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Chapter 10

What You Don't Know Can't Hurt You, Right? Resolving the Inherent Tension Between the *Yates Memo* and the Collective Knowledge Doctrine in Environmental Criminal Enforcement Actions

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Synopsis

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§ 10.01. Introduction.

Civil and criminal liability under federal environmental protection statutes is an increasing concern for the oil and gas industry. Government enforcement actions have severe impacts on a company's ability to do business. While the goal of civil enforcement is to compensate injured parties with liability limited to fines and injunctions, criminal enforcement aims to punish violators with increased fines and the possibility of jail time. This chapter discusses the differences between the government's burdens in civil

and criminal enforcement, and the practical and ethical ramifications of an increased focus by the Department of Justice ("DOJ") on pursuing individual criminal liability. Throughout the chapter, a mock scenario acts as a lens to guide the discussion and highlight the real life circumstances where this content comes into play.

To prepare for government investigations and prosecutions under environmental statutes, it is important to consider *what* the government must prove and *who* could be held responsible. The line between a civil or criminal violation in the environmental enforcement regime is a question of the violator's state of mind, or *mens rea*. Nearly all criminal violations require that a defendant "knowingly" violate a statute. On the other hand, civil liability attaches simply through a violation with no requirement that the defendant had (or that the government prove) any element of intent or knowledge. At the corporate level, there are various ways the government can prove that the corporation possessed the requisite knowledge, such as identifying a guilty actor within the company, or proving that a responsible corporate officer should have known of the illegal conduct and addressed or remedied the violation. However, in some jurisdictions the collective corporate knowledge doctrine may permit the government to prove the requisite corporate *mens rea* through multiple corporate employees'[2] collective knowledge without identifying a single guilty actor although, as discussed below, this doctrine has been rejected in some jurisdictions.

Within the context of corporate criminal enforcement, a 2015 DOJ memorandum known as the *Yates Memo* announced a renewed focus on pursuing criminal charges against individuals as part of enforcement actions against companies.[3] In addition to emphasizing the pursuit of individual criminal charges, the *Yates Memo* also set a new standard for the level of

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2 The ABA's Model Rules of Professional Conduct use the term "constituent" to refer to any agent or employee of the corporation. *See* MODEL RULES OF PROF. CONDUCT 1.13(a), (d), (f), (g) (AM. BAR ASS'N 2016) (including officers, employees, directors, members, and shareholders as types of constituents). We instead use the term "employee."

3 Sally Quillian Yates, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015). [hereinafter cited as *Yates Memo*]

cooperation that a company is expected to engage in with the government during an enforcement investigation. Since the *Yates Memo*, companies targeted in criminal environmental enforcement actions can no longer expect to receive cooperation credit in reaching a settlement with the DOJ without providing specific information about the individuals involved in the alleged misconduct.[4] Corporations are further expected to provide *all* relevant facts about the individuals and their actions in order to receive *any* cooperation credit.[5] As a result, corporate counsel conducting internal investigations can be placed in the difficult position of essentially acting as government agents by aggressively pursuing any alleged misconduct and turning the individuals over to the DOJ for fear that the DOJ might deny cooperation credit.[6]

Practically speaking, this will require revealing what a culpable or potentially culpable individual says during an investigatory interview. In a context that the Fourth Circuit has referred as "a potential legal and ethical mine field,"[7] numerous questions may arise such as: Who is the client? What duties, if any, are owed to corporate employees? When is there a conflict of interest between the corporation and its employees? This chapter concludes by addressing these issues and providing the ethical framework embodied in the Model Rules of Professional Conduct and relevant case law.

§ 10.02. Basics of Traditional Environmental Enforcement.

The Scenario: The United States Attorney's Office has executed a search warrant at a midstream company's facilities in a raid with agents carrying assault rifles, with some agents even emerging from the woods wearing ghillie suits. During the raid, an agent hands a company employee a grand jury subpoena seeking detailed information about air emissions and permits at all of the company's

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4 *Id*. at 2.

5 *Id*.

6 *See* Nathan Huff, *One Year Later: Yates Memo Remains a Threat to the Privileged Status of Internal Investigations*, Am. Bar Ass'n White Collar Crime Comm. Newsletter (Winter/Spring 2017).

7 *In re* Grand Jury Subpoena Under Seal, 415 F.3d 333, 340 (4th Cir. 2005). [hereinafter cited as *AOL Subpoena*]