

## MINIMIZING RISK UNDER THE CLEAN WATER ACT

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**Synopsis:** The Federal Water Pollution Control Act—more commonly known as the Clean Water Act—establishes a stringent regulatory and permitting regime governing the discharge of pollutants into rivers, streams, wetlands, and other “navigable waters.” The statute also addresses accidental releases of oil and hazardous substances, and imposes spill prevention, reporting, planning, and response requirements on the regulated community, as well as civil and criminal penalties for unauthorized discharges. The energy industry faces substantial legal risk under the Clean Water Act because (1) many of its operations are subject to Clean Water Act regulatory and permitting requirements, (2) the industry’s core activities—oil and gas exploration and production, storage, transportation, processing, and refining—are technically and operationally difficult and pose inherent risks of accidental releases, (3) federal authorities have targeted the industry for enforcement, (4) the statute provides for onerous civil and criminal penalties, and has been interpreted by several courts to allow the imposition of criminal fines and imprisonment for violations caused by simple negligence, and (5) in certain circumstances, the statute automatically disqualifies violators from receiving energy supply and other federal contracts, as well as federal oil and gas leases.

Energy companies can minimize their exposure to Clean Water Act regulatory enforcement actions by implementing strong compliance programs, including compliance audits. But meeting regulatory requirements and permit conditions is not enough. Energy companies should also have strong risk management programs designed to prevent accidental releases of oil and hazardous substances, as well as emergency preparedness and response plans that enable them to minimize the impacts of any release. Should a regulatory violation or accidental release nonetheless occur, energy companies may persuade the government to forgo criminal enforcement and accept reduced civil penalties by

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taking steps spelled out in federal enforcement policies and guidelines. These steps include promptly reporting a known or suspected violation, remediating environmental damage and other harm caused by the violation, and implementing corrective measures to prevent a recurrence.

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## I. INTRODUCTION

Energy companies—as well as their officers, employees, and contractors—face significant legal risk under the Clean Water Act for a number of reasons, including: the statute’s applicability to a wide range of energy industry activities, imposition of liability for purely accidental discharges of oil and hazardous substances, and onerous penalty provisions; judicial precedents construing the statute to criminalize simple negligence; and a lengthening string of successful enforcement actions against companies and individuals representing virtually every sector of the industry. Indeed, the U.S. Environmental Protection Agency (EPA), which has principal responsibility for administering and enforcing the Clean Water Act, has specifically targeted the industry’s upstream sector for enforcement under the Clean Water Act and other federal environmental statutes.<sup>1</sup>

The following sampling of enforcement cases against companies and individuals in the energy industry illustrates the range of industry activities that pose Clean Water Act enforcement risk, as well as the range of potential penalties:

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1. EPA’s Office of Enforcement and Compliance Assurance (OECA) sets “National Enforcement Initiatives” (NEIs) every three years. One NEI currently targets the “Energy Extraction Sector” for the period 2013 through 2016. EPA, OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, FY 2014 NATIONAL PROGRAM MANAGER GUIDANCE 3, 8 (2013), *available at* <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100H18X.txt>.

- In February 2015, Duke Energy agreed to plead guilty to negligent violations of the Clean Water Act based on the discharge of coal ash and coal ash wastewater from electric utility coal ash waste ponds. Under the plea agreement, Duke Energy would pay \$68.2 million in fines and restitution and \$34 million for community service and mitigation.<sup>2</sup>
- In December 2014, XTO Energy entered into a consent agreement requiring payment of a \$2.3 million civil penalty for alleged violations of the Clean Water Act's dredge and fill permitting requirements in connection with the construction of facilities related to extraction of natural gas, including well pads, freshwater pits, access roads, a pipeline, and a compressor station pad.<sup>3</sup>
- In August 2014, ExxonMobil Pipeline Company agreed to pay a \$1.4 million civil fine in connection with an oil spill from a crude oil pipeline rupture.<sup>4</sup>
- In June 2014, a federal district court found a petroleum barge owner and operator and the captain of the barge guilty of negligently violating the Clean Water Act in connection with oil discharges from the barge. The court determined that the defendants negligently vented combustible vapors from the cargo hold of the barge, causing an explosion hazard that ultimately resulted in the death of a crew member and the release of thousands of gallons of oil.<sup>5</sup> As of the time of this writing, sentencing had not yet occurred and was set for April 29, 2015.<sup>6</sup>
- In March 2014, the individual owner of a gauging service company entered a plea agreement for the negligent discharge of pollutants in violation of the Clean Water Act.<sup>7</sup> In this case, the defendant was a contractor retained to measure the amount of oil contained in storage tanks at an oilfield exploration site. Investigators found an "unauthorized bypass built into containment at

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2. News Release, Duke Energy, United States Reach Proposed Agreement on Dan River (Feb. 20, 2015), <http://www.duke-energy.com/news/releases/2015022002.asp>.

3. United States v. XTO Energy Inc., No. 1:14-cv-00218-IMK (N.D. W. Va. Dec. 22, 2014), available at <http://www2.epa.gov/sites/production/files/2014-12/documents/xto-cd14.pdf>; *XTO Energy, Inc. Settlement-2014*, EPA, available at <http://www2.epa.gov/enforcement/xto-energy-inc-settlement-2014> (last updated Jan. 4, 2015).

4. Consent Decree at 4, United States v. ExxonMobil Pipeline Co., No. 3:14-cv-00532-JWD-SCR (M.D. La. Aug. 26, 2014).

5. Press Release, U.S. Attorney's Office for the N. Dist. of Ill., U.S. Dep't of Justice, Barge Captain and Marine Company Convicted in Fatal 2005 Explosion that Discharged Slurry Oil in Chicago Canal (June 9, 2014), [http://www.justice.gov/usao/iln/pr/chicago/2014/pr0609\\_01.html](http://www.justice.gov/usao/iln/pr/chicago/2014/pr0609_01.html).

6. United States v. Egan, No. 1:10-cr-00033 (N.D. Ill. Mar. 12, 2015) (Notification of Docket Entry).

7. Press Release, U.S. Attorney's Office for the W. Dist. of La., U.S. Dep't of Justice, Youngsville Company Owner Pleads Guilty to Negligently Discharging Pollutants into Vermillion River (Mar. 12, 2014), <http://www.justice.gov/usao/law/news/wdla20140312a.html>.

the site,” and brought charges against the gauger and his company.<sup>8</sup> Facing the possibility of a year in prison and a fine of \$100,000 or more, the defendant agreed that he “negligently discharged or caused the discharge” of a mixture of produced water and crude oil from the site into a river without a permit.<sup>9</sup> The defendant was ordered to pay \$10,025.<sup>10</sup>

- Enforcement actions brought under the Clean Water Act in connection with the 2010 explosion of the *Deepwater Horizon* and resulting oil spill in the Gulf of Mexico have produced record-breaking criminal fines. BP Exploration & Production Inc. (BP), operator of the *Macondo* offshore lease, pled guilty to a violation of the Clean Water Act, in combination with other violations, and was required to pay \$4 billion.<sup>11</sup> Transocean, BP’s drilling contractor and owner and operator of the *Deepwater Horizon*, pled guilty to negligently discharging oil into the Gulf of Mexico, and paid \$400 million in criminal penalties.<sup>12</sup> Transocean also agreed to pay \$1 billion in civil penalties.<sup>13</sup> The government continues to litigate against BP and other defendants for *civil* penalties under section 311 of the Clean Water Act; civil monetary penalties, which will be based on the number of barrels of oil spilled, could dwarf the criminal fines.
- In September 2008, CITGO pleaded guilty to the negligent discharge of waste oil from storm water and wastewater storage tanks at a Louisiana petroleum refinery and paid a \$13 million criminal fine.<sup>14</sup> Federal enforcement authorities are also seeking substantial civil fines in on-going litigation.<sup>15</sup>

Section II below provides a high-level summary of the Clean Water Act’s major regulatory programs and civil and criminal enforcement provisions. Section

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8. DEP’T OF JUSTICE, APRIL 2014 ENVTL. CRIMES SECTION MONTHLY BULLETIN 9 (2014), *available at* [http://www.justice.gov/enrd/2014/public\\_bulletin\\_April\\_\\_2014\\_\\_final.pdf](http://www.justice.gov/enrd/2014/public_bulletin_April__2014__final.pdf).

9. United States v. Robbie Mouton, No. 6:13-CR-00135 (W.D. La. Mar. 12, 2014) (Stipulated Factual Basis for Guilty Plea).

10. *Id.* (Sept. 3, 2014) (Amended Judgment in a Criminal Case).

11. United States v. BP Exploration & Prod., Inc., No. 2:12-cr-00292-SSV-DEK (E.D. La. Nov. 2012), *available at* <http://www.justice.gov/iso/opa/resources/43320121115143613990027.pdf>. Under BP’s plea agreement, BP’s sentence included payment of criminal recoveries totaling \$4 billion, including criminal fines totaling \$1.256 billion. *Id.*

12. Cooperation Guilty Plea Agreement, United States v. Transocean Deepwater Inc., No. 13-001 “H” (E.D. La. Jan. 3, 2013), *available at* <http://www.justice.gov/sites/default/files/opa/legacy/2013/01/03/transocean-plea-agreement.pdf>. Under Transocean’s plea agreement, Transocean’s sentence included payment of criminal recoveries totaling \$400 million, including a criminal fine of \$100 million. *Id.*

13. Partial Consent Decree, *In re* Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, No. 2:10-md-02179-CJB-SS (E.D. La. Jan. 3, 2013), *available at* <http://www.justice.gov/iso/opa/resources/915201313122945254063.pdf>.

14. Plea Agreement at 6, United States v. CITGO Petroleum Corp., No. 2:08-cr-00077-PM-KK (W.D. La. Sept. 17, 2008).

15. United States v. CITGO Petroleum Corp., No. 2:08-cv-00893-TLM-MEM (W.D. La. June 24, 2008); United States v. CITGO Petroleum Corp., 723 F.3d 547 (5th Cir. 2013) (remanding case to district court for further consideration of penalty).

III focuses on the statute's exceptionally broad misdemeanor enforcement provision, which some courts have construed to criminalize conduct meeting a simple negligence standard. Finally, Section IV explains how energy companies can minimize their enforcement exposure under the Clean Water Act by implementing strong regulatory compliance and risk management programs tailored to their particular operations.

## II. THE CLEAN WATER ACT CREATES THE POTENTIAL FOR SIGNIFICANT CIVIL AND CRIMINAL LIABILITY AND COLLATERAL CONSEQUENCES

### A. *Clean Water Act Programs*

The Clean Water Act's overarching goal is "[r]estoration and maintenance of the chemical, physical and biological integrity of the Nation's waters."<sup>16</sup> To attain this objective, the statute establishes:

- The National Pollutant Discharge Elimination System (NPDES), a permit program under section 402 of the Clean Water Act to govern discharges of pollutants from "point sources" into "navigable waters," which are defined as "waters of the United States, including the territorial seas;"<sup>17</sup>
- A pretreatment program under section 307(b)(1),<sup>18</sup> which governs indirect discharges to publicly owned treatment works (POTWs) and requires such discharges to be "pretreated"<sup>19</sup> so that they do not interfere with POTW treatment processes or contaminate sewage sludge;<sup>20</sup>
- The section 404 permit program, which governs discharges of dredged or fill material into navigable waters, including wetlands; and
- Section 311 authority, which governs spills of oil and other hazardous substances to navigable waters, adjoining shorelines, or into or upon waters

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16. 33 U.S.C. § 1251(a) (2012).

17. 33 U.S.C. § 1362(7) (2013). A "point source" is:

[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

*Id.* § 1362(14).

18. EPA's regulations implementing the pretreatment program are codified at 40 C.F.R. pt. 403.

19. "The term *Pretreatment* means the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW." 40 C.F.R. § 403.3(s) (2005).

20. See generally *Pretreatment*, EPA, available at <http://water.epa.gov/polwaste/npdes/pretreatment/index.cfm> (last visited Apr. 6, 2015); *Unconventional Extraction in the Oil and Gas Industry*, EPA, available at <http://water.epa.gov/scitech/wastetech/guide/oilandgas/unconv.cfm> (last visited Apr. 6, 2015); *Process Wastewater—Indirect Discharge to Publically Owned Treatment Works (POTWs)*, NATURAL GAS EXTRACTION PORTAL, available at [http://envcap.org/energy/id\\_potw.cfm](http://envcap.org/energy/id_potw.cfm) (last visited Apr. 6, 2015).

of the contiguous zone, and establishes requirements for preventing, reporting, and responding to spills.

EPA has principal responsibility for administering and enforcing the Clean Water Act. However, the statute provides for a dual federal/state regulatory scheme under which EPA may delegate regulatory and enforcement authority to states whose programs meet standards set by EPA.<sup>21</sup> Even in delegated states, however, EPA retains independent enforcement authority.<sup>22</sup>

Other federal agencies share regulatory and enforcement responsibility with EPA under certain Clean Water Act programs. For example, EPA and the U.S. Army Corps of Engineers (Corps) jointly administer the section 404 permitting program for discharges of dredged or fill material. Similarly, spill prevention and response authority under section 311 is allocated among EPA, the U.S. Department of the Interior (DOI), and the U.S. Department of Transportation (DOT).<sup>23</sup> EPA is responsible for non-transportation-related offshore facilities located landward of the coast line; DOT is responsible for transportation-related facilities, including pipelines, located landward of the coast line; and DOI is responsible for facilities, including pipelines, located seaward of the coast line.<sup>24</sup>

#### *B. Enforcement under the Clean Water Act*

The Clean Water Act provides a variety of enforcement tools and remedies. Depending on the violation, EPA may seek administrative, civil, or criminal penalties and obtain injunctive relief.<sup>25</sup> EPA refers more serious civil cases and all criminal cases to the U.S. Department of Justice (DOJ) to litigate.<sup>26</sup> In criminal cases, EPA's criminal enforcement program assists prosecutors by providing evidence, forensic analyses, and legal guidance.<sup>27</sup>

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21. 33 U.S.C. § 1251(b) (calling for states to manage permit programs under the Clean Water Act). This article focuses on federal enforcement; state enforcement actions and related policies often employ the same general principles as their federal counterparts.

22. 33 U.S.C. § 1342(i) (2014) ("Nothing in this section shall be construed to limit the authority of the [EPA] Administrator to take action pursuant to section 1319 of this title."); *see also* 33 U.S.C. § 1342(d) (authorizing EPA to veto a proposed permit if it concludes that the permit violates the Clean Water Act).

23. Exec. Order 12777, 56 Fed. Reg. 54,757 (Oct. 22, 1991). The Coast Guard retained its delegated responsibilities under section 311 when Congress transferred the agency from DOT to the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 888(b)-(c), 116 Stat. 2135, 2249 (2002).

24. Memorandum of Understanding Among the Secretary of the Interior, Secretary of Transportation, and Administrator of the Environmental Protection Agency, 40 C.F.R. pt. 112, app. B (2000).

25. 33 U.S.C. §§ 1319(b) (injunctive relief), (c) (criminal penalties), (d) (civil penalties), (g) (administrative penalties) (2014); 33 U.S.C. §§ 1321(b)(6)(B) (administrative penalties for unauthorized releases of oil or hazardous substances), (b)(7) (civil penalties for unauthorized releases of oil or hazardous substances) (2014).

26. EPA, Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies (Aug. 28, 1987).

27. *OCEFT At a Glance*, Office of Enforcement, Forensics and Training, EPA.GOV, available at [http://www2.epa.gov/sites/production/files/2013-11/documents/oceft-at-a-glance\\_0.pdf](http://www2.epa.gov/sites/production/files/2013-11/documents/oceft-at-a-glance_0.pdf) (last visited Apr. 6, 2015).

Section 309 of the Clean Water Act authorizes the imposition of penalties on “any person.”<sup>28</sup> For purposes of enforcement, “person” is broadly defined to include, among others, an “individual, corporation, . . . association,” and “any responsible corporate officer.”<sup>29</sup> Section 311 provides for the imposition of penalties for unauthorized discharges of oil or hazardous substances on “[a]ny person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility” from which the discharge occurred.<sup>30</sup>

The current inflation-adjusted maximum fines<sup>31</sup> under the Clean Water Act are:

- Administrative penalties: \$16,000 per violation or per day, up to a total of \$187,500;<sup>32</sup>
- Civil penalties for NPDES or section 404 permit program violations: \$37,500 per day for each violation;<sup>33</sup>
- Civil penalties for section 311 violations: \$37,500 per day or \$2,100 per barrel of oil discharged;<sup>34</sup>
- Civil penalties for section 311 violations resulting from gross negligence or willful misconduct: \$150,000 minimum or \$5,300 per barrel;<sup>35</sup>
- Criminal penalties:
  - Negligent violations: \$25,000 per day of violation for first conviction, \$50,000 per day for subsequent convictions;<sup>36</sup> and
  - Knowing violations: \$50,000 per day of violation for first conviction, \$100,000 per day for subsequent convictions.<sup>37</sup>

Monetary penalties for criminal violations can balloon under the Alternative Fines Act, which provides for the imposition of fines in federal criminal cases in amounts up to double the loss or gain associated with the violation.<sup>38</sup>

28. 33 U.S.C. § 1319(a)(1).

29. *Id.* §§ 1319(c)(6), 1362(5).

30. *Id.* § 1321(b)(7).

31. These amounts are higher than those listed in the statute due to inflation adjustments under EPA’s Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66,643, 66,647-48 (Nov. 6, 2013) (codified at 40 C.F.R. § 19.4).

32. 33 U.S.C. §§ 1319(g)(2)(A)-(B), 1321(b)(6)(B)(i)-(ii).

33. *Id.* § 1319(d).

34. *Id.* § 1321(b)(7)(A).

35. *Id.* § 1321(b)(7)(D).

36. *Id.* § 1319(c)(1).

37. *Id.* § 1319(c)(2).

38. Under 18 U.S.C. § 3571(d) (2014),

[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the

Individuals convicted of violating the Clean Water Act—including “responsible corporate officers”—face imprisonment in addition to criminal fines.<sup>39</sup> “Knowing” violations are felonies that carry prison sentences of up to three years.<sup>40</sup> “Negligent” violations are misdemeanors that carry up to a one-year prison term.<sup>41</sup> As discussed in Section III below, the misdemeanor enforcement provision of the Clean Water Act is exceptionally broad and has been interpreted by several courts to incorporate a civil standard of “ordinary” or “simple” negligence rather than a higher criminal standard of gross negligence.<sup>42</sup>

### C. Collateral Consequences: Disqualification, Suspension, and Debarment

In addition to potential jail time and fines, a criminal conviction under the Clean Water Act can result in disqualification, debarment, or suspension from doing business with the federal government. Disqualification is facility-specific and applies automatically by statute upon conviction of either a misdemeanor or felony offense.<sup>43</sup> Disqualification extends (per EPA’s regulations) to all

gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

This provision was invoked to increase the criminal fine imposed on Transocean in the *Deepwater Horizon* case by three orders of magnitude, from \$200,000 to \$100 million. Cooperation Guilty Plea Agreement, *supra* note 12, at 5. In addition, 18 U.S.C. § 3571(e) provides:

If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

This separate provision has been invoked to increase criminal penalties under the Clean Water Act. *See, e.g.,* United States v. Hong, 242 F.3d 528, 533 (4th Cir. 2001) (holding that, although the maximum fine under the Clean Water Act as the “statute of conviction” was \$300,000, a total fine of \$1.2 million could be imposed under the “alternative fine statute”).

39. In *Hong*, the Fourth Circuit upheld the conviction of the owner of a wastewater treatment facility for negligently violating pretreatment requirements under the Clean Water Act, based on the discharge of untreated water by the facility’s employees. *Hong*, 242 F.3d at 532. The Fourth Circuit cited United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998), for the conclusion that a “responsible corporate officer” may be someone who merely has “authority to exercise control over the corporation’s activity that is causing the discharges.” *Hong*, 242 F.3d at 531. The Fourth Circuit found that, even though the defendant was not formally a corporate officer, he could be held criminally responsible based on his degree of control over facility operations. *Id.* at 532.

40. Under 33 U.S.C. § 1319(c)(2),

[a]ny person who . . . knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation . . . shall be punished by a fine . . . or by imprisonment for not more than 3 years, or by both.

41. Under 33 U.S.C. § 1319(c)(1),

[a]ny person who . . . negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation . . . shall be punished by a fine . . . or by imprisonment for not more than 1 year, or by both.

As one court has explained it, “an individual commits [this] crime by (1) negligently, (2) discharging, (3) a pollutant, (4) from a point source, (5) into the navigable waters of the United States, (6) without a permit.” United States v. Ortiz, 427 F.3d 1278, 1282 (10th Cir. 2005).

42. *Ortiz*, 427 F.3d at 1283.

43. The Clean Water Act provides:

No Federal agency may enter into any contract with any person, who has been convicted of any offense under [Clean Water Act] section 1319(c) . . . for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person.

transactions throughout the federal government, and stays in effect until the violator successfully petitions for reinstatement of the “violating facility.”<sup>44</sup>

Debarment and suspension are discretionary actions, and unlike disqualification, can be applied to an entire company, including its affiliates. Suspension is a temporary and immediate prohibition from participating in government transactions, which stays in effect for a specified period of time (generally up to twelve months, although the time can be extended under certain circumstances).<sup>45</sup> Debarment may become effective only after a debarring official issues a decision, and after giving a company the opportunity to protest.<sup>46</sup> Debarment stays in effect for a longer specified period of time (generally not more than three years, but subject to extensions).<sup>47</sup>

Federal regulations establish several potential causes for debarment or suspension,<sup>48</sup> and debarring officials may consider several factors in determining whether to debar or suspend a company.<sup>49</sup> Clean Water Act violations may trigger the suspension or debarment process based on these causes and factors. For example, EPA has found that a conviction for negligent wastewater discharges in violation of the Clean Water Act is a basis for debarment.<sup>50</sup> Similarly, EPA has determined that even where a company has paid restitution and pled guilty to negligent permit violations, “[t]he actual or potential harm or impact that results or may result from the wrongdoing”<sup>51</sup> may be an aggravating factor in a debarment decision.<sup>52</sup> The most prominent recent example of debarment in the energy industry occurred after the *Deepwater Horizon* incident, when BP and certain affiliated companies were prohibited from entering into new contracts with the federal government, including new deep-water leases in the Gulf of Mexico, for nearly four years.<sup>53</sup>

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33 U.S.C. § 1368(a).

44. EPA regulations extend disqualification to both covered non-procurement transactions as defined in 2 C.F.R. pt. 180 (2014) and the other agency-specific parts of title 2 of the Code of Federal Regulations and procurement awards prohibited by the Federal Acquisition Regulation. 48 C.F.R. pt. 9, subpart 9.4 (2001); 2 C.F.R. § 1532.1110 (2007); *see generally* Statutory Disqualification and Reinstatement under the Clean Air and Water Acts, 2 C.F.R. pt. 1532, subpart J (2007).

45. *See generally* 2 C.F.R. §§ 180.700-760 (subpart g).

46. *See generally* 2 C.F.R. §§ 180.800-885 (subpart h).

47. *See generally* 2 C.F.R. pt. 180.

48. 2 C.F.R. §§ 180.700 (causes for suspension), 180.800 (causes for debarment).

49. *Id.* § 180.860.

50. *In re* DWC Corporation, Case No. 11-0026-00A, 2011 WL 5356837 (EPA Nov. 2, 2011) (EPA Office of Grants and Debarments) (citing 2 C.F.R. § 180.800(a)(4), which states, “[a] Federal agency may debar a person for . . . [c]onviction of or civil judgment for . . . [c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects [the person’s] present responsibility.”).

51. 2 C.F.R. § 180.860(a).

52. *In re* DWC Corp., 2011 WL 5356837, at \*5.

53. Press Release, BP U.S. Press Office, BP Reaches Administrative Agreement with EPA Resolving Suspension and Debarment (Mar. 13, 2014), <http://www.bp.com/en/global/corporate/press/press-releases/bp-reaches-administrative-agreement-with-epa.html>.

### III. THE PREVAILING LEGAL STANDARDS GIVE PROSECUTORS BROAD DISCRETION

Among the panoply of federal environmental laws, only the Clean Water Act and the Clean Air Act provide for the imposition of misdemeanor criminal penalties for negligence.<sup>54</sup> The Clean Air Act makes it a misdemeanor to negligently release a hazardous air pollutant *and* thereby place “another person in imminent danger of death and serious bodily injury.”<sup>55</sup> Unlike its Clean Air Act counterpart, the Clean Water Act negligence provision is not limited to violations involving human endangerment.<sup>56</sup> Because of its broad reach, the Clean Water Act has become the “principal environmental statute that has been used to prosecute significant pollution events under a negligence theory.”<sup>57</sup> As explained below, the case law interpreting the meaning of “negligence” under the Clean Water Act has blurred the line between civil and criminal conduct, leaving prosecutors substantial discretion to pursue criminal penalties for unintended violations, including accidents resulting in prohibited releases of oil and hazardous substances.

#### A. *Simple or Gross Negligence Standard for Misdemeanors?*

Section 309(c) of the Clean Water Act authorizes the imposition of criminal penalties on any person who “negligently” violates any of the statutory provisions enumerated in section 309(c) or any permit condition or limitation.<sup>58</sup> The statute does not define the term “negligently.” Nor does the statute’s legislative history shed any real light on what standard of liability Congress intended.<sup>59</sup> It has therefore been left to the courts to determine the applicable standard, and three United States Courts of Appeals have held that the common law “ordinary” or “simple” negligence standard applies.<sup>60</sup>

In *Hanousek v. United States*, the Ninth Circuit Court of Appeals upheld an individual defendant’s conviction under the Clean Water Act for “negligently”

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54. 33 U.S.C. § 1319(c)(1); 42 U.S.C. § 7413(c)(4) (2013).

55. 42 U.S.C. § 7413(c)(4).

56. Compare 33 U.S.C. § 1319(c)(1) with 42 U.S.C. § 7413(c)(4).

57. Stacey P. Geis, *An Accident Waiting to Happen? Prosecuting Negligence-Based Environmental Crimes*, 59(4) U.S. ATTORNEYS’ BULLETIN 33 (July 2011). See also David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL. L. REV. 159, 186 (2014) (identifying Clean Water Act as “the most frequently charged environmental statute”).

58. 33 U.S.C. § 1319(c)(1).

59. The government, represented by the Solicitor General, has pointed to statements from U.S. Representative William Harsha to argue that the simple negligence interpretation is “supported by legislative history.” Brief for the United States in Opposition, *Hanousek v. United States*, 528 U.S. 1102 (2000) (No. 99-323), 1999 WL 33633015, at \*5-6, \*9. In opposition to a 1972 amendment that would have created an offense in the Clean Water Act for violating an order of the Administrator, Rep. Harsha stated, “I would like to call to the attention of my colleagues the fact that in this legislation we already can charge a man for simple negligence, we can charge him with a criminal violation under this bill for simple negligence.” *Id.* at \*9 (citing 118 Cong. Rec. 10,644 (1972)). Because the Supreme Court denied *certiorari* in *Hanousek*, and because courts have decided cases regarding the interpretation of “negligently” based on the plain language of the statute, courts have not had occasion to determine what weight, if any, a single comment by one legislator should be accorded.

60. *Hanousek*, 176 F.3d at 1125; *Ortiz*, 427 F.3d at 1282; *United States v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012).

discharging a harmful quantity of oil into navigable waters.<sup>61</sup> In that case, the defendant was the supervisor of a quarrying project when a backhoe operator struck and ruptured an above-ground petroleum pipeline, discharging between 1,000 and 5,000 gallons of oil into the Skagway River in Alaska.<sup>62</sup> The individual backhoe operator who physically caused the incident worked for a contracting company hired by the defendant's employer.<sup>63</sup> The defendant was off duty and at home at the time of the spill.<sup>64</sup> The government's evidence showed that it had been "customary" during the quarrying project "to protect the pipeline with railroad ties and fill when using heavy equipment in the vicinity of the pipeline."<sup>65</sup> However, when the defendant took responsibility for supervising the project, this practice was suspended, which ultimately resulted in the accidental spill.<sup>66</sup>

The issue in *Hanousek* was whether simple negligence was sufficient to establish an offense.<sup>67</sup> The district court instructed the jury that it could find the defendant guilty of a negligent violation for "the failure to use reasonable care."<sup>68</sup> In doing so, the court rejected the defendant's proposed jury instruction, derived from the Model Penal Code, which would have defined negligence as "a gross deviation from the standard of care that a reasonable person would observe in the situation."<sup>69</sup> The Ninth Circuit upheld the district court's application of a simple negligence standard, finding that the legislative purpose is expressed by the "ordinary meaning" of the language used in a statute, and that the ordinary meaning of "negligence," according to Black's Law Dictionary and the Random House Dictionary, is a "failure to use such care as a reasonably prudent and careful person would use under similar circumstances."<sup>70</sup> It reasoned further that if "Congress intended to prescribe a heightened negligence standard, it could have done so explicitly" as it did years later under section 311 of the statute, which imposes increased civil penalties for oil and hazardous substance discharges resulting from gross negligence or willful misconduct.<sup>71</sup> The Ninth Circuit also rejected Hanousek's contention that his conviction violated due process because he did not have notice or actual knowledge that his conduct violated the Clean Water Act.<sup>72</sup> The court concluded that the Clean Water Act constitutes public welfare legislation and therefore did not require knowledge of the law to sustain a conviction.<sup>73</sup>

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61. *Hanousek*, 176 F.3d at 1125.

62. *Id.* at 1119.

63. *Id.*

64. *Hanousek*, 528 U.S. at 1102.

65. *Hanousek*, 176 F.3d at 1124.

66. *Id.* at 1119.

67. *Id.* at 1120-21.

68. *Id.* at 1120.

69. *Id.* at 1120, 1124; MODEL PENAL CODE § 2.02(d) (2013) (emphasis added).

70. *Hanousek*, 176 F.3d at 1120-21 (citing BLACK'S LAW DICTIONARY 1032 (6th ed. 1990); THE RANDOM HOUSE COLLEGE DICTIONARY 891 (Rev. ed. 1980)).

71. *Hanousek*, 176 F.3d at 1121.

72. *Id.* at 1121-22.

73. *Id.* The Supreme Court denied *certiorari* in *Hanousek*, with Justices Thomas and O'Connor dissenting from the denial on the grounds that the Ninth Circuit erred in finding that the Clean Water Act is a public welfare statute. *Hanousek*, 120 S. Ct. at 860. In his dissent, Justice Thomas found that it was "erroneous" to consider the Clean Water Act public welfare legislation because it does not regulate only "dangerous and deleterious

In *United States v. Ortiz*, the Tenth Circuit Court of Appeals held that the manager of a propylene glycol distillation facility was properly convicted by the jury for negligently violating the Clean Water Act based on his repeated disposal of process wastewater down a toilet.<sup>74</sup> The Tenth Circuit rejected the defendant's contention that the government would have to prove that he knew the wastewater would discharge into the Colorado River, holding that it would be sufficient for the government to show that the defendant was negligent in flushing industrial wastewater down the toilet.<sup>75</sup> The Tenth Circuit cited *Hanousek* in concluding that the "ordinary meaning" of negligence is "a failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance"—in other words, the standard of liability is simple negligence.<sup>76</sup> The standard was met because investigators had informed Ortiz that they had traced a black, onion-smelling substance (found to be propylene glycol) from the river to a storm drain and ultimately to his facility.<sup>77</sup> The government presented evidence that after receiving this notification, Ortiz again dumped propylene glycol into the toilet.<sup>78</sup> Although Ortiz may not have known with certainty that the material he put in the toilet would flow into the river, the information he received from the investigators concerning that likelihood made his conduct negligent in the view of the Tenth Circuit.<sup>79</sup>

Finally, in *United States v. Pruett*, the Fifth Circuit reviewed both felony and misdemeanor convictions of two corporate entities and their President and Chief Executive Officer (CEO) for multiple Clean Water Act violations at six of the twenty-eight wastewater treatment plants they owned and operated in Louisiana.<sup>80</sup> In upholding felony convictions associated with one of the plants, the court observed that violations at the plant had occurred nearly constantly over the course of four years, and the CEO, who was "familiar with his permit obligations," had installed an old rail car for use in wastewater treatment even though he knew this

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devices," but also "standard equipment," and because it imposes penalties more serious than are appropriate for "public welfare" offenses. *Hanousek*, 176 F.3d at 1103. Justice Thomas warned that the Ninth Circuit's definition of negligence would inappropriately "expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations." *Id.* In 2014, the United States District Court for the Eastern District of Louisiana dismissed due process challenges to criminal negligence charges, including an alleged Clean Water Act violation under sections 309(c)(1)(A) and 311(b)(3), brought against two BP well-site leaders who were on board the *Deepwater Horizon* during the April 20, 2010 explosion. *United States v. Kaluza*, No. 12-265, 2014 WL 295051, at \*6 (E.D. La. Jan. 27, 2014). The court rejected the defendants' assumption that "in order to be negligent or grossly negligent, an external standard of care must exist." *Id.* at \*5. The court stated that, unlike professional malpractice claims that typically rely on an external standard, established by expert testimony, the Clean Water Act's ordinary negligence and gross negligence standards have "well-settled meanings." *Id.* The court concluded that those standards rely on "common understanding," and did not need to derive from a specific industry standard. *Id.* As a result, the court found that the Clean Water Act was not void for vagueness. *Id.* at \*1.

74. *Ortiz*, 427 F.3d at 1278-80.

75. *Id.* at 1279.

76. *Id.* at 1283.

77. *Id.* at 1280-81.

78. *Id.*

79. *Id.* at 1283-84.

80. *Pruett*, 681 F.3d at 236-37 (relying on dictionary definitions of negligence to affirm defendant's conviction for a "negligent" violation of the Clean Water Act under a jury instruction based on simple negligence).

“unorthodox makeshift” measure was unauthorized.<sup>81</sup> The court upheld the CEO’s misdemeanor conviction under section 309(c) of the Clean Water Act for negligent operation of another plant based on evidence that four feet of sludge had accumulated in a tank that normally should have no sludge and that the sludge was unlawfully discharged into a creek.<sup>82</sup> The evidence showed that the CEO was aware of the “appropriate standard of care,” but allowed the plant to operate in a manner inconsistent with that standard.<sup>83</sup> The CEO contended that the lower court improperly instructed the jury to apply a simple negligence standard under section 309(c) and should have given a gross negligence instruction based on the Model Penal Code.<sup>84</sup> The Fifth Circuit rejected that argument, finding that “negligence” is a “plain and unambiguous term” that, according to Black’s Law Dictionary, means “failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.”<sup>85</sup> As in *Hanousek*, the Fifth Circuit pointed to the gross negligence language in section 311 of the statute and observed that Congress is presumed to have acted intentionally in omitting the language from section 309.<sup>86</sup>

### B. Grounds for Challenging the Simple Negligence Standard

Although no court has yet interpreted section 309(c) to incorporate a higher standard of liability than simple negligence, *Hanousek* and its progeny are not necessarily the last word on the topic for several reasons.

First, only three circuit courts have addressed the issue, leaving the opportunity open in the remaining circuits to challenge application of a simple negligence standard.

Second, it is not clear whether the Supreme Court, as constituted today, would accept *Hanousek’s* reasoning, particularly its conclusion that simple negligence is the appropriate standard because the Clean Water Act constitutes a public welfare statute.<sup>87</sup> The public welfare offense doctrine typically is invoked to permit the imposition of criminal penalties under *strict liability* provisions (i.e., those that do not require any *mens rea* whatsoever) of statutes that govern substances or activities posing particularly serious public safety risks.<sup>88</sup> The doctrine is *not* a canon of construction and is arguably inapposite in determining the meaning of “negligence” in section 309 of the Clean Water Act.<sup>89</sup>

Third, *Hanousek*, *Ortiz*, and *Pruett* did not recognize the importance of the Model Penal Code as a guide in interpreting criminal statutes. The Supreme Court has looked to the Model Penal Code as a “source of guidance” where a criminal statute “provide[d] minimal assistance in determining what standard of intent is

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81. *Id.* at 239.

82. *Id.* at 241.

83. *Id.*

84. *Id.*

85. *Pruett*, 681 F.3d at 242 (citing BLACK’S LAW DICTIONARY 1061 (8th ed. 2004)).

86. *Id.* at 246.

87. *Hanousek*, 176 F.3d at 1122.

88. *Id.*

89. *Hanousek*, 120 S. Ct. at 860-61 (Thomas, J., dissenting from denial of petition for writ of *certiorari*).

appropriate.”<sup>90</sup> The Model Penal Code defines “negligent” crimes as those involving a “gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”<sup>91</sup> This is, in fact, consistent with the common law understanding that “negligence” in the criminal context entails a *gross* deviation from the applicable standard of care.<sup>92</sup>

Fourth, although the court in *Hanousek* relied on Black’s Law Dictionary to define “negligently” to mean simple negligence, it failed to recognize that Black’s distinguishes between civil and *criminal* negligence, and looked only to Black’s definition of civil “negligence.”<sup>93</sup> Black’s defines “*criminal* negligence” as “[g]ross negligence so extreme that it is punishable as a crime.”<sup>94</sup>

Finally, at least one court has questioned *Hanousek*’s reasoning that if “Congress intended to prescribe a heightened negligence standard, it could have done so explicitly, as it did” years later in section 311 of the Clean Water Act, which provides for increased civil penalties for discharges of oil resulting from “gross negligence or willful misconduct.”<sup>95</sup> In *United States v. Atlantic States Cast Iron Pipe Co.*, the defendants were charged with negligently violating the Clean Water Act by discharging wastewater without a permit.<sup>96</sup> The United States District Court for the District of New Jersey held that because *Hanousek* was the leading appellate case “interpreting the definition of negligence” under section 309(c) of the Clean Water Act, criminal penalties could be imposed based on a

90. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443-44 (1978).

[T]he language of the [criminal statute at issue] provides minimal assistance in determining what standard of intent is appropriate, and the sparse legislative history of the criminal provisions is similarly unhelpful. We must therefore turn to more general sources and traditional understandings of the nature of the element of intent in the criminal law. . . . The . . . Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type.

*Id.* See also *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969):

Nothing in the legislative history of [the statutory section at issue] is of aid in determining the intended scope of the word ‘knowing,’ as it is used in that section. In making that determination, we have employed as a general guide the definition of ‘knowledge’ which appears in the Proposed Official Draft of the Model Penal Code, at 27 (1962).

91. See generally MODEL PENAL CODE § 2.02(d). Similarly, several state penal codes and the federal sentencing guidelines define negligent crimes as requiring a “gross” deviation from the applicable standard of care. See, e.g., TEX. PENAL CODE ANN. § 6.03(d) (West 2003); LA. REV. STAT. ANN. § 14:12 (2007); U.S. SENTENCING GUIDELINES MANUAL § 2A1.4 cmt. 1 (2011) (criminal negligence is “a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless”).

92. See, e.g., *State v. Cacchiotti*, 568 A.2d 1026, 1030 (R.I. 1990) (explaining that “gross negligence is equated with the term ‘criminal negligence’”). The overwhelming majority of negligence crimes impose liability only under the common law/Model Penal Code heightened standard:

The tort-negligence concept . . . applies in only a relatively few modern statutory crimes. More often, it is a concept applicable to a defense to crime, rather than an element in the crime itself, as in the defense of self-defense. But for the most part, as we have seen, something more than negligence is required for criminal liability.

Wayne R. LaFare, 1 SUBSTANTIVE CRIM. L. § 5.4(a)(2) (2d Ed. 2003).

93. *Hanousek*, 176 F.3d at 1120.

94. BLACK’S LAW DICTIONARY 1838 (10th ed. 2014) (citing Professors LaFare and Scott’s treatise on Criminal Law and the Model Penal Code) (emphasis added).

95. *Hanousek*, 176 F.3d at 1121; see also 33 U.S.C. § 1321(b)(7)(D).

96. *United States v. Atl. States Cast Iron Pipe Co.*, No. 03-852 (MLC), 2007 U.S. Dist. LEXIS 56562 (D.N.J. Aug. 2, 2007).

“civil or ordinary negligence definition.”<sup>97</sup> The district court acknowledged, however, the Supreme Court’s reasoning in *Safeco Insurance Co. v. Burr* that “[t]he vocabulary of the criminal side of [the statute in question] is . . . beside the point in construing the civil side.”<sup>98</sup> Because the Ninth Circuit in *Hanousek* had also used language in civil provisions of the Clean Water Act to help interpret the criminal provisions of the statute—the “type of reasoning [that] was explicitly rejected” in *Safeco*—the district court in *Atlantic States* noted that “there is good reason to scrutinize carefully that aspect of *Hanousek*, rather than accepting it as controlling.”<sup>99</sup> On appeal, the Third Circuit did not reach the issue for unrelated reasons, but expressly left open the possibility that *Safeco*’s holding could affect “future case law addressing the Clean Water Act.”<sup>100</sup>

For the foregoing reasons, a defendant facing misdemeanor charges under section 309(c) has reasonable grounds to challenge application of the simple negligence standard and should consider doing so if the facts of the particular case are sympathetic and can be distinguished from the facts in the three circuit court decisions. In this regard, it is important to highlight that both *Pruett* and *Ortiz* involved apparently knowing misconduct, while *Hanousek* involved the suspension of a “customary” safety practice. Based on these cases and other precedent, the courts take into account the following factors in determining what constitutes criminal negligence under section 309 of the Clean Water Act:

- The defendant’s position of control, responsibility, or supervisory authority;<sup>101</sup>
- The defendant’s prior notice of possible consequences or risks;<sup>102</sup>
- The degree of departure from industry standards or customary safety precautions;<sup>103</sup>
- The maintenance of safety measures and equipment;<sup>104</sup> and
- Any efforts to avoid detection.<sup>105</sup>

Courts may be more willing to revisit the liability standard under section 309(c) in cases involving purely accidental releases or other unintentional violations, particularly where the defendant can show that it had strong compliance and risk management procedures in place. The next section evaluates

97. *Id.* at \*42, \*122.

98. *Id.* at \*43 n.17 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 60 (2007)).

99. *Id.*

100. *See generally* *United States v. Maury*, 695 F.3d 227, 258-59 (3d Cir. 2012).

101. *See, e.g., Hanousek*, 176 F.3d at 1124-25 (Hanousek, who was found negligent, had directed daily activities at the site, including the failure to protect the pipeline that ruptured.); *Hong*, 242 F.3d at 532 (upholding defendant’s conviction for negligence based on his control over company’s finances, including decision not to purchase filtration media that would have prevented the spill).

102. *See, e.g., Ortiz*, 427 F.3d at 1284.

103. *See, e.g., Hanousek*, 176 F.3d at 1124-25; *Pruett*, 681 F.3d at 241.

104. *United States v. Kelly*, 238 F.3d 425, 2000 WL 1909397, at \*4 (6th Cir. Dec. 28, 2000) (citing “careless storage” of a toxin as possible basis for negligent violation for its discharge).

105. *United States v. Rosenblum*, No. 07-294 (JRT/FLN), 2008 WL 4104692, at \*2 (D. Minn. Aug. 29, 2008) (jury could reasonably find defendant was negligent where record showed defendant’s company changed its wastewater discharge procedures when regulators began monitoring, and that defendant reprimanded an employee for reporting a spike in cyanide levels exceeding company’s permit limit).

governmental policies guiding DOJ and EPA in their decision on whether to bring enforcement actions in the first place, and the nature of the enforcement.

*C. Enforcement Authorities Have Broad Discretion in Deciding Whether to Bring Criminal or Civil Charges*

The possibility of a prosecution based on simple negligence places enormous power in the hands of prosecutors. Although EPA and DOJ have issued a number of policy pronouncements stating that criminal charges will be brought in only the most severe cases, they are not enforceable in court and are broadly worded.<sup>106</sup> Nevertheless, it is important for energy companies to understand what factors influence enforcement authorities' decision-making so they can take the steps that will best support a bid for leniency in the unfortunate event that a violation occurs.

In deciding whether to proceed with criminal or civil enforcement, enforcement authorities consider a number of factors.<sup>107</sup> In 1987, EPA issued guidance on when it would refer matters to DOJ for criminal prosecution.<sup>108</sup> That guidance states:

Whether a particular matter should be considered for criminal prosecution will be determined on the basis of criteria which include the following:

- (a) Was the conduct knowing or negligent?
  - (b) Was the conduct egregious in nature (e.g., a blatant disregard for commonly known requirements)?
  - (c) Did the conduct cause foreseeable environmental harm?
  - (d) Was the conduct characteristic of a type which especially should be deterred?
  - (e) Was the violator from a category to which it is especially important to convey a deterrent message?
  - (f) Did the conduct involve a particularly dangerous material?
  - (g) Did the violation reflect conduct by responsible corporate officers or employees?
- This list should not be considered exclusive, and other circumstances may arise which also make a particular matter appropriate for criminal prosecution.<sup>109</sup>

In 1991, DOJ issued a policy memorandum for environmental cases stating that the exercise of prosecutorial discretion should be based on the following factors: (1) voluntary disclosure; (2) cooperation; (3) preventative measures and compliance programs; (4) pervasiveness of noncompliance; (5) internal disciplinary action; and (6) efforts to remedy ongoing noncompliance.<sup>110</sup> The DOJ memorandum set forth a "goal of encouraging critical self-auditing, self-policing, and voluntary disclosure."<sup>111</sup> Similar principles appear in the U.S. Attorney's Manual.<sup>112</sup>

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106. See generally *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator*, U.S. DEP'T OF JUSTICE (July 1, 1991) [hereinafter *DOJ Factors*], available at <http://www.justice.gov/enrd/3058.htm>.

107. *Id.*

108. Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies, *supra* note 26.

109. *Id.* at 4-5.

110. *DOJ Factors*, *supra* note 106.

111. *Id.*

112. See generally Dep't of Justice, U.S. Attorney's Manual, 9-27.000 (Principles of Federal Prosecution), and 9-28.000 (Principles of Federal Prosecution of Business Organizations), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/title9.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm).

In 1994, the EPA Office of Criminal Enforcement issued a policy memorandum entitled “The Exercise of Investigative Discretion.”<sup>113</sup> The memorandum stated that criminal enforcement “should target the most significant and egregious violators.”<sup>114</sup> The memorandum sets out “factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities.”<sup>115</sup> These factors include whether: actual harm was evident or the threat of significant harm may be demonstrated; a violator failed to self-report; a violation was part of an industry trend; or culpable conduct occurred (such as deliberate misconduct, concealment of misconduct, falsification of records, tampering with monitoring or control equipment, operations without required permits, and a history of repeated violations).<sup>116</sup>

More recent commentary echoes this guidance.<sup>117</sup> A 2011 article in the United States Attorneys’ Bulletin listed hypothetical questions a prosecutor might ask when deciding whether to bring criminal charges.<sup>118</sup> These questions pertain to the type of industry involved (e.g., “highly regulated” or not); the nature of the violation (e.g., a paperwork violation or a substantive violation, caused by one negligent act or a series of proximate causes); whether the company complied with industry standards; whether the company had a strong environmental compliance program and provided sufficient funding for it; whether the company trained employees appropriately; and whether the company committed similar violations in the past or had other warnings of its compliance risks.<sup>119</sup> The author asserted that “a prosecutor may consider actual harm or potential for harm that resulted from the negligent conduct,” but conceded that “harm is not generally an element of a water pollution violation.”<sup>120</sup> The author specifically called out the energy industry as the “type of industry” for which prosecutors may appropriately determine that negligent conduct should be criminally prosecuted.<sup>121</sup> This position is based on the premise that the energy industry is “highly regulated” and therefore “involve[s] dangerous activity that can have disastrous consequences if something goes wrong” such as “oil spills, pipeline explosions, [and] refinery leaks.”<sup>122</sup>

In evaluating the real-world risks of criminal prosecution for “negligent” violations under the Clean Water Act, it is important to consider the government’s actual track record. A recent study conducted by David Uhlmann, former chief of

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113. Memorandum from Earl E. Devaney, Dir., Office of Criminal Enforcement, EPA, to All EPA Employees Working in or in Support of the Criminal Enforcement Program 2 (Jan. 12, 1994), *available at* <http://www2.epa.gov/sites/production/files/documents/exercise.pdf>.

114. *Id.* at 3-6.

115. *Id.* at 1.

116. *Id.* at 3-6. These concepts were integrated into EPA’s “Audit Policy” in 2000, as discussed *infra* in Section IV.

117. *See, e.g.*, Geis, *supra* note 57.

118. *Id.* at 39-40.

119. *Id.*

120. *Id.* at 42.

121. *Id.* at 33-34, 43-44. At the time her article was published, Geis was listed as the Environmental Crimes Coordinator for the U.S. Attorney’s Office in San Francisco. *Id.* at 45.

122. *Id.* at 43 (“highly regulated industries such as the oil industry, the pipeline industry, the chemical manufacturing industry, the nuclear industry, the shipping industry, and the drilling industry”).

the Environmental Crimes Section at DOJ, concluded that, while only “a small percentage” (3.9%) of Clean Water Act defendants between 2005 and 2010 were prosecuted “solely for negligence” (i.e., “in the absence of knowing violations, significant harm, or deceptive conduct”),<sup>123</sup> the *total* number of defendants charged with negligence (129 of 307 defendants) “appeared high.”<sup>124</sup> This number may be influenced by the government’s use of the negligence charge in plea bargaining, with defendants pleading to misdemeanor “negligent” violations to avoid more serious charges, as a different study suggested in 2002.<sup>125</sup> The study ultimately found that conduct involving an “aggravating factor”—which Professor Uhlmann defined for purposes of the study as “(1) significant environmental harm or public health effects; (2) deceptive or misleading conduct; (3) operating outside the regulatory system; or (4) repetitive violations”<sup>126</sup>—was present in 91% of prosecutions for negligence under the Clean Water Act.<sup>127</sup> However, Professor Uhlmann considered violations that exceeded one day in duration to be “repetitive violations.” Because the failure to correct a violative condition can be charged as a separate violation under the Clean Water Act, the percentage of criminal negligence prosecutions under the statute that had no real aggravating factors may be considerably lower than 91%.<sup>128</sup>

As demonstrated above, the risk of criminal prosecution under the Clean Water Act—including for ordinary negligence—is very real. Energy industry participants can best protect themselves from this risk by adopting strong compliance and risk management programs designed to prevent violations from occurring in the first place, or, if an incident occurs, to present a sympathetic case for leniency. Section IV below addresses the elements of effective compliance programs, both from the perspective of governmental enforcement policies and penalty guidelines and from our own perspective as counsel to energy companies.

#### IV. EFFECTIVE COMPLIANCE AND RISK MANAGEMENT PROGRAMS ARE CRITICAL

Federal enforcement policies and guidelines incentivize the implementation of robust corporate compliance programs—including auditing—by providing for lenient treatment of a company that demonstrates it has an effective program. This section first explains how federal policies incentivize the development of compliance programs. The section next summarizes the elements of effective compliance programs, as defined in enforcement policies and guidelines. Finally, this section concludes with a few observations about program features that are particularly important for energy companies.

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123. Uhlmann, *supra* note 57, at 187-88 (emphasis added).

124. *Id.* at 186.

125. *Id.* at 216 n.123 (citing Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong*, 32 ENVTL. L. REP. 11153 (2002) (concluding that a majority of negligence charges resulted from “knowing conduct [being] pleaded down to negligence, or were accompanied by false statements or other deceptive conduct”)).

126. *Id.* at 164.

127. *Id.* at 208.

128. Of the 307 Clean Water Act cases in Professor Uhlmann’s data set, 62 (or 20%) did not involve repetitive violations. *Id.* at 212.

*A. Effective Compliance Programs May Help Avoid Enforcement and Reduce Penalties under Federal Policies and Guidelines*

Federal enforcement authorities may forgo enforcement altogether—or at least reduce the penalties sought—if a corporate defendant demonstrates that it has an effective compliance program.<sup>129</sup> “Effective programs do not guarantee immunity from prosecution, but the existence of a qualifying compliance program may influence a prosecutor’s decision to prosecute.”<sup>130</sup> By contrast, an *ineffective* program for corrective and preventive action can *increase* legal liability. For example, a company’s failure to follow its own compliance policies or to correct compliance problems detected in an audit could expose the company to charges of a knowing or willful violation.<sup>131</sup>

In deciding whether and how to proceed with *civil* enforcement under the Clean Water Act, EPA is guided by three separate policies: (1) Interim Clean Water Act Settlement Penalty Policy; (2) Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act; and (3) Clean Water Act Section 404 Settlement Penalty Policy.<sup>132</sup> These policies set forth “how [EPA] generally expects to exercise its enforcement discretion in deciding on an appropriate enforcement response and determining an appropriate settlement penalty,”<sup>133</sup> with an overarching goal of requiring “alleged violators to promptly correct the violations and remedy any harm caused by the violations.”<sup>134</sup> When determining whether to impose civil or administrative penalties, as well as the magnitude of such penalties, the policies require EPA to pursue four goals: (1) deterring noncompliance; (2) creating a “level playing field by ensuring that violators do not obtain an economic advantage over their competitors;” (3) ensuring consistency across the country (to avoid “pollution havens”); and (4) promoting “swift resolution.”<sup>135</sup>

EPA’s policies provide for the assessment of penalties based on the factors set forth in the Clean Water Act, but allow for case-by-case adjustments.<sup>136</sup> To

129. Melissa Ku & Lee Pepper, *Corporate Criminal Liability*, 45 AM. CRIM. L. REV. 275, 297 (2008).

130. *Id.* at 300.

131. *Id.* at 298. *See also* Memorandum from Earl E. Devaney, *supra* note 113, at 6 (“Corporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the noncompliance and correct any harm done.”).

132. ENVTL. PROT. AGENCY, INTERIM CLEAN WATER ACT SETTLEMENT PENALTY POLICY (1995) [hereinafter CWA SETTLEMENT PENALTY POLICY], *available at* <http://www2.epa.gov/sites/production/files/documents/cwapol.pdf>; OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, CIVIL PENALTY POLICY FOR SECTION 311(B)(3) AND SECTION 311(J) OF THE CLEAN WATER ACT (1998) [hereinafter 311 POLICY], *available at* <http://www2.epa.gov/sites/production/files/documents/311pen.pdf>; OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 404 SETTLEMENT PENALTY POLICY (2001) [hereinafter 404 POLICY], *available at* <http://water.epa.gov/type/wetlands/outreach/upload/404pen.pdf>.

133. CWA SETTLEMENT PENALTY POLICY, *supra* note 132, at 3; *see also* 311 POLICY, *supra* note 132, at 1; 404 POLICY, *supra* note 132, at 2.

134. CWA SETTLEMENT PENALTY POLICY, *supra* note 132, at 2; *see also* 404 POLICY, *supra* note 132, at 2.

135. CWA SETTLEMENT PENALTY POLICY, *supra* note 132, at 3; *see also* 404 POLICY, *supra* note 132, at 4.

136. 33 U.S.C. § 1319(d) (listing the following factors: “the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to

qualify for mitigation of penalties, companies should be able to demonstrate that they have undertaken “good faith efforts to comply” with requirements of the Clean Water Act before problems arise.<sup>137</sup> The policies make clear that, “[t]he efforts of the violator to achieve compliance or minimize the violations after EPA or a state has initiated an enforcement action do not constitute ‘good faith’ efforts.”<sup>138</sup> As a result, the policies encourage companies to develop environmental auditing programs<sup>139</sup> and generally incentivize investment in compliance efforts, such as training, by calling for EPA to seek penalties to recapture the economic benefit of avoiding or delaying such investments.<sup>140</sup>

EPA’s Audit Policy, which applies to all federal environmental statutes, including the Clean Water Act, provides incentives for voluntary disclosure of violations and for implementation of compliance and auditing programs.<sup>141</sup> These incentives include reduction or elimination of gravity-based penalties and EPA agreement not to recommend criminal prosecution or make routine requests for audit reports.<sup>142</sup> To be eligible for these incentives, companies must voluntarily discover, promptly disclose, and expeditiously correct violations, and prevent recurrence of future violations.<sup>143</sup> The Audit Policy provides that EPA may waive gravity-based civil penalties for companies that meet all of these conditions and systematically discover violations through an environmental audit or compliance management system.<sup>144</sup> The Audit Policy further provides that EPA will not

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comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require”); 33 U.S.C. § 1319(g)(3) (listing the following factors: “the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require”); 33 U.S.C. § 1321(b)(8) (listing the following factors: “the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require”); 311 POLICY, *supra* note 132, at 3. In *CITGO*, for example, the district court’s penalty analysis credited the company for its compliance program under the statutory factor “The Nature, Extent, and Degree of Success of any Efforts of the Violator to Minimize or Mitigate the Effects of the Discharge.” *United States v. Citgo Petroleum Corp.*, 2011 U.S. Dist. LEXIS 158345, at \*10-12 (W.D. La. Sept. 29, 2011). On appeal, the Fifth Circuit expressed no concern with that aspect of the penalty analysis. *United States v. Citgo Petroleum Corp.*, 723 F.3d 547, 553 (5th Cir. La. 2013).

137. 404 POLICY, *supra* note 132, at 15 n.32.

138. *Id.* at 18 n.41; CWA SETTLEMENT PENALTY POLICY, *supra* note 132, at 16 n.17.

139. CWA SETTLEMENT PENALTY POLICY, *supra* note 132, at 13 (Environmental Auditing Adjustment Factor); 404 POLICY, *supra* note 132, at 2, 14 (incorporating EPA’s Audit Policy); 311 POLICY, *supra* note 132, at 10, 13 (incorporating EPA’s Audit Policy).

140. 311 POLICY, *supra* note 132, at 15-16.

141. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,620 (Apr. 11, 2000).

142. *Id.*

143. EPA’s Audit Policy, EPA.GOV, <http://www2.epa.gov/compliance/epas-audit-policy> (last updated Feb. 2, 2015).

144. Incentives for Self-Policing, *supra* note 141, at 19,620.

In general, civil penalties that EPA assesses are comprised of two elements: the economic benefit component and the gravity-based component. The economic benefit component reflects the economic gain derived from a violator’s illegal competitive advantage. Gravity-based penalties are that portion

recommend criminal prosecution if certain conditions are met, including adopting a “systematic approach to preventing recurring violations.”<sup>145</sup>

DOJ has a longstanding policy setting forth the factors to be considered in deciding whether to bring a criminal prosecution for a violation of an environmental statute.<sup>146</sup> A key factor is the existence and scope of environmental compliance programs.<sup>147</sup> DOJ’s policy states that such a program should be “regularized, intensive, and comprehensive,” and that prosecutors should give particular attention “to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.”<sup>148</sup>

DOJ’s policy also provides hypothetical examples to illustrate how prosecutors may apply these factors in environmental cases. The policy describes an “ideal case” in which a company has an effective compliance program, immediately discloses and corrects violations uncovered through a comprehensive audit, disciplines those involved, strengthens its compliance program to prevent recurrences, and cooperates with regulators. In this ideal case, the company “would stand a good chance of being favorably considered for prosecutorial leniency, to the extent of not being criminally prosecuted at all.”<sup>149</sup> At the other extreme, the policy presents a hypothetical company that conducts a narrowly-focused audit only in response to a potential whistleblower’s threat and finds and reports a violation, but fails to correct the problem or cooperate with regulators or prosecutors. The policy concludes that the likelihood of prosecutorial leniency for this company is “remote.”<sup>150</sup>

The Federal Sentencing Guidelines also provide that criminal penalties can be reduced if an organization shows, among other things, that it has an effective compliance program.<sup>151</sup> Specifically, if an offense occurs even though a defendant had in place an effective compliance and ethics program, the guidelines call for the defendant’s “Culpability Score” used for sentencing to be reduced.<sup>152</sup>

Notwithstanding these long-established and well-known incentives for compliance programs, a remarkable number of organizational defendants in recent Clean Water Act criminal cases apparently had no compliance program at all. The latest U.S. Sentencing Commission data files show that, in only one of twenty cases involving organizations sentenced in federal district courts for Clean Water

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of the penalty over and above the economic benefit. They reflect the egregiousness of the violator’s behavior and constitute the punitive portion of the penalty.

*Id.*

145. *Id.*

146. *DOJ Factors*, *supra* note 106. Other factors include: (1) whether violations are voluntarily, timely, and completely disclosed; (2) whether a violator cooperates with investigators and prosecutors; (3) the pervasiveness of noncompliance; (4) whether a defendant has an effective system for internal disciplinary action; and (5) any efforts to remedy ongoing noncompliance. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 8C2.5(f) (2014), available at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf>.

152. *Id.*

Act offenses in 2013, “the probation officer indicated that the offender organization had any type of compliance program, ethics program or policy in effect before or at the time of the offense.”<sup>153</sup>

*B. Elements of an Effective Compliance Program under Federal Enforcement Policies and Guidelines*

The Federal Sentencing Guidelines for organizational defendants identify the basic elements of an effective compliance program as: (1) leadership commitment and culture; (2) appropriate policies, standards, and procedures; (3) diligent hiring and employee screening practices; (4) effective communications and training practices; (5) reasonable monitoring and auditing practices; (6) appropriate incentives and disciplinary measures; and (7) reasonable corrective and preventative steps.<sup>154</sup> The Sentencing Guidelines recognize that there is no “one size fits all” for compliance, and provide that programs should be tailored to a specific company’s operations, accounting for overarching factors such as the size of the organization and the organization’s compliance history.<sup>155</sup>

EPA’s enforcement policies also address the elements of compliance programs. EPA’s Audit Policy borrows from the Sentencing Guidelines in describing the components of a “compliance management system” that will qualify for the incentives offered under the policy.<sup>156</sup> Similarly, EPA’s policy on factors to consider in reinstating a party that has been disqualified, suspended, and debarred from federal contracts emphasizes the importance of an effective compliance program, and incorporates the Sentencing Guidelines program elements.<sup>157</sup>

EPA’s Office of Enforcement and Compliance Assurance has developed a model “compliance-focused environmental management system” (CFEMS) to be imposed as injunctive relief in settlements with corporate defendants to address violations caused by “management failures.”<sup>158</sup> The CFEMS is based in part on ISO 14001, an industry consensus standard for environmental management systems. EPA’s guidance calls for the CFEMS to embody the “plan, do, check, act” model for continuous improvement, which is a hallmark of ISO management system standards.<sup>159</sup>

To be successful, a compliance program must be more than a one-time “check the box” exercise to implement the components prescribed by governmental

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153. U.S. SENTENCING COMM’N, ORGANIZATIONS CONVICTED IN FEDERAL CRIMINAL COURTS (Inter-university Consortium for Political and Social Research, 2014-12-03) (2013), *available at* <http://doi.org/10.3886/ICPSR35347.v1>.

154. U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 8B2.1(b)(1)-(7).

155. *Id.* § 8B2.1 (Commentary).

156. 65 Fed. Reg. 19,618, 19,625 (Apr. 11, 2000).

157. EPA Policies Regarding the Role of Corporate Attitude, Policies, Practices, and Procedures, in Determining Whether to Remove a Facility From the EPA List of Violating Facilities Following a Criminal Conviction, 56 Fed. Reg. 64,785, 64,787 (Dec. 12, 1991) (“The hallmark of an effective program is that the organization exercises due diligence in seeking to prevent and detect environmental problems or violations, or criminal conduct.”).

158. Compliance-Focused Environmental Management System—Enforcement Agreement Guidance (EPA-330/9-97-002R) 3-4 (Rev. June 2005).

159. *Id.* at 4.

policies and industry standards. First and foremost, the compliance program must have strong and sustained support from the company's leaders, from the C-suite down to the line managers who are responsible for day-to-day implementation. Leaders must set the correct "tone from the top" by clearly communicating that compliance comes first. Leaders must also demonstrate their commitment to that principle by reflecting compliance goals in corporate strategic planning and annual budgeting, as well as daily decision-making. It is also incumbent on executive leaders to clearly define compliance roles and responsibilities, and provide the staffing and other resources needed for an effective compliance program.

Although compliance programs must be designed to address all of the requirements that apply to a company's operations, government policies encourage a risk-based approach to prioritizing compliance activities. Risk assessment involves evaluating both the likelihood that a violation will occur and the severity of the impact caused by the potential violation.<sup>160</sup> The Federal Sentencing Guidelines suggest using outside experts on the theory that it is difficult for any company to look at itself objectively.<sup>161</sup> Industry associations, working groups, experienced legal counsel, and outside consultants can help evaluate compliance risks, provide the benefit of industry-wide "lessons learned," and benchmark a company's policies and procedures against industry standards and best practices.

User-friendly policies, procedures, and work practices are a keystone of effective compliance programs. They should be developed with the input of employees who must implement and comply with them. Companies should have a carefully planned roll-out process that includes training for those most affected by new or modified policies and procedures. Companies should monitor implementation to assure the effectiveness of compliance procedures and training.

Auditing is an especially important feature of any compliance program. Companies should conduct periodic audits of discrete substantive areas or particular compliance procedures. They should also periodically assess the overall compliance system itself. Like compliance programs themselves, audit programs may vary depending on the size of the organization, potential risks, and liabilities. Generally, effective audit programs require: (1) top management support; (2) explicit audit function goals, objectives, and scope; (3) adequate audit function staffing and training; (4) careful planning and scheduling; (5) clear reporting procedures; (6) timely implementation of corrective and preventative measures; and (7) quality assurance.<sup>162</sup>

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160. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 8B2.1 (Commentary).

161. *Id.*

162. Sources of information on establishing good auditing programs include: Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,009 (July 9, 1986) (discussing "Elements of Effective Auditing Programs"); Board of Environmental, Health & Safety Auditor Certifications, Performance and Program Standards for the Professional Practice of Environmental, Health & Safety (EH&S) Auditing (2008) (providing standards and guidance "for the proper design of an effective EH&S audit program and the management of the auditing function"); ASTM E2107-6, Standard Practice for Environmental Regulatory Compliance Audits (a fairly general standard focused on compliance auditing); and ISO 19011, Guidelines for Auditing Management Systems (2d ed. Nov. 15, 2011) (designed for auditing EH&S management systems; part of suite of ISO standards for corporate management systems).

Good execution of an environmental compliance program should strike a balance between incentives for performance and a consistently applied disciplinary policy for violations. Bonus and award programs should be established to incentivize progress toward compliance goals and performance measures. When problems are uncovered, appropriate disciplinary actions should be taken, accounting for the severity of any misconduct and a specific employee's disciplinary record, seniority, and responsibilities. Enforcement authorities may take a dim view of the failure to sanction problematic employees or behavior. And information on any misconduct and the resulting disciplinary action should be disseminated to deter future problems, reinforce compliance standards, and show that the company takes misconduct seriously.

Finally, a compliance program should be periodically updated to reflect new requirements and to strengthen its effectiveness. Companies should review their compliance programs on a regular cycle (annually for many companies) to identify, evaluate, prioritize, and implement improvements.

### *C. Special Considerations for Energy Companies*

Energy exploration, development, generation, and transportation entail specific risks that should be addressed through *both* robust regulatory compliance programs *and* strong operational risk management processes. In developing or updating their regulatory compliance programs, energy companies should consider recent or proposed changes in regulations affecting their operations, as well as the government's enforcement focus in recent years. For example, EPA and the Corps have proposed a "clarification" of the definition of "waters of the United States" for purposes of the section 404 program that industry observers believe would substantially expand the reach of the program's permitting requirements.<sup>163</sup> There have been a number of civil and criminal enforcement actions against energy companies for alleged section 404 violations under the existing regulations, and the already high risk of enforcement will only increase if the section 404 program expands.

Energy companies also face particular risk of enforcement under section 311 of the statute for accidental releases of oil or hazardous substances. Compliance with spill prevention, control and countermeasure rules promulgated under section 311 alone may be insufficient to guard against accidental releases and the enormous penalties and clean-up liability that may ensue. Companies should assure that construction materials and safety critical equipment meet applicable technical industry standards. They should also implement thorough inspection and maintenance programs and operational risk management procedures (e.g., pre-startup safety reviews) to prevent accidents that could cause the release of oil or hazardous substances.

Many energy companies also rely heavily on contractors, which can increase the complexity—and therefore the risk—of their core operations. The role of

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163. EPA and the Corps published a draft rule defining "waters of the United States" in April 2014. Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328). The rule has been widely criticized and the House of Representatives has passed the "Waters of the United States Regulatory Overreach Protection Act of 2014" to prevent the rule's progress. H.R. 5078, 113th Cong. (2014).

contractors was a focal point in the various governmental investigations—and ongoing litigation—stemming from the 2010 *Deepwater Horizon* explosion and oil spill in the Gulf of Mexico. As part of the federal government’s efforts to reform offshore oil and gas regulation and oversight in the aftermath of that tragedy, the Bureau of Ocean Energy Management, Regulation and Enforcement (the successor agency to the Minerals Management Service and predecessor to the Bureau of Safety and Environmental Enforcement) issued a rule requiring operators to develop and implement Safety and Environmental Management Systems (SEMS) for oil and gas operations in the Outer Continental Shelf.<sup>164</sup> The so-called “SEMS rule” also imposes requirements on operators related to contractor oversight, which other sectors of the energy industry may wish to consider in developing their own contractor management programs. The SEMS rule requires operators to:

- Develop procedures and verify that contractors: (1) have their own written safe work practices;<sup>165</sup> (2) are conducting their activities in accordance with the operator’s SEMS program;<sup>166</sup> and (3) have the skills, knowledge, understanding, and ability to perform their assigned duties;<sup>167</sup>
- Establish and implement a training program so that all personnel (including contractors) are trained in accordance with their duties and responsibilities to work safely and are aware of potential environmental impacts;<sup>168</sup>
- Document: (1) contractor selection criteria (including an evaluation of the contractor’s safety record and environmental performance);<sup>169</sup> (2) an agreement with the contractor on appropriate contractor safety and environmental policies and practices before the contractor begins work;<sup>170</sup> and (3) that contracted employees are knowledgeable and experienced in the work practices necessary to perform their job in a safe and environmentally sound manner;<sup>171</sup>
- Perform periodic evaluations of the performance of contract employees that verifies they are fulfilling their obligations;<sup>172</sup> and

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164. U.S. Department of the Interior, Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Safety and Environmental Management Systems, 75 Fed. Reg. 63,610 (Oct. 15, 2010).

165. 30 C.F.R. § 250.1914.

166. *Id.* § 250.1914(c)(1).

167. *Id.* §§ 250.1914(c)(2), 250.1914(d).

168. *Id.* § 250.1915.

169. *Id.* § 250.1914.

170. *Id.*

171. 30 C.F.R. §§ 250.1914(b), 250.1915(d).

172. *Id.* § 250.1914(e)(1).

- Inform contractors of any known hazards at the facility where they are working.<sup>173</sup>

In our experience, many energy companies are implementing comprehensive contractor management programs that go well beyond regulatory requirements. These programs typically include screening procedures to ensure that potential contractors have (1) appropriate training, licensing, and certifications, (2) a good safety record, and (3) no history of illegal activities or other misconduct. Screening includes reference checks; internet searches; review of social media websites; criminal background checks; and review of the federal System for Award Management for individuals suspended or debarred from government contracts and benefits, as well as applicable state suspension and debarment lists. Potential contractors are usually required to complete a questionnaire relating to their safety and compliance record, and certify in writing to the accuracy of their answers.

Once selected, contractors should be contractually obligated to comply with applicable laws, regulations, and company policies and procedures. Contractors should also be required to promptly report environmental and safety incidents and to provide access to files, facilities, and offices, and to cooperate with investigations, inspections, and audits. Companies should maintain a comprehensive list of their approved contractors, and have clear procedures for retaining the services of contractors that are not on the list. Contractors should be regularly audited, monitored, and evaluated against regulatory and internal company requirements, and should be subject to termination for significant violations.

## V. CONCLUSION

Prosecutors and EPA consider the energy industry to be a prime target for investigation and enforcement. The broad sweep of the Clean Water Act creates significant legal exposure for both companies and individuals, especially by criminalizing simple negligence. While the sparse case law interpreting the Clean Water Act's negligence provision is vulnerable to challenge, the wisest course is to avoid becoming a defendant in the first place by developing and implementing robust compliance and risk management programs that have senior management's full backing, and that are regularly updated and policed.

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173. *Id.* § 250.1914(f).