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—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.

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. This article is © 2015 Morgan, Lewis & Bockius LLP. Reprinted with permission.
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.”

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. 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.

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, installing a new vertical gas furnace and modifying flow techniques in towers, installing new sewer lines, and removing tanks and oil-burning equipment where part of a larger project requires excavation of the ground around the tanks. 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.

Even if employers are able to determine whether their operation is governed by the construction or the general industry standards, employers working on multemployer 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,
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.
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...
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-chang-

ing 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

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).
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).