What Natural Gas and Electric Industry Must Know About OSHA

Jonathan L. Snare and Rachel Ladeau

In a recent memorandum to regional administrators, Occupational Safety and Health Administration (OSHA) Director of Enforcement Programs Thomas Galassi noted that worker fatality rates at upstream drilling and well servicing operations range from *five to eight times greater* than the national average for all US industries.

As a result, in February 2015 OSHA authorized the addition of upstream oil and gas hazards to the list of High-Emphasis Hazards in the agency's Severe Violator Enforcement Program. This means that any nonfatality inspection of upstream employers in which OSHA finds two or more willful or repeat violations or failure-to-abate notices will now be considered a severe violator enforcement case. Such branding can subject an employer to a host of special attention from OSHA, including enhanced follow-up inspections and settlement provisions, news releases, and even federal court enforcement.

This new directive from OSHA is just the most recent reason why employers in your industry—natural gas and electricity—need to be sure they understand the role and jurisdiction of OSHA, as well as what to do when OSHA comes knocking on your door to conduct an inspection.

OSHA'S ROLE AND JURISDICTION

OSHA has jurisdiction over essentially every private-sector employer, including in your industry (with a few exceptions discussed later). To handle that significant responsibility, OSHA is one of the largest agencies at the United States Department of Labor, with approximately 2,200 employees (and counting) across the country. OSHA is made up of 10 regional offices and approximately 90 area offices, as well as nine directorates in its Washington, DC, national office.

OSHA also allows states to operate their own safety and health programs, currently maintained by 26 states (including California, Maryland, Oregon, South Carolina, and Indiana). These offices work both together both regionally and on a national level to "assure" safe and healthy working conditions on jobsites in the United States and its territories. OSHA carries out its mission through programmed and compliance inspections, national and local emphasis programs, rulemaking, outreach and education, cooperative programs, and other enforcement initiatives.

Taken together, federal and state OSHA programs have a broad and sweeping reach. As previously noted, with few exceptions, OSHA has jurisdiction over virtually every private-sector employer. However, OSHA cannot regulate working conditions when another federal agency has the statutory authority to prescribe or enforce standards or regulations covering occupational safety and exercises such authority. This rule can result in confusion and overlapping jurisdiction when OSHA shares responsibility for ensuring workplace safety with another agency.

For example, pipeline employers in the oil and gas industry must also contend with the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA), which regulates pipeline systems and the transportation of hazardous liquids in those systems. While OSHA and PHMSA work together to clarify their respective enforcement areas, determining the boundary between PHMSA and OSHA is not always easy. Traditionally, OSHA has regulated operations inside midstream facilities through its Process Safety Management System.[1]

Jonathan L. Snare (jsnare@morganlewis.com) is a partner with Morgan, Lewis & Bockius. **Rachel Ladeau** (rladeau@morganlewis.com) is an associate with Morgan, Lewis & Bockius.

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PHMSA, on the other hand, does not regulate "onshore production . . ., refining, or manufacturing facilities or storage or in-plant piping systems associated with such facilities." In 2012, however, PHMSA issued letters of interpretation stating that the mere "presence of a fractionation plant or other kinds of separation or processing equipment located on the grounds of a mid-stream hazardous liquid pipeline facility does not mean that virtually the entire facility is exempt from regulation as a refinery." Instead, PHMSA distinguished between "[s]eparation or processing plants located on the grounds of a production facility where NGLs [natural gas liquids] are initially produced and a NGL pipeline originates," which are not subject to PHMSA's jurisdiction, and a midstream facility, "which receives products that are already in the stream of transportation."[2]

Offshore employers face murky waters as well. In the past, OSHA has shared jurisdiction over working conditions at sea with the Coast Guard and the Department of the Interior's Minerals Management Service. Elements affecting OSHA's offshore jurisdiction include whether the worksite is an inspected vessel, an uninspected vessel, or a facility or structure (i.e., rigs), as well as the worksite's geographic location (US navigable waters or the Outer Continental Shelf). However, the extent to which either the Coast Guard or the Department of the Interior actually *exercises* its authority to regulate certain categories of offshore workplaces also impacts OSHA's reign over those workplaces.

A recent organizational shakeup at the Department of the Interior (DOI) may result in limiting OSHA's offshore reach. Following the 2010 *Deepwater Horizon* oil spill, the secretary of the interior disbanded the Minerals Management Service to create several new agencies designed to increase effective oversight of offshore exploration and drilling. One such agency, the Bureau of Safety and Environmental Enforcement, has already promulgated aggressive regulatory reforms, including the requirement that offshore operators maintain comprehensive safety and environmental programs. It remains to be seen whether increased DOI regulation will serve to displace OSHA in this area, particularly for offshore rigs.

Even where OSHA's jurisdiction is clear, however, employers still struggle to determine which of OSHA's standards actually apply to a particular operation. For example, both OSHA's general industry standards and its construction standards (as well as OSHA's General Duty clause) have been applied to employers in the natural gas and electricity industry.[3] However, general industry standards do not apply where a party is engaged in construction work (i.e., "work for construction, alteration, and/or repair, including painting or decorating") and a construction standard is addressed to the particular hazard arising from the cited conditions.[4]

Thus, how is an employer to know whether its project will be deemed to fall under the construction standards or the general industry standards? Generally, work is more likely to be deemed a construction project if the project is large-scale or complex and does not constitute regularly scheduled maintenance. Examples have included operating power tongs to attach new sections of pipe to existing sections of pipe in a well,[5] installing a new vertical gas furnace and modifying flow techniques in towers,[6] installing new sewer lines,[7] and removing tanks and oil-burning equipment where part of a larger project requires excavation of the ground around the tanks.[8] In 2009, however, OSHA issued a standard interpretation asserting that the *only* aspect of oil and gas well drilling and servicing operations covered by OSHA's construction standards was "site preparation," such as leveling, trenching, and excavation.[9]

Even if employers are able to determine whether their operation is governed by the construction or the general industry standards, employers working on multiemployer worksites may still have trouble figuring out who is the entity responsible for ensuring that the relevant standards are met. By way of its Multi-Employer Citation Policy (MEP), OSHA has asserted the authority to issue citations to both the employer that is responsible for correcting a hazardous condition (even if that employer has no employees exposed to the hazardous condition) *and* the employer whose own employees are exposed to the hazardous condition. The MEP outlines four types of citable employers:

- "Creating Employer" (the employer who actually creates a violative condition, even if the only employees exposed are those of other employers)
- "Exposing Employer" (the employees whose own employees are exposed to the hazard)
- "Correcting Employer" (the employer engaged in a common undertaking as the exposing employer and who is responsible for correcting a hazard)
- "Controlling Employer" (the employer with general supervisory authority over the worksite,

including the power to correct safety and health violations itself or require others to correct them)

Employers can take steps to avoid the results of OSHA's broad multiemployer doctrine by doing the following:

- Ensuring a contractual assignment of responsibility
- Ensuring that there is no joint employment
- Requiring subcontractors to observe all safety rules and OSHA regulations
- Conducting inspections and corrections
- Designating expert subcontractors

RECENT OSHA DEVELOPMENTS THAT YOU SHOULD KNOW

OSHA has been busy lately. From the latest enforcement initiatives to proposed rulemaking to new alliances, it can be difficult to keep up. Here is a streamlined list of the most important new developments from the agency that *you* need to know.

Updates to OSHA's Reporting Requirement for Injuries and Fatalities

As of January 1, 2015,[10] substantial changes to OSHA's reporting requirements for work-related injuries and fatalities went into effect.

- All work-related fatalities must be reported within eight hours (if occurring within 30 days of the incident).
- All work-related inpatient hospitalizations of one or more employees, all amputations, and all losses of an eye must be reported within 24 hours (if occurring within 24 hours of the incident). Previously, reporting was only required for work-related inpatient hospitalizations of three or more employees.
- If an employer does not learn that a reportable fatality, in-patient hospitalization, amputation, or loss of an eye was a result of a work-related incident within the time prescribed, the employer must report within eight hours (for a fatality) or 24 hours (for all other reportable incidents) from the time the employer or its agents learned that the reportable incident was a result of a work-related incident.

Increased Emphasis on Recordkeeping

Reported workplace injuries are at a record low. Yet this news may not be as good as it sounds. OSHA has stated that this statistical trend is driven in part by widespread underreporting of workplace injuries. After inspecting approximately 350 workplaces under its 2010 National Enforcement Program (NEP) for Recordkeeping, OSHA reported that around half of the worksites inspected had underreported injuries and illnesses. In recent years, therefore, the agency has brought increased enforcement focus to recordkeeping obligations and data accuracy.

This focus means higher penalties, and potentially criminal prosecutions for employers who fail to comply. In a recent case, for example, the OSHA Review Commission agreed that an employer's recordkeeping violation "continues" throughout the five-year period that employers are required to retain records—an unprecedented holding that essentially obliterated the agency's six-month statute of limitations.[11] While the US Court of Appeals for the DC Circuit eventually reversed this result,[12] OSHA has announced its intent to publish a formal rule "clarifying" that the "duty to make and maintain an accurate record of an injury or illness continues for as long as the employer must keep and make available records for the year in which the injury or illness occurred."[13] Likewise, in 2013 OSHA proposed a rulemaking entitled "Improve Tracking of Workplace Injuries and Illnesses," which would impose new and substantial electronic injury and illness reporting obligations on employers.[14]

Temporary Workers Initiative

Likely the most significant and broad-ranging enforcement and education program undertaken by OSHA in the past few years is its new Temporary Workers Initiative. Defined as workers who are supplied to a host employer and paid by a staffing agency, temporary workers are the target of a new, concerted effort by OSHA that combines enforcement, outreach, and training. In a 2013 enforcement memorandum on this issue, OSHA Director of Enforcement Programs Galassi emphasized the need for host employers and staffing agencies to proactively communicate and work together to ensure the safety of temporary workers. He warned that a violative condition may result in an OSHA citation for both the staffing agency and the host employer.

Since the Temporary Workers Initiative was launched in 2013, OSHA has released three guidance bulletins governing the relative responsibilities of host employers and staffing agencies with respect to injury and illness recordkeeping

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requirements, personal protective equipment, and whistleblower protection rights. These guidance documents emphasize that in OSHA's view, host employers need to treat temporary employees the same as full-time employees for health and safety purposes, including evaluating temporary employees' exposure to health and safety hazards and providing health and safety training. The Temporary Workers Initiative web page on OSHA.gov also keeps a running list of recent significant citations issued to staffing agencies and host employers, and OSHA has entered into agency alliances with at least two major staffing companies on this issue.

In an industry where the use of short-term labor is all too common, electricity and gas employers need to recognize that OSHA's new focus on temporary employees presents a heightened enforcement risk. Here are some practical recommendations for host employers:

- Hire a staffing agency that supervises employees, to minimize legal risk.
- Conduct a hazard analysis to determine to what health and safety hazards temporary workers may be exposed.
- Review your contract with the staffing agency, to determine the responsibilities of the host employer.
- Determine whether the staffing agency has provided training and if additional training is necessary.

Revised Standards for Electric Power Generation, Transmission, and Distribution Work

Citing the 40-year gap since the construction standards were last updated, last year OSHA revised the construction standard governing the construction of transmission and distribution installations at 29 CFR Part 1926, Subpart V, as well as the corresponding general industry standard at 29 CFR 1910.269. The new revisions cover a variety of subjects, including training, host/contract employer information sharing, job briefing, enclosed spaces, minimum approach distances, electric-arc hazards, fall protection, grounding, tree-trimming, and underground work.

As part of a settlement of a legal challenge to the rule brought by industry interest groups, OSHA has issued a variety of guidance documents and enforcement memorandums on the revisions. Among these documents, which can be reviewed on OSHA.gov's Electric Power Generation, Transmission and Distribution Standard web page, are a comprehensive set of FAQs for employers and a detailed enforcement schedule for certain of the new obligations.

HOW TO SURVIVE AN OSHA INSPECTION

But what good is understanding OSHA's recent enforcement trends if you don't know what to do when the agency actually comes knocking? Here's a rundown of what to expect and some best practices for employers when anticipating an OSHA inspection.

Why Me?

Sometimes employers are taken completely off guard when OSHA shows up on their doorstep. While it's not always possible to predict when OSHA will come calling, understanding the circumstances that trigger an on-site inspection helps to remove the element of surprise and allow adequate preparation. If OSHA receives any of the following, you can bet that an on-site inspection is not far behind:

- A written, signed complaint by a current employee or employee representative demonstrating that a violation or danger that threatens physical harm likely exists or that an imminent danger exists
- An allegation that physical harm has occurred as a result of the hazard and that it still exists
- A report of an imminent danger
- A complaint under OSHA's local or national emphasis programs
- An inadequate response from an employer who has received information on the hazard through a phone/fax investigation
- A complaint against an employer with a past history of egregious, willful, or failure-to-abate OSHA citations within the past three years
- A referral from a whistleblower investigator
- A complaint at a facility scheduled for or already undergoing an OSHA inspection

What Happens Once OSHA Gets Here?

Understanding the usual path of an on-site inspection is important not just for the sake of preparation, but also to protect your rights if OSHA attempts to veer off course. Here's a map of the on-site OSHA inspection:

1. *The Opening Conference*. The compliance officers present their credentials, state the basis and

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scope of the investigation, and provide you with the relevant documents (the warrant and/or an employee complaint). The scope of the inspection should be limited to the subject matter that originally created the probable cause for the inspection—any expansions of the scope of the inspection must be by consent.

2. *Walk-around.* The compliance officer and the representatives the employer has chosen to accompany the officer will walk through the portions of the workplace covered by the inspection, looking for hazards that could lead to employee injury or illness, taking photographs, collecting samples, and reviewing records and posters.
3. *Interviews.* OSHA may conduct interviews of management and nonmanagement personnel. Employers are entitled to be present at the interviews of management personnel because of their ability to bind the company by their statements; thus, employers need to make sure that their management personnel are properly prepared. Typically OSHA will demand privacy for its interviews of nonmanagement personnel. However, employers can always request that a representative be included, and OSHA may consent.
4. *Closing Conference.* The compliance officer sits down with the employer to discuss the proposed violations and the employer's safety programs and inform the employer of its rights.

How Can I Prepare?

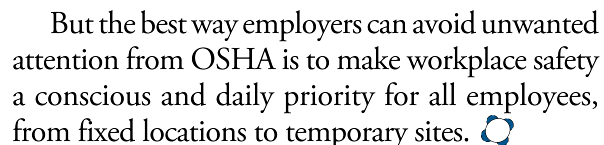
You've had a workplace accident, and it's only a matter of time until OSHA shows up. Where do you start? Here are some preparatory steps employers should take when preparing for an OSHA inspection:

- Start a written log.
- Advise safety management and legal of the pending inspection.
- If there has been a fatality or catastrophic accident, immediately inform senior management and contact corporate counsel before allowing the inspection to commence.
- Ensure videotape/camera equipment is available if it is needed.
- Ensure safety and health records are easily accessible and up-to-date.

CONCLUSION

As with any government agency, it can be challenging to keep up with OSHA's ever-changing enforcement positions and regulatory developments and priorities—never mind dealing with the agency head-on after a workplace accident. Some employers find that keeping OSHA close ends up being the best strategy to avoid unwanted attention from the agency, whether by participating in OSHA's training and educational programs or entering into strategic alliances and partnerships. This strategy was exemplified most recently by the agreement that utility and electric interest groups recently reached with OSHA regarding training and delayed enforcement of the newly revised OSHA Electric Power Generation, Transmission and Distribution standards.

But the best way employers can avoid unwanted attention from OSHA is to make workplace safety a conscious and daily priority for all employees, from fixed locations to temporary sites.



NOTES

1. 29 CFR Part 1910.119.
2. See Doc. 1456008, *ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Trans.*, No. 13-1040 (D.C. Cir. Sept. 11, 2013).
3. In 2014, OSHA issued a final rule modifying its standards for electric power generation, transmission, and distribution at 29 CFR 1910.269 (General Industry) and Subpart V (Construction Industry).
4. See *Jimerson Underground, Inc.*, 21 O.S.H. Cas. (BNA) 1459, 2006 WL 741753, at *3 (OSHRC March 3, 2006).
5. *Clary Well Serv., Inc.*, 9 O.S.H. Cas. (BNA) 1299 (O.S.H.R.C. 1981).
6. *Gulf Oil Co.*, 6 O.S.H. Cas. (BNA) 1240 (O.S.H.R.C. 1976).
7. *Jimerson Underground, Inc.*, 21 O.S.H. Cas. (BNA) 1459 (O.S.H.R.C. March 3, 2006).
8. *Active Oil Serv., Inc.*, 21 O.S.H. Cas. (BNA) 1184 (O.S.H.R.C. 2005).
9. See Standard Interpretation, U.S. Dep't of Labor, Occupational Safety & Health Administration. (2009, April 27). Retrieved from https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27995.
10. See Final Rule, "Occupational Injury and Illness Recording and Reporting Requirements—NAICS Update and Reporting Revisions," 79 Fed. Reg. 56,129 (Sept. 18, 2014).
11. OSHRC Docket No. 06-1990 (March 11, 2011).
12. *AKM LLC dba Volks Constructors v. Secretary of Labor*, No. 11-1106, 2012 WL 1142273 (D.C. Cir. Apr. 6, 2012).
13. *See* OSHA Unified Agenda 1218-AC84, "Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness" (Nov. 2014).
14. The rule has not yet been finalized, and in August 2014 the agency sought comments on whether to amend the proposed rule to (1) require that employers inform their employees of their right to report injuries and illnesses; (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and (3) prohibit employers from taking adverse action against employees for reporting injuries and illnesses." See Notice, "Improve Tracking of Workplace Injuries and Illnesses," 79 Fed. Reg. 47605 (Aug. 14, 2014).

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