

Environmental Law Alert

EPA/OSHA Alliance Increases the Danger of Criminal Liability for Employers

Todd M. Hooker

August 2000

A Federal District Court Judge recently sentenced Allan Elias, the owner of Evergreen Resources, a chemical processing and fertilizer company, to 17 years in prison for knowingly exposing his employees to cyanide gas and making false statements to the government. The jury found Mr. Elias guilty of ordering his employees to clean a 25,000 gallon storage tank containing cyanide without taking the proper safety precautions. As a result, one employee collapsed in the tank and suffered permanent brain damage. Because of the injury, Mr. Elias was also ordered to pay nearly \$6 million in restitution to the victim and his family.

Lois J. Schiffer, Assistant Attorney General for the Justice Department's Environment and Natural Resources Division, stated in a press release that "[t]his case also should serve as fair warning to employers who knowingly endanger their employees: you will be investigated and prosecuted." Indeed, federal prosecutors were eager to make an example of Mr. Elias. David Uhlmann, who was the lead prosecutor, commented that the case "was a very high priority for the government."

While the facts in the Elias case appear quite egregious, there was nothing in Mr. Elias' past that would lead one to conclude that his future would be clouded by a lengthy prison term. He had a degree in economics and a law degree from the University of Arizona. He built two successful businesses, one in real-estate investment, and the other in his company Evergreen Resources. His successful background, however, contributed to his harsh punishment. In justifying the lengthy prison sentence, Uhlmann said Elias was "a man who was very well educated, sophisticated . . . and very knowledgeable about requirements that govern a place like Evergreen Resources."

In a similar case in 1998, three officers and the environmental health and safety manager of LCP Chemicals were sentenced to multi-year prison terms for violating environmental and occupational safety and health laws, including knowingly exposing employees to chlor-alkali bleach, caustic soda, hydrochloric acid and mercury. LCP employees allegedly suffered chemical burns as a result of these exposures. In LCP, the chief executive officer was sentenced to nine years in prison, the chief operating officer was sentenced to 46 months in prison, the plant manager was

sentenced to 6 ? years in prison, and the environmental health and safety manager was sentenced to 18 months in prison.

"...[t]his case also should serve as fair warning to employers who knowingly endanger their employees: you will be investigated and prosecuted."

When the LCP sentences were handed down, they were the longest imposed for environmental or occupational safety and health crimes. The 17 year sentence handed down in Evergreen Resources, however, surpasses the LCP sentences, and by far is the most severe ever imposed for such a crime. The imposition of long prison sentences and the exposure to individual criminal liability obviously raises the stakes for corporate officers and management personnel. For that reason, it is important to understand the manner in which these matters were prosecuted.

Although both LCP and Evergreen Resources involved employee exposures to hazardous chemicals, neither case was prosecuted under the Occupational Safety and Health Act ("OSH Act"). Rather, they were prosecuted under the Resource Conservation Recovery Act's ("RCRA") knowing endangerment provision. See 42 U.S.C. §6928(e). RCRA's knowing endangerment provision carries a potential 15 year prison sentence. The maximum criminal penalty imposed under the OSH Act is six months, and this penalty can only be sought in the case of an employee death.

The criminal prosecution of occupational exposure cases under RCRA's knowing endangerment provision results from two independent, yet interrelated policies. First, the Environmental Protection Agency ("EPA") and the Occupational Safety & Health Administration ("OSHA") have forged an alliance by entering into two formal agreements which are referred to as memorandums of understanding ("MOU") by the agencies.

The first MOU was published in 1991 and served to "establish and improve the working relationship between the [EPA & OSHA]." In 1996, the agencies entered into a second MOU, which applies narrowly to the investigation of chemical accidents. This MOU fosters agency cooperation and information sharing during investigations related to chemical exposure incidents. Although the MOU does not specifically apply to criminal investigations, it does call for coordination between the agencies to "ensure the maximum cooperation with criminal investigations."

The second policy giving rise to the prosecution of employee exposure cases under RCRA is the Department of Justice Guidelines for Bringing Criminal Charges Against Corporations ("DOJ Guidelines"), officially released in June 1999. The DOJ Guidelines provide that "the imposition of individual criminal liability on [directors, officers, employees or shareholders] provides a strong deterrent against future corporate wrong doing." The guidelines also declare that it is the DOJ's policy to "charge the most serious offense that is consistent with the nature of defendant's conduct."

The message from the Elias case is clear - - EPA and OSHA have forged an effective alliance, and the Department of Justice is

going to rely on information obtained by a joint investigation team to prosecute officers and managers to the fullest extent of the law. As such, companies must have effective environmental and safety and health compliance and audit programs not only to meet their regulatory obligations, but also to keep their officers and managers out of jail.

For information regarding occupational exposures or other OSHA compliance issues, please contact **Todd M. Hooker**, an Associate in the Environmental Law Practice Group and the Employment Law Practice Group at 973.597.2420. Mr. Hooker is a graduate of the Process Safety Institute's Process Safety Management and Risk Management Planning Auditing Course, and has experience in counseling clients under investigation for occupational exposures to highly hazardous chemicals. The firm also provides advice with respect to employment law issues, environmental compliance, regulatory and criminal exposure issues. If we can be of assistance in any of these matters, please contact **Michael Dore**, Chair of the Environmental Law Practice Group at 973.597.2344 or **Martha L. Lester**, Chair of the Employment Law Practice Group at 973.597.2388.

[\[Back to Top\]](#)

[Featuring](#) | [In the News](#) | [Events](#)
[Publications](#) | [About the Firm](#) | [What's New](#)
[Contact Us](#) | [Community Service](#) | [Recruiting](#)
[Secure Area](#) | [Site Map](#) | [Home](#)
[Search](#)



Copyright © 1998 - 2001 Lowenstein Sandler PC. All rights reserved.
[Disclaimer](#)