See DEP'T OF LABOR, BRIEFING BY DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION OF DISASTER AT MASSEY ENERGY'S UPPER BIG BRANCH MINE-SOUTH 5 (2010), available at [www.msha.gov/performancecoal/DOL-MSHA\\_president\\_report.pdf](http://www.msha.gov/performancecoal/DOL-MSHA_president_report.pdf) [hereinafter MASSEY BRIEFING] ("In short, this was a mine with a significant history of safety issues, a mine operated by a company with a history of violations, and a mine

In 2009, Massey's Upper Big Branch mine received forty-eight orders<sup>133</sup> to withdraw miners from the mine due to repeated significant and substantial<sup>134</sup> violations—violations that the mine operator either knew or should have known constituted a hazard.<sup>135</sup> This number of significant and substantial violations was nineteen times the national rate of such violations.<sup>136</sup> Since 2000, seventeen of the withdrawal orders issued to the Upper Big Branch mine were issued because Massey failed to correct dangers for which the mine had been previously cited.<sup>137</sup> In March 2010, the Mine Safety and Health Administration ("MSHA") cited Upper Big Branch for fifty-three safety violations.<sup>138</sup> Miners had been evacuated from Upper Big Branch due to high methane levels in the mine on seven occasions in the weeks before the explosion.<sup>139</sup> A major problem that recurred frequently at the Upper Big Branch Mine was the buildup of dust and other combustible materials that could ignite and cause an explosion.<sup>140</sup>

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and company that MSHA was watching closely."); In 2009, Massey Energy reported \$104.4 million in net income. News Release, Massey Energy Company, Massey Energy Reports Fourth Quarter Results, Increases Metallurgical Coal Outlook For 2010 (Feb. 2, 2010), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=102864&p=irol-newsArticle&ID=1382152&highlight>. That same year, Massey paid \$4.2 million in criminal and civil fines for willfully violating mandatory safety standards that led to the deaths of two miners in 2006 in the Aracoma Mine fire. KENNETH A. MURRAY ET AL., U.S. DEP'T OF LABOR: MINE SAFETY AND HEALTH ADMINISTRATION, REPORT OF INVESTIGATION: FATAL UNDERGROUND COAL MINE FIRE JANUARY 19, 2006 (2006), available at <http://www.msha.gov/fatals/2006/aracoma/aracomareport.asp>; Ian Urbina & Michael Cooper, *Deaths at West Virginia Mine Raise Issues About Safety*, N.Y. TIMES, Apr. 6, 2010, at A1, available at <http://www.nytimes.com/2010/04/07/us/07westvirginia.html>.

133. A "withdrawal order" shall be given if a mine inspector discovers within 90 days at least two violations of mandatory health or safety standards that could significantly and substantially contribute to a coal or mine safety hazard as a result of the operator's unwarranted failure to comply with the mandatory standards. The withdrawal order requires all persons who might be affected by the hazard to be removed from the area until the inspector determines the area to be safe. Federal Mine Safety and Health Act of 1977 § 104(d), 30 U.S.C. § 814(d) (2006).

134. The four elements of whether a violation is "significant and substantial," are: (1) violation of a mandatory standard; (2) whether the violation contributes to a discrete safety hazard; (3) the likelihood that the hazard will result in an injury; and (4) the reasonable likelihood that the resultant injury will be serious. Sec'y of Labor v. Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984).

135. See MASSEY BRIEFING, *supra* note 132, at 5.

136. *Id.*

137. See MASSEY BRIEFING, *supra* note 132 at 7.

138. Ian Urbina & Michael Cooper, *Deaths at West Virginia Mine Raise Issues About Safety*, N.Y. TIMES, Apr. 6, 2010, <http://www.nytimes.com/2010/04/07/us/07westvirginia.html>.

139. *Miner Safety and Health Act of 2010: Hearing on H.R. 5663 Before the H. Comm. on Education & Labor*, 111th Cong. 4 (2010) (statement of George Miller, Chairman, H. Comm. on Education & Labor).

140. MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, REGULAR SAFETY AND HEALTH INSPECTION NO. 6286108 (2010), citations # 8084609, 8084611, 8085073, 8085076, 8085077, 8087754, 8087755, 8087763, <http://www.msha.gov/performancecoal/PerformanceCoalRegularInspectionReports.asp>. A March 25, 2010 citation is illustrative of the problems that were repeatedly documented and brought to the attention of Massey's management:

The dust collection system of the Fletcher Double Bolter . . . has not been maintained in a permissible and operating condition. . . . 1) The gaskets on both dust collection doors where [sic] found to be torn and deteriorated and in need of replacement. 2) The dust filters had not been replaced when they had become full of fine rock dust as required by the manufacture, [sic] [t]he filters showed signs of having been beaten causing the housings to become dented. 3) There was



Troubling patterns also existed with respect to the monitoring and management of methane gas just prior to the explosion. Methane gas accumulation in a mine is a very serious problem that can largely be prevented by proper ventilation. Unfortunately, Massey had a practice of removing ventilation curtains, measuring methane with several gas monitors and recording only the lowest number, and shutting down machinery when MSHA inspectors arrived so that the inspectors could not do measurements while machines were operating.<sup>141</sup> Between March 2 and March 30, 2010, miners were evacuated on seven separate occasions when MSHA cited the Upper Big Branch for violating the “Approved Ventilations Methane and Dust Control Plan,” the very plans that are designed to prevent the build-up of explosive methane gas.<sup>142</sup>

Investigations into the Upper Big Branch are continuing and preliminary indications are that some of the same patterns of conduct evidenced in both the Deepwater Horizon and Texas City explosions occurred at this mine. Specifically, available evidence suggests that Massey failed to follow required safety procedures mandated by law and failed to properly maintain equipment designed to ensure the safety of the workers. As evidenced by miners’ statements, Massey also purposely tried to thwart federal inspections and attempted to cover up its violations of law.<sup>143</sup>

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fine rock dust found on the clean side of the rock dust filter media on the operator side of the machine. . . . The dust parameter checks are to be checked and completed before the bolting machine is put into operation at the beginning of each shift [and] . . . used.

MINE SAFETY AND HEALTH ADMIN., U.S. DEP’T OF LABOR, REGULAR SAFETY AND HEALTH INSPECTION NO. 6284326 (2010), citation # 8085078, <http://www.msha.gov/performancecoal/SpotInspections/6284326.pdf>.

141. According to testimony given by former miner Jeffrey Harris, Massey had a practice of disabling the methane monitors until the arrival of federal mine inspectors. *Putting Safety First: Strengthening Enforcement and Creating a Culture of Compliance at Mines and Other Dangerous Workplaces: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. (2010) (statement of Jeffrey Harris), available at <http://help.senate.gov/imo/media/doc/Harris3.pdf>. Massey employee Ricky Lee Campbell was fired for speaking out in a television interview about the methane monitors, and for voicing safety concerns to mine management. Press Release, Mine Safety and Health Admin., U.S. Dep’t of Labor, MSHA Files Complaint with Review Comm’n Over Firing of Massey Miner (Aug. 11, 2010), <http://www.dol.gov/opa/media/press/msha/msha20101121.htm>. MSHA subsequently filed a retaliatory discharge complaint on his behalf. *Id.* Campbell’s testimony was verified by two employees who remained anonymous in order to maintain job security. Frank Langfitt, *Former Massey Workers Say Blast Wasn’t a Surprise*, NPR, Apr. 27, 2010, <http://www.npr.org/templates/story/story.php?storyId=126292007&ps=rs>.

142. MINE SAFETY AND HEALTH ADMIN., U.S. DEP’T OF LABOR, REGULAR SAFETY AND HEALTH INSPECTION NO. 6286108 (2010), citations # 8086927, 8086928, 8087744, 8087761, 8090312, 8098204, 8103337, <http://www.msha.gov/performancecoal/PerformanceCoalRegularInspectionReports.asp>.

143. On February 28, 2011, the United States Attorney for the Southern District of West Virginia unsealed an indictment charging Hughie Elbert Stover, the head of security at the Upper Big Branch Mine with violations of 18 U.S.C. § 1001, 18 U.S.C. § 1519 and 18 U.S.C. § 2(b) for lying to the FBI and a MSHA investigator and directing others to destroy documents. Indictment at 1, 4–6, *United States v. Hughie Elbert Stover*, No. 5:11-cr-00038 (S.D.W. Va. Feb. 25, 2011), available at <http://lawprofessors.typepad.com/files/hughie-elbert-stover-indictment.pdf>. The investigation is continuing and only time will tell whether any management personnel will be charged in this case. See Jerry Markon, *Massey Official Charged with Lying to FBI in Mine Investigation*, WASH.

## II. IMPORTANCE OF PERSONAL ACCOUNTABILITY

Holding individuals (rather than an organizational entity) criminally liable can impact decisions and change the risk–reward mentality of an organization’s decision makers.<sup>144</sup> The ability to take away an individual’s freedom and to compel that person to spend time in a jail cell is a vital tool that is exclusive to criminal law. Unfortunately it is a tool that the government has failed to use effectively in cases involving worker safety or environmental crimes as is evidenced by the recent trend of defaulting to corporate pleas in lieu of prosecution of individuals.<sup>145</sup>

It is easy to understand the appeal of this default. It takes a great deal of government time and resources to peel back the layers of the organizational onion to figure out who are the key decision makers. The larger the organization and more complicated the technical issue, the more time and resources the government needs to investigate and prosecute the case.<sup>146</sup> It is much easier to indict the organizational entity, blame its corporate culture, as the culprit,<sup>147</sup> levy a fine,<sup>148</sup> and declare victory.

What is lost in this default prosecutorial position is the ability to deter conduct by holding individuals accountable for their decisions and conduct. Systemic management failures and corporate cultures that emphasize profits over safety reflect the values and conduct of individual actors within the organization.<sup>149</sup> In

Post, Feb. 28, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/28/AR2011022803552.html?hpid=towers>.

144. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2442 (1995); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1809 (1992).

145. See *infra* note 161 and accompanying text. A recent example of this trend is the March 11, 2011 plea by Honeywell International, Inc. to felony violations of the Resource Conservation and Recovery Act. See News Release, U.S. Env’tl. Prot. Agency, Honeywell Pleads Guilty in Ill. to Illegal Storage of Hazardous Waste (Mar. 11, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/ab2d81eb088f4a7e85257359003f5339/def2f68123e736b38525785000721a93!OpenDocument>. Honeywell paid an \$11.8 million criminal fine for knowingly storing hazardous waste without a permit which “put employees at risk of exposure to radioactive and hazardous materials.” *Id.*

146. These cases have very complex factual, scientific, and legal issues combined with devastating loss to the victims. In addition, prosecutors and investigators must analyze financial implications of the underlying conduct and work their way up the chain of command at both the facility and in the larger organization in order to identify culpable individuals.

147. The Deepwater Horizon Presidential Commission makes frequent references to these or similar phrases. See PRESIDENTIAL REPORT, *supra* note 120, at ix, 72, 122. The same is true of reports filed by the CSB, OSHA, and MSHA after investigations into deaths at industrial facilities. See *supra* note 117 and accompanying text (discussing other Deepwater Horizon investigations).

148. The Alternative Fines Act makes settling for a large corporate fine both possible and appealing since the statute enables the government to go after a fine that is the greater of either the statutory maximum or twice the gain or loss associated with the offense. 18 U.S.C. § 3571(c)–(d) (2006).

149. See Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability For the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343, 1346 (2007) (“One reason for targeting individuals rather than firms is the view that corporate crime is a simple manifestation of the principal-agent problem that is inherent in corporate governance. Under this view, executives and employees invariably act in their own self-interest, and

short, people—not a fictional entity—make the choices and decisions that translate into conduct.

An illustration of this is found in the Texas City Statement of Facts (“SOF”)<sup>150</sup> that was filed in support of the corporate plea entered by BP after the Texas City Refinery explosion. The SOF is replete with statements that the company “allowed,” “was aware of,” or “failed to prevent” specific actions that led to the explosion, despite written protocols.<sup>151</sup> But there are also references to specific actions of BP employees. For example, “BP Products supervisory operations personnel allowed” employees to ignore the required start-up procedures for a critical unit because following the safe procedures “extended the duration of the startup.”<sup>152</sup> Similarly, although BP maintenance personnel told supervisory personnel that critical alarms on the unit in question had not been inspected as required, BP supervisory personnel still allowed the start-up of the unit that led to the deadly explosion.<sup>153</sup> Obviously, the labels “maintenance personnel” and “supervisory operations personnel” refer to actual people—people who took, or failed to take, specific actions.

The chain of command within a refinery, a manufacturing facility, or a mining operation may involve many people but eventually someone has the responsibility for ensuring that actions are either taken or stopped when necessary. Someone approves or denies a request for money to perform the necessary maintenance or make upgrades to equipment; someone reviews and approves the standard operating procedures and deviations from those procedures; someone is responsible for ensuring that personnel assigned to dangerous machinery have been properly trained; someone signs monthly, quarterly, and annual reports to regulatory agencies certifying that the facility is complying with the requirements of its permits, which, in the case of the CAA, include compliance with operating manuals and risk management plans. As John Guide, BP’s Wells Team Leader admitted during the Deepwater Horizon hearings, “[t]he business unit leader is accountable to ensure that any deviation from policy and established procedures and all non-routine operations have undergone a formal risk assessment and the appropriate measures are taken to manage the risk prior to performing the

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their pursuit of individual goals is the primary reason for corporate crime.”); see also John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 229 (1991) (“[C]overt signals from senior corporate management can send the implicit message throughout the organization that compliance with law is desirable, but increased profitability is mandatory. Extreme pressure for increased profits or reduced costs carries the message that it is up to the lower echelons to find the means necessary to achieve those goals.”).

150. DOJ Statement of Facts, *supra* note 36.

151. DOJ Statement of Facts, *supra* note 36, at 9, 11, 12, 13. These written procedures are mandated by CAA Risk Management Plan regulations. See *supra* notes 20–33 and accompanying text.

152. DOJ Statement of Facts, *supra* note 36, at 9. When a unit is taken out of service for repair or maintenance, it obviously is not available for use in the process, thus impacting production at the facility.

153. DOJ Statement of Facts, *supra* note 36, at 11–12.

operation.”<sup>154</sup>

It is the supervisors, business unit leaders, and senior managers who must be held accountable for complying with the law and implementing procedures to protect their employees and the community at large, particularly when they work in inherently dangerous industries. If their actions, or inactions, are the result of pressures, express or implied, from executives, then those executives must also be held accountable for the consequences of their choices particularly when the consequence is the preventable death of an employee, contractor, visitor, or member of the general public.

Money, and a lot of it, often drives decisions that result in violations of critical safety standards and laws. However the “money driver” alone does not mean that a company and its employees will violate the law or gamble on unreasonable risks. What distinguishes law abiding companies from those that end up with criminal convictions is often a “corporate culture”<sup>155</sup> that encourages employees to engage in risky and even unlawful behavior to achieve a financial reward. For example, firm policies, such as compensation schemes tied to making certain production targets or meeting benchmarks for revenues, can induce criminal behavior. Moreover, when supervisors encourage their subordinates to meet targets by any means necessary, a not-so-subtle message is sent about the real priorities of the company.<sup>156</sup>

Personal accountability, which creates a risk to an individual that he might go to jail as a result of decisions he makes, can change behavior and drive deterrence.<sup>157</sup> The government has an opportunity to alter the current landscape of terrible, preventable tragedies that occur in our factories, refineries, mines, and neighborhoods by deterring individuals from taking undue risks. Allowing individuals to

154. USCG/BOEM Marine Board of Investigation into the Marine Casualty, Explosion, Fire, Pollution, and Sinking of Mobile Offshore Drilling Unit Deepwater Horizon, with Loss of Life in the Gulf of Mexico 21–22 April 2010, 72 (July 22, 2010) (statement of Alexander John Guide, Wells Team Leader, BP), <http://www.deepwaterinvestigation.com/external/content/document/3043/856503/1/7-22-10.pdf>.

155. “Corporate culture,” as used in this article, refers to “the system of incentives and constraints operating within the organization, including both formal rules and informal norms.” Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence From the Directors’ & Officers’ Liability Insurance Market*, 74 U. CHI. L. REV. 487, 517 (2007).

156. See Lisa Hope Nicholson, *Culture Is the Key to Employee Adherence to Corporate Codes of Ethics*, 3 J. BUS. & TECH. L. 449, 451, 453 (2008). Nicholson suggests that corporations need to do more than simply adopt a code of ethics:

[C]orporate employees need to accept the legitimacy of the corporation’s codes of ethics before they will act effectively thereon . . . . Consequently, the communication of good ethical standards must not clash with other authoritative communications about meeting the bottom line at all cost. Rewarding only results-oriented behavior clearly undermines the existence of the code of ethics.

*Id.* at 452–53 (footnotes omitted); see also Baker & Griffith, *supra* note 155, at 542–43. In *United States v. Brown*, 459 F.3d 509, 522 (5th Cir. 2006), the court noted that the policies of a firm can contribute to wrongful conduct of its employees.

157. See Geraldine Szott Moohr, *On the Prospects of Deterring Corporate Crime*, 2 J. BUS. & TECH. L. 25, 35 (2007).

hide behind the façade of a fictional legal entity minimizes the law's deterrent effects and fails to satisfy criminal law's retributive function.<sup>158</sup>

During the last decade, while there has been a significant overall increase in the number of individuals prosecuted for financial fraud crimes, particularly senior executives and senior managers,<sup>159</sup> there has not been a corresponding growth in the prosecution of individuals for crimes that are the focus of this article. During the last decade, according to EPA and DOJ annual enforcement reports, the total number of environmental crimes charged ranged from a high of 372 in 2001 to a low of 176 in 2008. However, since 2007 there has been a significant decrease in jail time imposed for violations of environmental crimes.<sup>160</sup> In recent years, the DOJ's environmental crimes enforcement has focused more on corporate pleas with big fines than on the prosecution of individuals, particularly in cases involving larger corporate entities such as BP.<sup>161</sup> Other areas of enforcement

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158. Although not the focus of this article, the importance of retribution to these types of cases should not be overlooked. See Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 834 (2000) ("In response, I suggest that these critics of corporate criminal liability may be incorrect—that corporate criminal liability is not without purpose. The problem lies in a foundational premise of the critics' arguments: By centering the case for eradicating corporate criminal liability exclusively upon its asserted inefficiency as a deterrent to unlawful acts, [other authors] overlook retribution as a normative basis for criminal liability and accordingly fail fully to appreciate that, even in the corporate context, moral condemnation remains a valid aim of the criminal law. Indeed, the attributes of modern corporate existence support the argument that corporations, like individuals, can and should be morally condemned for actions that transgress the law."); Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 144 (2010) ("Retribution brings to the criminal law an evaluative function, an announcement that there are some actions, so outrageous and heinous, that they merit punishment, not solely to deter future conduct, but to restore and reaffirm the community's core values.")

159. See Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397 (2006), in which, as part of a study of major fraud prosecutions, she reviewed major fraud prosecutions from March 2002 through January 2006. "Of the forty-six defendants who have gone to trial, twelve held the title of Chief Executive Officer, Chief Operating Officer, President, Chairman of the Board or, in the case of a partnership, Senior Partner. Defendants on trial also included five Chief Financial Officers and an assortment of other financial and accounting executives." *Id.* at 406 (footnotes omitted). From 1992 to 2010, the number of people sentenced to prison terms for committing white collar crimes has risen steadily. TRACFED, [http://tracfed.syr.edu/index/cr/cr\\_godeep\\_index\\_pros.html](http://tracfed.syr.edu/index/cr/cr_godeep_index_pros.html) (select "Fiscal Year," "Program Category (grouped)," "Lead Charge (Title and Section)," "Prison Term" and follow hyperlinks by year to "White Collar Crime" tally).

160. See OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, EPA FY 2004 END OF YEAR ENFORCEMENT & COMPLIANCE ASSURANCE RESULTS 14–15 (2004), available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2004/fy04results.pdf> (2000–2004 EPA reports); OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2009 ENFORCEMENT & COMPLIANCE ANNUAL RESULTS 21, 23 (2009), available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2009/fy2009results.pdf> (2005–2009 EPA reports); A review of data maintained on the University of Syracuse Trac Fed criminal database reflects that the number of prison sentences for the commission of environmental crimes is decreasing. Although there was a gradual increase in the early 1990s, the general trend is of decreasing prison sentences; TRACFED, [http://tracfed.syr.edu/index/cr/cr\\_godeep\\_index\\_pros.html](http://tracfed.syr.edu/index/cr/cr_godeep_index_pros.html) (select "Fiscal Year," "Program Category (grouped)," "Lead Charge (Title and Section)," "Prison Term" and follow hyperlinks by year to "Environment," excluding data related to wildlife protection statutes).

161. Although the DOJ has not prosecuted a significant number of Fortune 100 (or even Fortune 500) companies for environmental crimes, those that have been prosecuted resulted in very large fines but no individual prosecutions. See, e.g., Government's Memorandum in Aid of Sentencing, *United States v. Exxon Corp. & Exxon*

involving industrial health and safety violations have never been robust enough to even stagnate—these prosecutions barely exist.<sup>162</sup>

This history of recent white collar prosecutions could be interpreted as sending the following message: if you gamble with someone's money, you can go to jail; if you gamble with someone's life, your company will pay a fine, and it might not even be a criminal fine.

It is difficult to reconcile this message with societal views on the value of a human life. Surely it is just as morally reprehensible for an executive of a company to gamble with the lives of workers and members of the community as it is to take their money under false pretenses. Most would agree that this conduct is unacceptable because it falls outside the "normative conduct" for those working in inherently dangerous business enterprises. When the conduct of certain members of a segment of society falls outside the "normative conduct" for their segment, that behavior should be punished through criminal law.<sup>163</sup>

### III. STRENGTHENING ENFORCEMENT

Although the problems with corporate cultures that lead to the lawlessness and risky behavior seen in financial crimes are also clearly present in crimes that affect public safety, the government's response has not been as aggressive. To combat the financial crimes of the last decade the government re-prioritized its resources, established cross-agency investigative task forces and mounted a massive effort to stop and punish those who were gambling with investor money and our economy. New legislation was passed that gave prosecutors expanded tools, including the ability to hold senior executives responsible for conduct that was actually done by

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Shipping Co., No. A90-015-CR (D. Alaska Sept. 30, 1991) (\$150 million criminal fine); *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 660–61 (S.D. Tex. 2009) (assessing a \$50.6 million criminal fine); *cf.* *United States v. Rivera*, 942 F. Supp. 732, (D.P.P. 1996) (three corporate entities, although not Fortune 500 or 100 companies, pled guilty in connection with a significant oil spill in Puerto Rico, paying \$25 million apiece for a total of \$75 million). An exception to the pattern of not charging individuals has been the numerous vessel pollution cases prosecuted by the DOJ. In these cases, the DOJ often charges a crew member working on the vessel. *See Vessel Pollution Enforcement*, DEP'T OF JUSTICE, <http://www.justice.gov/enrd/3395.htm> (last visited Mar. 19, 2011).

162. *See infra* notes 186, 187.

163. Twenty years ago, Professor John Coffee expressed concern that the distinction between tort and criminal law was disappearing in the United States. *See Coffee, supra* note 149, at 200. He recognized that since the law is not static, new problems could arise "for which the criminal law is the most effective instrument, but which involve behavior not historically considered blameworthy." *Id.* He also discussed a "bulwark" that could prevent criminal law from sprawling into civil law. *Id.* at 201. "One answer is to update the notion of blameworthiness, looking not only to historical notions of culpability, but to well-established industry and professional standards whose violation has been associated with culpability within that narrower community." *Id.* Professor Coffee identified insider trading as an example of such conduct in the financial sector. *Id.* My premise is that our society has evolved to the point where violating basic industry safety standards in that sector of the economy that deals with inherently dangerous materials should be as culturally blameworthy as insider trading violations are in the financial sector.

lower-level employees.<sup>164</sup> However measured, the time period between 2000 and the end of 2010 resulted in an increase in the number of financial crimes prosecuted, record fines, and a significant increase in the number of individuals, particularly senior executives, prosecuted.<sup>165</sup> The government needs to mount a comparable response to business conduct that irresponsibly takes lives.

When combating violations of health, safety and environmental statutes, prosecutors can use both the criminal provisions of the substantive statutes as well as statutory provisions set forth in Title 18 of the United States Code. As is further explained below, I advocate the more aggressive use of Title 18 statutes to combat the conduct detailed in Section I of this article.

#### A. Existing Substantive Statutes

Despite numerous federal statutes aimed at protecting health, safety, and the environment,<sup>166</sup> the criminal provisions of these statutes are a patchwork and, for the most part, fail to isolate and punish the conduct discussed in this article that results in grievous harm to people.<sup>167</sup> The two statutes that focus specifically on worker safety, namely, the Federal Mine Safety and Health Act of 1977 (MSH Act)<sup>168</sup> and the Occupational Safety and Health Act (OSH Act),<sup>169</sup> have inadequate penalties and inconsistent mens rea requirements. While one statute enables prosecution of any conduct that violates the specific provisions of the law irrespective of harm, the other only punishes conduct that results in death. As is further explained, these provisions are inadequate tools for the existing problems identified in Section II of this article.

When the MSH Act was enacted, Congress declared that the miner was the

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164. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); *SEC v. Jenkins*, 718 F. Supp. 2d 1070, 1075 (D. Ariz. 2010) (requiring clawback of executive compensation under section 304 of the Sarbanes-Oxley Act even where CEO was unaware of employee misconduct leading to misstated financials).

165. See *supra* note 159 and accompanying text.

166. See statutes cited *supra* note 10.

167. Examination of the punishment schemes in these statutes suggests that we, as a society, value the lives of animals as dearly (or more dearly) than the lives of people: the Endangered Species Act, Migratory Bird Treaty Act and Marine Mammal Protection Act all have criminal provisions with more significant criminal penalties for harming or killing wildlife than the OSH Act does for criminal conduct that kills people. Compare Endangered Species Act, 16 U.S.C. § 1540(b) (2006) (imposing criminal fine up to \$50,000 and/or imprisonment up to one year), Migratory Bird Treaty Act, 16 U.S.C. § 707(b)(2) (2006) (imposing criminal fine up to \$2,000 and/or imprisonment up to two years), and Marine Mammal Protection Act, 16 U.S.C. § 1375(b) (2006) (imposing criminal fine up to \$20,000 and/or imprisonment up to one year), with Occupational Safety and Health Act, 29 U.S.C. § 666(e) (2006) (imposing imprisonment up to six months for first offense of willful violation leading to death of an employee). This is clearly not our moral code and it should not be our criminal code. See Lynne K. Rhinehart, *Would Workers Be Better Protected If They Were Declared an Endangered Species? A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws*, 31 AM. CRIM. L. REV. 351, 389-90 (1994).

168. 30 U.S.C. §§ 801-964 (2006). This Act amended the prior law, the Federal Coal Mine Health and Safety Act of 1969, and expanded the coverage to include all mining activity under one provision.

169. 29 U.S.C. §§ 651-678 (2006).

mining industry's most precious resource and that there was an "urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm . . . ." <sup>170</sup> A key provision of this statute is the requirement that MSHA promulgate and enforce mandatory safety standards. <sup>171</sup> Although violations of these standards are subject to criminal enforcement, again the penalty does not correlate with the seriousness of the harm that can be caused by the conduct. Criminal sanctions are set forth in § 110 which provides in relevant part that:

Any operator <sup>172</sup> who willfully <sup>173</sup> violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 and section 817, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a)(1) or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than \$250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than \$500,000, or by imprisonment for not more than five years, or both. <sup>174</sup>

Thus, even if the violation results in the death of a miner, this crime is still only a misdemeanor unless the person has previously been convicted of violating this section.

The OSH Act has even more limited criminal sanctions. <sup>175</sup> It subjects an employer to criminal prosecution only for willful <sup>176</sup> violations of a standard, rule,

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170. 30 U.S.C. § 801(c) (2006).

171. 30 U.S.C. § 861 (2006).

172. "Operator" means "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d) (2006).

173. In the context of MSH Act, the Sixth Circuit has defined "willful" to mean "the failure to comply with [statutory safety standards] . . . if done knowingly and purposely by a coal mine operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements." *United States v. Consolidation Coal Co.*, 504 F.2d 1330, 1335 (6th Cir. 1974).

174. 30 U.S.C. § 820(d) (2006); other subsections of § 110 make it a crime to provide advance notice of inspections, 18 U.S.C. § 820(e) (2006), make false statements, *id.* § 820(f), or falsely represent that equipment complies with requirements of the Act. *Id.* § 820(h). Curiously, violations of § 820(f) and (h) are *felonies* and are punishable by up to five years in jail.

175. It has long been documented that OSHA is a dysfunctional agency that is unable to effectively fulfill its mission statement of "assur[ing] safe and healthful working conditions for working men and women." *OSHA's Role*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <http://www.osha.gov/oshinfo/mission.html> (last visited Mar. 19, 2011). For a comprehensive evaluation of OSHA's failures and recommendations for improvement, see THOMAS MCGARITY ET AL., *CTR. FOR PROGRESSIVE REFORM, WORKERS AT RISK: REGULATORY DYSFUNCTION AT OSHA* (2010), available at [http://www.progressivereform.org/articles/OSHA\\_1003.pdf](http://www.progressivereform.org/articles/OSHA_1003.pdf).

176. The term "willful" is not defined in 29 U.S.C. § 666 but OSHA uses the following definition: "A willful violation exists under the Act where an employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health." OCCUPATIONAL SAFETY & HEALTH



order, or regulation resulting in the death of an employee.<sup>177</sup> There are many problems with the criminal provisions of this statute. First, even for the most serious willful violations that result in the death of a worker, the crime is only a misdemeanor<sup>178</sup> punishable by no more than six months of incarceration.<sup>179</sup> Even if a defendant willfully violates the law again and causes a subsequent death, the crime is still a misdemeanor punishable by no more than one year of incarceration.<sup>180</sup> Not only is the maximum sentence a travesty in the context of the willful conduct that results in the loss of life,<sup>181</sup> but classifying this type of willful conduct as a misdemeanor has a significant impact on the perception of seriousness of the criminal conduct. In the currency of criminal law, prosecutors and investigators focus their energies and resources on pursuing felony<sup>182</sup> violations. Felony cases are the ones that drive government statistics and are considered worth the expenditure of limited government resources.

A second obstacle to successful prosecutions, particularly of individuals, is the definition of "employer." An employer is defined to include a very narrow class of individuals.<sup>183</sup> Individuals who can be held responsible under the statute are limited to owners, officers, and directors of a company.<sup>184</sup> Nor can other management employees be charged with aiding and abetting, as is the case with most federal crimes.<sup>185</sup>

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ADMIN., U.S. DEP'T OF LABOR, OSHA'S FIELD OPERATIONS MANUAL 4-28 (2009), available at [http://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-148.pdf](http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf); see also Wooster, *supra* note 60. In contrast, as used in federal criminal law, the term "willfully" means an act that is done voluntarily and intentionally, and with the specific intent to do something which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. 1-3A LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL 3A-3 (2010); see also *United States v. Seay*, 718 F.2d 1279, 1284 (4th Cir. 1983).

177. 29 U.S.C. § 666(e) (2006) ("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.") (emphasis added).

178. According to federal law, misdemeanors are those criminal violations punishable by less than a year of imprisonment. See 18 U.S.C. § 3559(a) (2006).

179. 29 U.S.C. § 666(e) (2006).

180. *Id.*

181. The absurdity of this sentencing provision is highlighted by the other criminal provisions of OSH Act. Defendants who are convicted of falsifying records or giving advance warning of inspections, even if no one is hurt or killed as a result of the violation, are subject to the same period of incarceration. *Id.* § 666(f)-(g).

182. "Felony" means "an offense punishable by a maximum term of imprisonment of more than one year." 18 U.S.C. § 3156(a)(3) (2006).

183. See 29 U.S.C. § 652(5) (2006) (defining employer as "a person engaged in a business affecting commerce who has employees, but [the definition does] not include the United States (not including the United States Postal Service) or any State or political subdivision of a State").

184. See *United States v. Shear*, 962 F.2d 488, 491 (5th Cir. 1992); *United States v. Doig*, 950 F.2d 411, 414 (7th Cir. 1991); *Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Comm'n*, 534 F.2d 541, 553 (3d Cir. 1976); *United States v. Cusak*, 806 F. Supp. 47, 51 (D.N.J. 1992).

185. *Shear*, 962 F.2d at 492-93; *Doig*, 950 F.2d at 414.

Another significant problem with the OSH Act is its failure to penalize conduct that results in serious bodily injury to employees. Thus an employee can suffer horrendous life-altering injuries without anyone being held criminally accountable for the conduct that caused the harm. Given these challenges, the paucity of criminal prosecutions under OSH Act is not surprising.<sup>186</sup>

In May 2005, recognizing the inadequacy of OSH Act, DOJ, EPA and OSHA announced an interagency initiative to focus on prosecution of worker-safety violations<sup>187</sup> through the use of the endangerment provisions of the Clean Air Act,<sup>188</sup> the Clean Water Act<sup>189</sup> and the Resource Conservation and Recovery Act.<sup>190</sup> All three statutes provide for felony violations of “knowing” endangerment

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186. See David Barstow & Lowell Bergman, *At a Texas Foundry, an Indifference to Life*, N.Y. TIMES, Jan. 8, 2003, at A1, available at <http://www.nytimes.com/2003/01/08/national/08PIPE.html> (“Between 1982 and 2002, there were 1,242 worker deaths as a result of willful violations yet OSHA sought prosecution in only 7% of those cases.”); David M. Uhlmann, Op-Ed., *The Working Wounded*, N.Y. TIMES, May 27, 2008, at A23, available at <http://www.nytimes.com/2008/05/27/opinion/27uhlmann.html> (“In the 38 years since Congress enacted the Occupational Safety and Health Act, only 68 criminal cases have been prosecuted, or less than two per year, with defendants serving a total of just 42 months in jail. During that same time period, approximately 341,000 people have died at work, according to data compiled from the National Safety Council and the Bureau of Labor Statistics by the AFL-CIO.”).

187. See David M. Uhlmann, *Prosecuting Worker Endangerment: The Need for Stronger Criminal Penalties for Violations of the Occupational Safety and Health Act*, 3 ADVANCE: J. ACS ISSUE GRPS. 191 (2009) available at <http://www.acslaw.org/Advance%20Spring%2009/Prosecuting%20Worker%20Endangerment.pdf>.

188. 42 U.S.C. § 7413(c)(5) (2006) (“Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both. Any person committing such violation which is an organization shall, upon conviction under this paragraph, be subject to a fine of not more than \$1,000,000 for each violation. If a conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment. For any air pollutant for which the Administrator has set an emissions standard or for any source for which a permit has been issued under subchapter V of this chapter, a release of such pollutant in accordance with that standard or permit shall not constitute a violation of this paragraph or paragraph (4).”).

189. 33 U.S.C. § 1319(c)(3) (2006) (“Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than \$1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.”).

190. 42 U.S.C. § 6928(e) (2006) (“Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.”).

provisions that are punishable by up to fifteen years imprisonment, and the CAA also has a provision under which negligent endangerment is a misdemeanor.<sup>191</sup> The interagency initiative was promising and resulted in a few important prosecutions.<sup>192</sup> However, the environmental statutes do not provide a completely satisfactory solution to the problem. Prosecutions are limited to conduct that falls within the specific scope of each statute and all the statutes' knowing endangerment provisions have challenges that make felony prosecutions of the CAA, CWA and RCRA difficult to pursue.<sup>193</sup>

Furthermore, not all conduct that leads to deaths or bodily injuries caused by industrial explosions, fires and other catastrophes is limited to either violations of the CAA, CWA or RCRA. For example, criss-crossing this country is a system of hazardous material pipelines. These pipelines carry extremely flammable, reactive and toxic materials under high pressure and high temperature and create havoc and devastation when they fail.<sup>194</sup> The Hazardous Liquid Pipeline Safety Act (HLPESA)<sup>195</sup> regulates those companies that use pipelines to transport hazardous materials. The criminal provisions of HLPESA prohibit knowing and willful violations of certain sections of the Act and the regulations promulgated pursuant to the Act. These include requirements that a person owning or operating a pipeline facility operate it within minimal safety standards, including certain maintenance and training responsibilities. Although violations of this statute are five-year felonies, there are no enhanced penalties for violations that lead to the loss of life or serious bodily injury.<sup>196</sup>

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191. See 42 U.S.C. § 7413(c)(4); 33 U.S.C. § 1319(c)(1) (2006).

192. *E.g.*, *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001); *United States v. Atlantic States Cast Iron Pipe Co.*, 627 F. Supp. 2d 180 (D.N.J. 2009); *United States v. Hylton*, 308 Fed. Appx. 262 (10th Cir. 2009); *United States v. Little*, 308 F. App'x 256 (10th Cir. 2009).

193. For example, § 1319 (C)(3)(B)(ii), provides that "it is an affirmative defense to the prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of (I) an occupation, a business or a profession."

194. On June 10, 1999 a pipeline explosion in Bellingham, Washington killed three people and spilled approximately 230,000 gallons of petroleum. After a lengthy criminal investigation, three individuals and two companies pled guilty on December 11, 2002 to violating the HLPESA by failing to keep training records as required by the Act. Press Release, U.S. Dep't of Justice, *Two Pipeline Companies and Three Employees Enter Pleas in Criminal Case Arising From the June 1999 Gasoline Pipeline Rupture in Bellingham, Washington* (Dec. 11, 2002), available at <http://www.oig.dot.gov/sites/dot/files/pdfdocs/pr021212.pdf>; Jack Broom et al., *3 Die, Including 2 Boys, When Fireball Erupts in Bellingham Gas-line Explosion*, THE SEATTLE TIMES, June 11, 1999, at A-1; Malia Wollan, *After Blast, Uneasiness for Residents Going Home*, N.Y. TIMES, Sept. 13, 2010, at A16, available at [http://www.nytimes.com/2010/09/13/us/13fire.html?\\_r=1&ref=sanbrunogasexplosion2010](http://www.nytimes.com/2010/09/13/us/13fire.html?_r=1&ref=sanbrunogasexplosion2010). On September 9, 2010 a Pacific Gas & Electric pipeline ruptured and exploded in San Bruno, California (near San Francisco), killing eight. The National Transportation Safety Board is currently conducting an investigation into the causes of the pipe rupture. According to preliminary reports the portion of the pipeline that ruptured was exceeding the specified maximum operating pressure. See Jaxon Van Derbeken, *NTSB Report Cites Faulty Weld on San Bruno Pipe*, S.F. CHRONICLE, Jan. 22, 2011, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/01/21/MNJC1HCM0Q.DTL>.

195. 49 U.S.C. § 601 (2006).

196. *Id.*

### B. Title 18 Tools

There are a number of Title 18 criminal provisions that can and should be used by the government when investigating and prosecuting health, safety and environmental violations. Often these are easier to prove and have more serious penalties than the substantive statutes discussed above. These include provisions prohibiting false statements,<sup>197</sup> conspiracy,<sup>198</sup> mail fraud,<sup>199</sup> and wire fraud.<sup>200</sup> The focus of this section is the obstruction of justice provisions of Title 18 that are particularly relevant to these cases.

When many people hear the term “obstruction of justice,” they think of witness tampering and document destruction in the context of an ongoing criminal investigation or Congressional hearing. However there are two obstruction of justice provisions—18 U.S.C. § 1505 and 18 U.S.C. § 1519—that focus on conduct that obstructs or interferes with the work of federal departments and agencies. These are powerful tools that are woefully underutilized by federal law enforcement in the area of health and safety cases.

#### 1. 18 U.S.C. § 1505

Section 1505 prohibits the obstruction of proceedings before departments, agencies and committees. There are several subsections of this statute but the one of particular relevance to this article reads as follows:

Whoever corruptly, or by threats or force, or by any threatening letter of communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . [s]hall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.<sup>201</sup>

In order to prove a defendant guilty of obstruction under § 1505, the government must establish (1) that the defendant acted *corruptly*, or threatened or used force, to obstruct or impede the due and proper administration of law;<sup>202</sup> (2) that there was a pending “proceeding” before a department or agency of the United States;<sup>203</sup> and

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197. 18 U.S.C. § 1001 (2006).

198. § 371.

199. § 1341.

200. § 1343.

201. 18 U.S.C. § 1505 (2006). This statutory provision also includes the following language: “or the due and proper exercise of the power of inquiry or investigation is being had by either House, or any committees of either House, or any joint committee of the Congress.”

202. *Id.*

203. *Id.*

(3) that the defendant knew or had notice of the proceeding.<sup>204</sup> As a preliminary matter, it should be noted that when prosecuting cases using section 1505, the government is *not* required to prove that there was an actual obstruction but simply an “endeavor” to obstruct the due and proper administration of law.<sup>205</sup> In other words, the effort does not need to succeed. The statute is designed to punish conduct that interferes, or attempts to interfere, with the ability of departments and agencies to perform the roles and responsibilities assigned to them by Congress. The key to the usefulness of this statute in the types of cases discussed in this article hinges on the broad interpretation given to the words “corruptly” and “proceeding” as used in the statute.

*i. Corruptly*

Section 1505 requires the government to prove that a defendant corruptly, or by threat or force, violated the statute. The term “corruptly” means “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering or destroying a document or other information.”<sup>206</sup> Conduct that courts consistently find satisfies this element of the offense includes providing false documents or false information to, or misleading, a federal agency.<sup>207</sup>

*ii. Pending Proceeding*

In order for the government to convict a person of violating § 1505, it must prove that there was a “pending proceeding” before a department or agency of the United States. Courts have long given this phrase an expansive definition.<sup>208</sup> To

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204. *Cf. United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006) (discussing intent and knowledge requirements under 18 U.S.C. § 1505).

205. *See United States v. Senffner*, 280 F.3d 755,762 (7th Cir. 2002); *United States v. Buffalano*, 727 F.2d 50, 53 (2d Cir. 1984); *United States v. Price*, 951 F. 2d 1028 (9th Cir. 1984).

206. 18 U.S.C. § 1515(b) (2000). This definitional section was added to the obstruction provisions of Title 18 in 1996 to address a successful constitutional vagueness challenge in *United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991). By the plain wording of the statute, the phrase “acting with an improper purpose” includes more than the specific acts detailed in the dependant clause of the sentence. To date, no reported case has explained the meaning of the phrase “acting with improper purpose” since the bulk of the reported § 1505 prosecutions have charged the defendants with making a false or misleading statement to agency investigators.

207. *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991); *United States v. Leo*, 941 F.2d 181 (3d Cir. 1991); *see also United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., dissenting in part) (discussing the word “corruptly” in the context of the similarly worded 18 U.S.C. § 1503). Statutory language need not be colloquial however, and the term “corruptly” in criminal laws has longstanding and well-accepted meaning. It denotes “[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it not be offered by another.” *Id.* (internal citations omitted).

208. *United States v. Fruchtmann*, 421 F.2d 1019, 1021 (6th Cir. 1970) (“‘[P]roceeding’ is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency.”) (citations omitted); *Rice v. United States*, 356 F.2d 709, 714–15 (8th Cir. 1966) (holding that an unfair labor charge filed with the National Labor Relations Board constituted a “proceeding” under § 1505); *United States v. Sutton*, 732

fall within the ambit of § 1505, the proceeding at issue need not be a “formal” agency proceeding, such as a rulemaking, hearing or accident investigation. Rather, § 1505 includes within its scope *all* investigative and adjudicative functions of a department or agency. The Eighth Circuit in *Rice v. United States*, stated that:

“Proceeding” is a comprehensive term meaning the action of proceeding—a particular step or series of steps, adopted for accomplishing something. This is the dictionary definition as well as the meaning of the term in common parlance. Proceedings before a governmental department or agency simply mean proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion.<sup>209</sup>

In short, a “proceeding” includes any activity of an agency that is being done pursuant to a valid statute or implementing regulation. Examples include SEC administrative investigations,<sup>210</sup> IRS efforts to recover taxes,<sup>211</sup> FDA reviews of drug applications,<sup>212</sup> Federal Trade Commission,<sup>213</sup> INS actions in connection with visa applications,<sup>214</sup> United States Coast Guard boardings,<sup>215</sup> and Department

F.2d 1483, 1490 (10th Cir. 1984) (“Agency investigative activities are ‘proceedings’ within the meaning of § 1505.”) (internal citation omitted).

209. *Rice*, 356 F.2d at 712.

210. *See, e.g.*, *United States v. Bhagat*, 436 F.3d 1140, 1148–49 (9th Cir. 2006); *United States v. Stewart*, 323 F. Supp. 2d 606, 622 (S.D.N.Y. 2004), *aff’d*, 433 F.3d 273 (2d Cir. 2006); *United States v. Callipari*, 368 F.3d 22, 42–43 (1st Cir. 2004), *vacated on other grounds*, 543 U.S. 1098 (2005) (dealing with false information given to SEC investigators in connection with insider trading investigation); *United States v. Senffner*, 280 F.3d 755, 760–61 (7th Cir. 2002) (holding that “proceeding” encompasses not only SEC or other agency investigations but also specific actions by other entities like courts that act for or at the direct request of the SEC).

211. *See, e.g.*, *United States v. Hopper*, 177 F.3d 824, 831 (9th Cir. 1999) (“[P]reventing the collection of the funds by the U.S. Marshal would have the direct effect of obstructing collection of those funds by the IRS. Because collection of delinquent taxes is an IRS proceeding, the [defendants] were properly convicted under 18 U.S.C. § 1505.”); *United States v. Vixie*, 532 F.2d 1277, 1278 (9th Cir. 1976) (holding that an IRS investigation is a “proceeding”); *United States v. Persico*, 520 F. Supp. 96, 101 (E.D.N.Y. 1981) (holding that an IRS investigation is a “proceeding” even if it is a criminal investigation because “it would be senseless to interpret section 1505 to punish obstruction of civil but not criminal tax investigations” when “[t]he line between the two is indistinct and impermanent”).

212. *See, e.g.*, *United States v. Chatterji*, 46 F.3d 1336, 1339–40 (4th Cir. 1995) (defendant pleaded guilty to obstructing proceedings before a federal agency after FDA audit revealed that he had changed an approved drug’s formula without notifying FDA). The defendant in *Chatterji* was cofounder and part owner of Quad Pharmaceuticals, a company that manufactured generic drugs. He supervised creation and testing of drugs for FDA approval. To cut costs, Chatterji tested his product once instead of three times as required by FDA regulations. The FDA approved his drug. For a different drug, Chatterji gained approval but then changed the formula slightly without notifying the FDA again in violation of FDA regulations.

213. *See, e.g.*, *Fruchtman*, 421 F.2d at 1019 (FTC investigated defendant for setting up false invoices purported to show the sale of steel to Canadian companies, when in fact the sale of steel went to another American company that did close business with the defendant).

214. *See, e.g.*, *United States v. Jacques Dessange, Inc.*, No. 99 CR. 1182 (DLC), 2000 U.S. Dist. LEXIS 2886, at \*17 (S.D.N.Y. March 13, 2000) (noting that law relating to obstruction of the administration of the law in a

of Defense and Department of Energy audits.<sup>216</sup>

DOJ has used § 1505 to prosecute obstruction of both EPA and OSHA proceedings in a handful of cases. In *United States v. Technic Services Inc.*,<sup>217</sup> the Ninth Circuit held that an “investigation into a possible violation of the Clean Air Act or the Clean Water Act which *could lead to a civil or criminal proceeding*,”<sup>218</sup> was a “proceeding” within the meaning of § 1505. The defendant was investigated by both EPA and OSHA for noncompliance with regulatory requirements related to asbestos removal from buildings.<sup>219</sup> In an effort to resolve the issue, the defendant entered into negotiations with the agencies and submitted additional information to EPA that was later determined to be false.<sup>220</sup> The defendant also tampered with air-monitoring devices in order to mislead EPA into believing that its asbestos removal operations complied with federal regulations.<sup>221</sup> Similarly, in connection with several vessel pollution cases, employees were convicted of violating § 1505 for maintaining a false Oil Record book and for lying to the Coast Guard.<sup>222</sup>

Thus, in the context of environmental, health and safety cases, permit application processes, license renewals, requests for special regulatory status,<sup>223</sup> as well as inspections conducted by agency personnel to determine compliance with various regulatory requirements are all within the ambit of this statute. For

pending proceeding before the INS “plainly encompasses attempts to influence testimony in civil proceedings as well as criminal proceedings”).

215. *See, e.g.*, *United States v. Stickle*, 355 F. Supp. 2d 1317, 1328–29 (S.D. Fla. 2004), *aff’d*, 454 F.3d 1265 (11th Cir. 2006) (concluding that Coast Guard investigation constitutes a “proceeding,” a term that generally “includes investigations by agencies that have discretionary or adjudicative power, or that have the power to enhance their investigations through the issuance of subpoenas or warrants”).

216. *See, e.g.*, *United States v. Leo*, 941 F.2d 181, 199 (3d Cir. 1991) (labeling a Defense Contract Audit Agency’s investigatory audit a “proceeding,” and noting that though such an audit “comes at the preliminary stage of the investigation, it is crucial in departmental proceedings for the discovery of fraud”); *United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984) (holding that a Department of Energy subpoena for documents pursuant to an audit was a “proceeding,” and that it would be absurd if defendant could end the “proceeding” simply by failing to timely comply with the subpoena).

217. *United States v. Technic Servs. Inc.*, 314 F.3d 1031 (9th Cir. 2002), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (defendant investigated by EPA and OSHA for noncompliance with regulatory requirements related to asbestos removal from buildings, and in attempt to resolve issue entered into negotiations with agencies and submitted information to EPA later determined to be false); *see also United States v. Atl. States Cast Iron Pipe Co.*, No. 03-852 (MLC), 2007 U.S. Dist. LEXIS 56562, at \*197–98 (D.N.J. Aug. 2, 2007) (noting, in context of employees lying to OSHA investigators about deadly forklift accident, that “although the agency proceeding need not be pending at the time they conspired, the conspirators [could] foresee that an OSHA proceeding would be instituted, and they [could] intend that their actions would obstruct that anticipated proceeding if it did commence in the future”).

218. *Technic Servs.*, 314 F.3d at 1044 (emphasis added).

219. *Id.* at 1036–37.

220. *See id.* at 1044–45.

221. *Id.* at 1054.

222. *See United States v. Petraia Maritime, Ltd.*, 483 F. Supp. 2d 34 (D. Me. 2007).

223. The OSHA Voluntary Protection Program (“VPP”) is an example of programs that give regulated industries special regulatory status. *See All About VPP*, OSHA, [http://www.osha.gov/dcsp/vpp/all\\_about\\_vpp.html](http://www.osha.gov/dcsp/vpp/all_about_vpp.html) (last visited March 19, 2011).

example, Congress charged OSHA to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”<sup>224</sup> In fulfilling that charge, OSHA must not only promulgate regulations but also ensure that industries are complying with these regulations. That process involves ongoing review and inspection of the facilities. Misrepresentations to inspectors about how a company is complying with these regulations, whether overt or passive, can constitute of violation of 18 U.S.C. § 1505.<sup>225</sup>

When looking at the Deepwater Horizon disaster, there are multiple areas of investigative inquiry that could lead to a § 1505 prosecution. One specific example is BP’s Oil Spill Response Plan (“OSRP”). As part of its drilling permit, BP was required by federal regulations to prepare and submit a detailed plan explaining how, if a spill occurred during the drilling of the Macondo well, it would respond to minimize the impact of the spill on the surrounding environment. This requirement is spelled out in the regulations that dictate what must be contained in the spill response plan.<sup>226</sup> The OSRP plan is supposed to be the safety net in case of an emergency, as well as the core of the overall response plan. As is well documented, BP’s OSRP was seriously flawed and misleading.<sup>227</sup> In addition to containing glaringly wrong information, BP’s OSRP painted a rosy, but clearly misleading, picture of a company that was fully capable of responding to a major oil spill, and that had also considered a range of worst-case scenarios. However, as the President’s Commission pointed out, despite the fact that “the BP plan identified three different worst-case scenarios that ranged from 28,033 to 250,000 barrels,” this was meaningless because they used identical language to “‘analyze’ the shoreline impacts under each scenario.”<sup>228</sup>

Thus, the elements of a § 1505 violation are arguably met because: (1) there was a pending proceeding (the drilling permit application) before a federal agency; (2) BP was aware of the proceeding; and (3) BP corruptly endeavored to influence the proceeding by submitting an OSRP that contained false and misleading informa-

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224. 29 U.S.C. § 651(2)(b) (2006).

225. 18 U.S.C. § 1505 (2006) (applying to “[w]hoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so”).

226. 30 C.F.R. § 254.20–254.30 (2008).

227. The blatant errors included listing marine animals that do not live in the Gulf, giving the name and contact information for a marine life specialist who died four years before the plan was submitted, and providing inaccurate contact information for its primary spill responder. *See, e.g.*, Justin Pritchard et. al., *BP’s Shocking, Spurious Action “Plan”*, SALON (June 9, 2010), [http://www.salon.com/news/excerpt/2010/06/09/us\\_gulf\\_oil\\_spill\\_sketchy\\_plans](http://www.salon.com/news/excerpt/2010/06/09/us_gulf_oil_spill_sketchy_plans).

228. PRESIDENTIAL REPORT, *supra* note 120, at 84. The fact that other oil companies’ OSRPs were similarly flawed does not excuse BP’s conduct.



tion. The fact that the regulatory agency<sup>229</sup> accepted this flawed OSRP and then issued the drilling permit is not a defense to this charge but rather it establishes the success of the endeavor. It is immaterial whether this success resulted from the cozy relationship that the industry had with the Minerals Management Service<sup>230</sup> or was due to the fact that the MMS simply did not have the expertise and time to do a thorough evaluation of the report.<sup>231</sup> The reality is that many permits and licenses are issued by regulatory agencies that have neither the expertise nor the staff to fully evaluate underlying reports and information provided by the regulated entity. Given the government's fiscal crisis, this problem is likely to get worse rather than better, making it all the more critical that the government, and the public, can rely on the truthfulness and accuracy of information provided by regulated industries.

## 2. 18 U.S.C. § 1519

An even more powerful prosecution tool can be found in 18 U.S.C. § 1519. Enacted in 2002, in response to rampant corporate fraud, this statute is also applicable to those who violate health, safety and environmental standards promulgated by federal agencies or departments. The statute provides as follows:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence *the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States* or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, *imprisoned not more than 20 years*, or both.<sup>232</sup>

Unlike with § 1505, the government does not need to establish the existence of a pending "proceeding" under § 1519. Rather, the government need only prove that the obstructive conduct was "in relation to or contemplation of" a matter or case. This statutory language makes § 1519 applicable to a much wider range of conduct

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229. At the time, the Department of the Interior's Minerals Management Service ("MMS") was responsible for permitting in the Outer Continental Shelf, but that responsibility was transferred to the newly formed Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE") after the Deepwater Horizon explosion. See BUREAU OF OCEAN ENERGY MGMT., REGULATION, & ENFORCEMENT, <http://www.boemre.gov/aboutBOEMRE/> (last visited Apr. 8, 2011).

230. See CTR. FOR PUB. INTEGRITY, [http://www.publicintegrity.org/investigations/broken\\_government/articles/entry/1022/](http://www.publicintegrity.org/investigations/broken_government/articles/entry/1022/) (last visited March 19, 2011) ("An eye-opening series of reports in fall 2008 by the Department of the Interior's inspector general disclosed a stunning level of corruption at the Minerals Management Service (MMS), and a coziness with industry officials that included a "culture of substance abuse and promiscuity" at the agency.").

231. PRESIDENTIAL REPORT, *supra* note 120, at 84; See also, CTR. FOR PROGRESSIVE REFORM, *Regulatory Failure Contributes to Eco-Disaster in the Gulf*, <http://www.progressivereform.org/bpoilspill.cfm> (last visited March 19, 2011).

232. Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1519 (2006) (emphasis added).

than § 1505.<sup>233</sup> Furthermore, the intent standard of § 1519 requires only that the conduct be “knowing,”<sup>234</sup> a less stringent mens rea requirement than is required by § 1505.<sup>235</sup> The penalty provision is also a significant difference between the two statutes when individuals are charged. The maximum sentence for violating § 1505 is five years’ imprisonment compared to *twenty* years for violating § 1519. A maximum sentence of twenty years in jail sends a strong message about the importance the government, and society, place on the conduct being prosecuted.

Both the language of §1519 and its legislative history clearly establish that Congress intended the scope of the statute to be expansive. As Senator Leahy stated before the Senate,

The intent required is the intent to obstruct, not some level of knowledge about the agency processes or the precise nature of the agency or courts jurisdiction. This statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter by intent or otherwise . . . . It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title . . . . It also extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution. The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function.<sup>236</sup>

Section 1519 has been used in a number of fraud cases as well as in a few environmental cases.<sup>237</sup> In *United States v. Ionia Management*,<sup>238</sup> the defendant

233. Unlike prosecutions brought under 18 U.S.C. § 1001 (false statements) and 18 U.S.C. §§ 1341, 1343 (mail and wire fraud), materiality is not an element of § 1519.

234. To prove a “knowing” violation the government must prove that the defendant acted intentionally and voluntarily and not from ignorance, mistake, accident or carelessness. “Whether the defendant acted knowingly may be proven by the defendant’s conduct and by all the facts and circumstances surrounding the case.” 1-3A LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL 3A-2 (2010).

235. Section 1505 requires a “willful” mens rea.

236. 148 Cong. Rec. S. 7418–19 (2002); Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. § 1519, 89 CORNELL L. REV. 1519, 1559–60 (2004).

237. *United States v. Hunt*, 526 F.3d 739, 742 (11th Cir. 2008) (police officer convicted of knowingly making a false description of an arrest in a report prior to the FBI’s initiation of excessive force investigation); *United States v. Jensen*, 248 F. App’x 849 (10th Cir. 2007) (employee of community corrections center provided inmate with a clean urine sample and falsified the paperwork relating to the sample); *United States v. Wortman*, 488 F.3d 752 (7th Cir 2007) (state senator convicted for destroying emails pertaining to matters under federal investigation); *United States v. Fumo*, 628 F. Supp. 2d 573 (E.D. Pa. 2007) (ophthalmologist falsified and created false Medicare and Medicaid records); *United States v. Kun Yun Jho*, 465 F. Supp. 2d. 618 (E.D. Tex. 2006) (defendant convicted because of false entries into Oil Record book regarding proper functioning of vessel’s oil pollution control equipment).

was convicted of violating the Act to Prevent Pollution from Ships (“AAPS”) and associated regulations by falsifying records and attempting to mislead Coast Guard in its investigation. On appeal, Ionia argued that “the Coast Guard, in its capacity relative to the compliance program, is not undertaking an “investigation or . . . matter within the jurisdiction of any department or agency.”<sup>239</sup> The Second Circuit had no trouble rejecting this challenge to the Coast Guard’s jurisdiction and looked to the Supreme Court’s opinion interpreting a similar phrase of an earlier version of Title 18, § 1001. In *United States v. Rodgers*, the Supreme Court concluded:

The most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department . . . A department or agency has jurisdiction, in this sense, when it has the power to exercise authority in a particular situation. Understood in this way, the phrase “within the jurisdiction” merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.<sup>240</sup>

With this broad interpretation, § 1519, is a valuable prosecutorial tool for the types of cases discussed in this article. An examination of the Massey Big Branch case illustrates how both § 1505 and § 1519 can be used in lieu of substantive statutes. Massey was required to operate and maintain gas monitors in the mine. MSHA inspectors periodically inspected the site to evaluate compliance with ongoing regulatory requirements. During these visits, according to testimony of miners, Massey’s practice was to disable the methane monitors unless and until inspectors came to inspect the mine, at which point they were turned on thereby misleading MSHA into believing that the company was complying with regulatory requirements.<sup>241</sup> These actions were taken with the “intent to impede, obstruct or influence the proper administration” of the Mine Safety Act, a matter within the jurisdiction of the agency. Massey’s practice of shutting down equipment when inspectors arrived to prevent them from measuring air quality while machines were running constitutes an effort to conceal actual operating conditions. Massey took these actions for the clear purpose of misleading the inspectors as to the actual operating status of the mine.<sup>242</sup>

238. 526 F. Supp. 2d 319 (D.Conn. 2007), *aff’d*, 555 F.3d 303 (2d Cir. 2009).

239. *Id.* at 329 (internal quotation marks omitted).

240. 466 U.S. 475, 479 (1984).

241. *See supra* note 141.

242. Another statute that the government can use to hold culpable individuals accountable, particularly those who are farther up the chain of command, is 18 U.S.C. § 2, which states that anyone who “aids, abets, counsels, commands, induces, or procures [the] commission [of an offense], is punishable as a principal” to the same extent as the person who actually committed the crime. In addition, the concept of “willfull blindness” or “conscious avoidance” is another tool. In federal fraud cases, juries are routinely instructed that:

[I]n determining whether the defendant acted knowingly, you may consider whether the defendant *deliberately closed his eyes to what would otherwise have been obvious* to him. If you find beyond

The Deepwater Horizon catastrophe also presents examples of conduct that could be prosecuted under § 1519. The Outer Continental Shelf Lands Act of 1953<sup>243</sup> is the framework within which leases and permits to drill for oil and gas are issued. The regulations promulgated pursuant to this statute set forth legal requirements that the regulated entities must meet.<sup>244</sup> For example, when drilling the Macondo well, BP was required, among other things, to properly maintain the BOP system and system components to ensure well control.<sup>245</sup> The evidence developed to date indicates that Transocean, with BP's knowledge, failed to timely inspect the BOP, although there were various known maintenance problems with the BOP. The most significant of those was a pilot leak on the BOP. This should have been reported to MMS, and the rig should have been shut down until it was repaired.<sup>246</sup> It is unknown at this point what, if any, representations were made to MMS about these issues but depending on the verbal or written communications, § 1519 charges could be triggered.

Also, changes to the temporary abandonment procedures<sup>247</sup> were to be submitted and approved by MMS prior to implementation. In its April 12, 2010 drilling plan, BP described one temporary abandonment procedure. This was later modified on April 14th and April 20th. However, the temporary abandonment procedure sent to MMS for approval on April 16th was different from the April 12th, 14th and, most importantly, the April 20th procedures.<sup>248</sup> It is hard to imagine that the individual or individuals responsible for submitting the temporary abandonment procedures to MMS did not know that they were submitting inaccurate and misleading information to MMS. This is even more troubling given the preliminary indications that the choices BP personnel made in connection with the temporary abandonment procedures contributed to the blowout.<sup>249</sup>

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a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth, then this element may be satisfied.

1-3A LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL 3A-2 (2010) (emphasis added); see also *United States v. Svoboda*, 347 F.3d 471, 476 & n.5 (2d Cir. 2003); *United States v. Espinoza*, 244 F.3d 1234, 1241-42 (10th Cir. 2001); *United States v. Hopkins*, 53 F.3d 533, 541-42 (2d Cir. 1995).

243. 43 U.S.C. §§ 1331-1356 (amended 1975, 1978, 1986, 1987, 1990, 1992, 1994 and 1995).

244. 30 C.F.R. §§ 250.400-250.409 (2010).

245. § 250.440. The criminal provisions of the OCSLA prohibit, among other things, the knowing and willful violation of any regulation designed to protect health, safety or the environment and specifically addresses the liability of corporate officers and agents. 43 U.S.C. § 1350(c), (a), (d) (2006). If the evidence developed during the criminal investigation confirms the public reports of failure to properly maintain the BOP on the Deepwater Horizon rig that could be a basis for charging a violation of the OCSLA.

246. See *supra* note 126.

247. Temporary abandonment is the process of sealing and securing the well before the drilling rig (in this case the Deepwater Horizon) can be removed. At some later date, a smaller rig is used to actually remove the oil from the well. PRESIDENTIAL REPORT, *supra* note 120, at 4, 4 n.\*, 77, 103.

248. PRESIDENTIAL REPORT, *supra* note 120, at 104-05.

249. *Id.* at 119-20. Troubling aspects of the temporary abandonment procedures included: (1) BP's decision to replace 3,300 feet of mud below the mudline with seawater; (2) setting the cement plug 3,300 feet below the mudline; and (3) displacing mud from the riser before setting the surface cement plug or other barrier in the

Finally, the representations made by BP and others in the aftermath of the spill should be carefully scrutinized for conduct that would constitute violations of either § 1505, § 1519 or 18 U.S.C. § 1001, the false statements statute. Since the beginning of the spill, many have expressed skepticism and disbelief over the representations made about the quantity of oil flowing from the damaged well.<sup>250</sup> It is a classic case of not only what did they know and when did they know it, but also, what information was shared with, or withheld from, the government.

Given the inadequacies and limitations of relevant substantive law, DOJ should aggressively use § 1505 and § 1519 in those cases involving death and serious bodily injury that result, in whole or in part, from choices made to avoid or ignore important industry safety standards.

### C. Legislative Proposal

Congress has a model from which to build a criminal negligence felony for those who gamble with the lives of their employees and the general public while engaging in inherently dangerous business activities. More than a century ago, Congress enacted what has come to be known as The Seaman's Manslaughter Law.<sup>251</sup> This statute criminalizes "misconduct, negligence or inattention to duties," by a captain, engineer, pilot or other person employed on a vessel, that leads to the death of a person. It is also a crime to cause the death of a person by "fraud, neglect, connivance, misconduct or violation of law." A violation of the Seaman's Manslaughter Law is a felony punishable by ten years in jail.<sup>252</sup>

This law was originally enacted in 1838 to deal with what was seen at the time as a serious public safety issue—the death of passengers on steamboats.<sup>253</sup> At the time, steamboats represented new technology in the field of transportation.<sup>254</sup> As originally enacted in 1838, the statute focused on the actions of the crew and was designed to ensure vigilance of the crew by making them criminally liable for fatal lapses and punishing captains, engineers and pilots for their negligence or inattention to duties that resulted in the death of a person.

Congress amended this law several times in recognition of the fact that advances

production casing. The National Commission concluded that these decisions "unnecessarily and substantially increased the risk of a blowout." *Id.* at 120.

250. See, e.g., Richard Simon et al., *Flow Estimate Up Sharply Again as Exec Gets Grilling*, CHI. TRIB., June 16, 2010, at C13; Jaquetta White, *BP Says Oil Flow Estimate Inflated: Company Backs Off Recent Statement*, TIMES PICAYUNE (New Orleans), May 22, 2010, at A1.; Justin Gillis, *Size of Oil Spill Underestimated, Scientists Say*, N.Y. TIMES, May 14, 2010 at A1, available at <http://www.nytimes.com/2010/05/14/us/14oil.html>.

251. Act of July 7, 1838, § 12, 5 Stat. 304, 306.

252. 18 U.S.C. §§ 1115, 3559 (2006).

253. Act of July 7, 1838, 5 Stat. 304; Brief of Plaintiff-Appellee at 20, *United States v. O'Keefe*, 426 F.3d 274 (5th Cir. 2004) (No. 04-30691), 2004 WL 5489970.

254. See generally ARCHER BUTLER HULBERT, *THE PATHS OF INLAND COMMERCE 100–15* (1920) (detailing the revolutionary development of the steamboat between 1784 and 1807).

in technology required the advancement of safety protocols,<sup>255</sup> and due to an enhancement of the scope of the statute to include all vessels.<sup>256</sup> The Seaman's Manslaughter statute remains a powerful tool by which the government can combat the "frequent loss of human life in consequence of explosions"<sup>257</sup> and other violative conduct on vessels by "enforc[ing] the greatest possible vigilance and caution on the part of those concerned in" vessel navigation.<sup>258</sup>

A review of the statutory language provides insight into how a parallel statute addressing land-based inherently dangerous operations might be fashioned. The statute provides that:

Every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.

When the owner or charter of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who had knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both.<sup>259</sup>

Under traditional criminal analysis, the *actus reus* of this statute are those acts or omissions of a known duty specific to the operation of a vessel that result in the death of a person.<sup>260</sup> The *mens rea* is simple negligence.<sup>261</sup> At first blush, this

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255. The Seaman's Manslaughter law was part of a broader steamboat act in 1838. In 1852, the steamboat act was revised; however, the manslaughter provision was not modified. The 1852 amendments focused on steamboat inspections (i.e. when inspections were required, how many life rafts were required, etc.) and added language establishing minimum standards for vessel boilers. Act of Feb. 28, 1871, sec. 57, 16 Stat. 440, 445 (added provisions for safety equipment, vessel design standards, inspection and testing of equipment and licensing of crew); Act of Mar. 4, 1909, ch. 11, sec. 282, 35 Stat. 1088, 1144 (broadened to include all vessels and not simply steamboats).

256. Act of March 3, 1905, ch. 1451, 33 Stat. 1023, 1025–26 (corporations and officers of corporations were added as potential defendants); Act of Mar. 4, 1909, ch. 11, § 282, 35 Stat. 1088, 1144 (broadened to include all vessels and not simply steamboats; limited jurisdiction to same jurisdiction as found in the penal code); Act of June 25, 1948, ch. 51, § 115, 62 Stat. 638, 757 (1909 jurisdictional restriction removed). There were also numerous re-codifications of the United States Criminal Code over the years. Act of Feb. 28, 1871, § 57, 16 Stat. 440; Act of December 1, 1873, § 5344, 18 Stat. 1, 1038; Act of March 3, 1905, § 5, 33 Stat. 1023; Act of June 30, 1926, ch. 11, § 461, 44 Stat. 1, 499; Act of June 25, 1948.

257. *In re Charge to Grand Jury*, 30 F. Cas. 990 (E.D. La. 1846) (No. 18,253).

258. *United States v. Warner*, 28 F. Cas. 404 (C.C.D. Ohio 1848) (No. 16,643).

259. 18 U.S.C. § 1115 (2006).

260. *United States v. Fei*, 225 F.3d 167, 171 (2d Cir. 2000) ("[R]egardless of whether the beach was sandy or rocky at the point of impact, the multiple deaths that in fact occurred were an entirely foreseeable result of [the defendant's] arrangements and orders to his subordinates."); *United States v. Collyer*, 25 F. Cas. 554, 563

might seem unduly harsh since the penalty for violating the statute is imprisonment for up to ten years. But, as the legislative history and subsequent case law make clear, this statute aimed to change behavior. Congress wanted to ensure that those in a position to prevent the deaths of crewmembers or passengers were held personally accountable if they failed to do so. As the Second Circuit noted in a 1908 decision, vessel owners, operators and employees:

Should be held to the strictest accountability and required to exercise the highest degree of skill and care. In this way alone can human life be safeguarded and such appalling disasters . . . be effectually prevented.<sup>262</sup>

A century after this observation, we are confronted with unnecessary and preventable deaths resulting from the failure of owners and operators of facilities to comply with their own safety procedures, widely accepted industry standards and specific regulations designed to save lives. Sadly, the need for the same personal accountability that drove Congress to pass the Seaman's Manslaughter Law is needed to hold those responsible for the operation and management of hazardous industrial activities.<sup>263</sup> A comparable federal manslaughter statute with graduated penalties dependant on the mens rea of the defendant should be enacted for land-based facilities.

#### IV. CONCLUSION

When instances of corporate misconduct lead to death or grievous bodily injury, those cases should be a top priority and DOJ should use every available resource and tool to prosecute not only the responsible companies but, more importantly, the individuals responsible for the criminal conduct. Decoupling individual criminal liability from corporate criminal liability undermines both the deterrent effect of the criminal law and the interests of justice. The only way to hold scofflaw businesses accountable is to hold the individuals who make the decisions that lead to the criminal conduct accountable.

Although it is stunning that forty-seven people died within nineteen days because their employers did not take the steps necessary to keep them safe, death

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(C.C.S.D.N.Y. 1855) (No. 14,838) ("By misconduct, negligence, or inattention in the management of steamboats is undoubtedly meant the omission or commission of any act which may naturally lead to the consequences made criminal; . . .").

261. *Cf.*, *United States v. Schröder*, No. 06-0088-CG, 2006 WL 1663663, at \*2 (S.D. Ala. June 12, 2006) (agreeing that the legislative history and case law interpreting the statute confirm that any degree of negligence is sufficient to meet the culpability threshold); *United States v. Ryan*, 365 F. Supp. 2d 338, 346 (E.D.N.Y. 2005) (also referring to simple negligence standard); *United States v. Mitlof*, 165 F. Supp. 2d 558, 565 (S.D.N.Y. 2001); *United States v. Holtzhauer*, 40 F. 76 (C.C. N.J. 1889); *In re Doig*, 4 F. 193 (C.C. Cal. 1880); *United States v. Farnham*, 25 F. Cas. 1042 (C.C.S.D.N.Y. 1853); *United States v. Warner*, 28 F. Cas. 404 (C.C. Ohio 1848).

262. *Van Schaick v. United States*, 159 F. 847, 855 (2d Cir. 1908).

263. Since the Deepwater Horizon rig is considered to be a vessel, the Seaman's Manslaughter Law is another potential criminal statute that should be evaluated in the context of the Deepwater Horizon catastrophe. *See* PRESIDENTIAL REPORT, *supra* note 120, at 5.

as a result of industrial activity is not an aberration nor is it likely to stop without more aggressive enforcement. The litany of the names of those killed during the last decade in “industrial accidents” is far too long.<sup>264</sup> What is sadder still is that many of these were preventable deaths.

BP and Massey may be the most egregious examples of their respective industry segments, but to believe that no one else will die as a result of a businessman’s decision to ignore safety requirements is simply naïve. Every life that is lost due to a preventable industrial event is one life too many. As a society, we place a very high value on human life and hard work. The enforcement of our laws should reflect these values and protect people, particularly workers, from scofflaws who needlessly gamble worker lives and our environment for financial benefits or career advancement. It is past time to seriously address the trivialization of public safety crimes committed by corporate executives, managers, employees and agents.

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264. In 2009, 534 workplace fatalities occurred in the mining, oil and gas, chemical, and manufacturing industry segments. *2009 Census of Fatal Occupational Injuries (Preliminary Data)*, BUREAU OF LABOR STATISTICS, at Table A-4, <http://stats.bls.gov/iif/oshwc/cfoi/cftb0244.pdf> (last visited Mar. 28, 2011). During the decade between 2000 and 2009 the total deaths in those industry sectors totaled 6,479. In addition, in the construction industry alone, there have been 10,137 deaths during this same time period, roughly one thousand deaths a year. *Census of Fatal Occupational Injuries Charts, 1992–2009 (Preliminary Data)*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/iif/oshwc/cfoi/cfch0008.pdf> (last visited Mar. 22, 2011).