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Environmental Update, Criminal Behavior Following Blankenship Trial, and Other Issues

Kentucky Professional Engineers in Mining
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Overview

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- Environmental Update:
  - *Army Corps v. Hawkes* – JDs
  - *Ohio Valley Environmental Coalition, et al. v. Army Corps & Raven Crest*
  - *US Sugar Corp*. – EPA Boiler Rule litigation
  - *Black Warrior Riverkeeper and Defenders of Wildlife v. US Army Corps*
- KY SSM SIP Revision
- New OSMRE Self-Bonding Rule

Overview continued…

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- MATS
- Selenium Standard
- Stream Protection Rule
- What Constitutes Criminal Behavior after the Blankenship Trial

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***US Army Corps v. Hawkes*, 136 S.Ct. 1807 (2016) – JDs**

- Companies sought to expand their peat mining operation
- Received a Jurisdictional Determination ("JD") from the Army Corps that the expansion included "waters of the US" because its wetlands had a "significant nexus" to the Red River of the North, located some 120 miles away.

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***US Army Corps v. Hawkes* continued…**

- Issue – Are JDs reviewable in federal court?
- US Supreme Court says yes, JDs are "final agency action" and subject to court review because of the significant financial and even criminal consequences for landowners if they disregard it

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***US Army Corps v. Hawkes* continued…**

- What does this mean for me?
- When the Corps says they have authority to make you get a permit, you can immediately challenge the determination in federal court.

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***Ohio Valley Env. Coalition, et al v. Army Corps & Raven Crest*, 2016 WL 3648476 (4th Cir. 2016)**

- 4th Circuit unanimously upheld a Corps 404 "dredge and fill" permit for a surface mine in West Virginia
- Environmental groups filed suit against the permit, claiming that the Corps violated the Clean Water Act and NEPA by not considering a series of studies allegedly linking mining to adverse health impacts

***Raven Crest* continued…**

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- But the 4th Circuit rejected this argument concluding that the groups' Clean Water Act argument "fails for the same reason its NEPA argument fails: it seeks to require the Corps to study the effects of surface coal mining, an activity it cannot authorize and over which, under SMCRA, WVDEP has exclusive jurisdiction."
- This decision is nearly identical to a case brought in the Western District of Kentucky.
  - *Kentuckians for Commonwealth v. U.S. Army Corps of Engineers*, 963 F. Supp. 2d 670, 672 (W.D. Ky. 2013), *aff'd sub nom. Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, 746 F.3d 698 (6th Cir. 2014)

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***US Sugar Corp. v. EPA*, 2016 WL 4056404, (D.C. Circ. 2016) – Boiler Rule**

- D.C. Circuit addressed 30 separate challenges to the EPA's contentious boiler rule, promulgated in 2011.
- In the rule, the EPA set standards for boilers deemed "major sources" of air toxics and for smaller "area source" boilers that burn natural gas, coal, biomass or other fuels to produce steam for electricity or heat.

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***US Sugar Corp* continued…**

- The federal court sided with the environmentalists finding that EPA wrongly excluded some existing boilers that were among the best-performing in certain subcategories. Had they been included, EPA's standards would have been more stringent.
  - The Clean Air Act “demands that source subcategories take the bitter with the sweet.”

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***US Sugar Corp* continued…**

- The court then rejected all industry claims against the rules, including an argument that EPA shouldn't hold facilities accountable for emissions released during unexpected malfunctions.
- Other take away – Chevron deference lives.
  - The Court's deference – by three Republican appointees – to EPA's technical decisions was notable.

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***Black Warrior Riverkeeper and Defenders of Wildlife v. US Army Corps*, 2016 WL 4254892 (11th Cir. 2016)**

- Enviro groups sued the Army Corps in 2013, claiming that the agency's decision to reissue NWP 21 was "arbitrary and capricious."
- In 2010, NWP 21 was suspended in 6 Appalachian states, except in Alabama. When the NWP was reissued in 2012, the Corps imposed stringent stream-fill limits on new operations, but declined to apply those same limits to operations previously authorized under the 2007 NWP 21.

***Black Warrior Riverkeeper* continued**

- Army Corps argued that the grandfathering provision was to reduce hardships on permittees who previously obtained authorization.
- Enviro groups argued that the Corps could not rely on economic considerations to issue a general permit that does not comply with the Clean Water Act.
- But the 11th Cir. disagreed, finding that nothing in the Clean Water Act or NEPA precluded the Corps from relying on economic considerations.
  - Affirmed judgement for Army Corps because "there was nothing arbitrary and capricious about the corps' decision to treat old and new activities differently…"

Kentucky Startup, Shutdown and Malfunction (SSM) SIP Revision

- On May 22, 2015, EPA issued a "SIP Call" and set a due date for states to revise their SIPs by November 22, 2016.
- EPA found that Kentucky's SIP was inadequate for the treatment of excess emissions that occur during periods of SSM

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SSM SIP Revision continued…

- The Div. of Air Quality's proposal is to remove the discretionary exemptions from otherwise applicable SIP emission limitations.
- Public hearing on the revision
  - September 14, 2016 at 10am in Conference Room 111, 300 Sower Blvd., Frankfort, KY.

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Changes in OSMRE Self-Bonding

- OSMRE recently announced a new rule-making process to “strengthen the regulations of self-bonding” in response to the increased market volatility in the coal industry.
- OSMRE Director says it’s a turbulent time of energy transformation which has “exposed the limitations of the current self-bonding rule and we have a responsibility to protect the public’s interests by keeping up with these changes.”

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Self-Bonding continued…

- Press release said the rule-making decision follows a petition by an environmental group that asked the government to look into the ways coal companies "with a history of financial insolvency, and their subsidiaries" used self-bonding to reclaim lands disturbed from mining operations once they are finished.
- Goals of new rule-making include modifying the eligibility standards of self-bonding "to include criteria that are more forward looking, instead of only focusing narrowly on past performance."

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Other Goals of New Bond Rulemaking

- Provide for independent 3rd party review of companies' finances and certification of their financial health
- Provide for diversification for reclamation bonds for each mine so that one entity could not provide 100% of any mines' bonds other than cash bonds
- Give regulatory authorities better tools to obtain replacement bonds when a company is no longer eligible for self-bonding.

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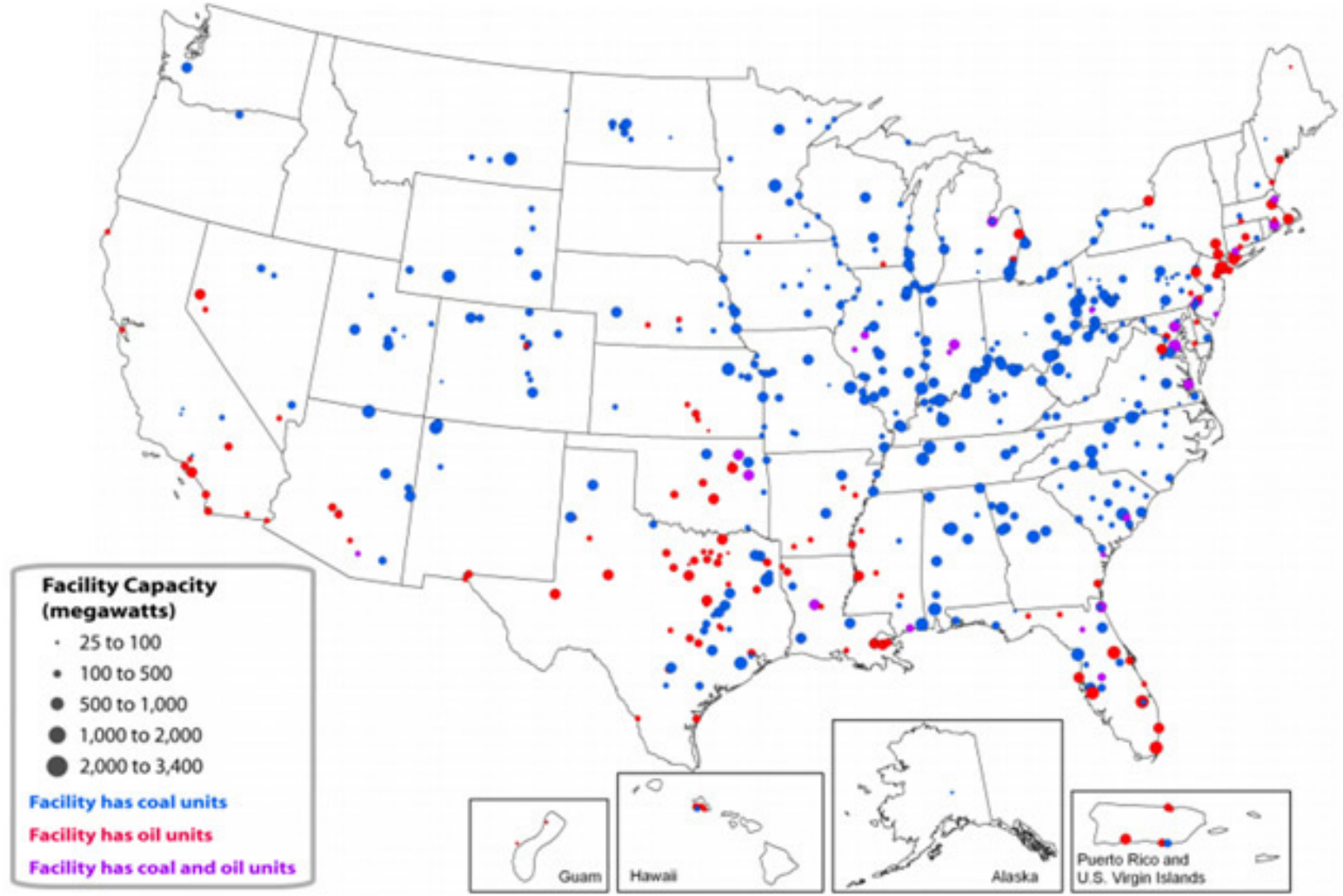
MATS: Mercury and Air Toxics Stds.

- March 29, 2013 – EPA finalized its MATS rule for new and existing Coal and oil fired power plants
- Set emissions limits for Hg, PM, SOx, acid gases, and certain metals
- Hg emissions limit at 0.003 lb/GWh

Generating Plants Subject to MATS Rule



(Source: EPA)

- On June 29, 2015, the US Supreme Court in *Michigan v. EPA* ruled that the EPA failed to comply with the Clean Air Act when it made its "appropriate and necessary" determination without considering compliance costs.
- SCOTUS remanded the case to the D.C. Circuit for further proceedings, leaving it up to the Court of Appeals to decide what to do with the rule while EPA corrects its error.

- In December 2015, the D.C. Circuit issued an order that left MATS in place while the EPA seeks to correct its error.
  - In June 2016, SCOTUS left this ruling in place.
- On April 25, 2016, the EPA published a supplemental finding that regulating HAPs is appropriate and necessary.
  - The EPA considered compliance costs and made no changes to the MATS rule.
  - Murray Energy has filed a timely petition challenging this finding in court.

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EPA'S Selenium Standard

- EPA moved to update its water quality standard for selenium emitted from coal mining and electricity production that harms fish. 81 FR 45285
  - The new rule is not a direct regulation, but affects how states set their own water quality standards.
- Rather than simply measuring concentrations in water, EPA recommends measurements based on levels found in fish eggs and ovaries. The agency also has new measurements based on whole body and muscle-specific concentrations.

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EPA'S Selenium Standard continued…

- In 2010 the EPA recommended water-column criteria of 2.6 micrograms of selenium per liter in flowing waters and 1.3 micrograms per liter in impounded waters, but the EPA adopted water-column criteria of 3.1 micrograms per liter in flowing waters and 1.5 micrograms per liter in impounded waters.
- The Center for Biological Diversity blasted the new standard.

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Stream Protection Rule ("SPR")

- Proposed rule by the Dep't of Interior Office of Surface Mining to update the existing Stream Buffer Zone Rule, enacted in 2008 to regulate surface coal mining on aquatic environments in Appalachia.
- SPR released in 2015, expected to be published soon
  - Key provisions include: defining "material damage to the hydrologic balance outside the permit area"; significant additional baseline data gathering for the mine site and adjacent areas; additional surface and groundwater monitoring requirements; specific requirements for the protection or restoration of perennial and intermittent streams; and additional bonding and financial assurance requirements.

Stream Protection Rule continued…

- Effect of rule:
  - Additional permitting costs
  - Rule's uncertainty will make it difficult to obtain and comply with permits
  - Could cost coal companies thousands of jobs and billions in revenue
- Opposed by the KCA, and both KY Republicans and Democrats. House of Representatives passed a bill to stop its implementation.

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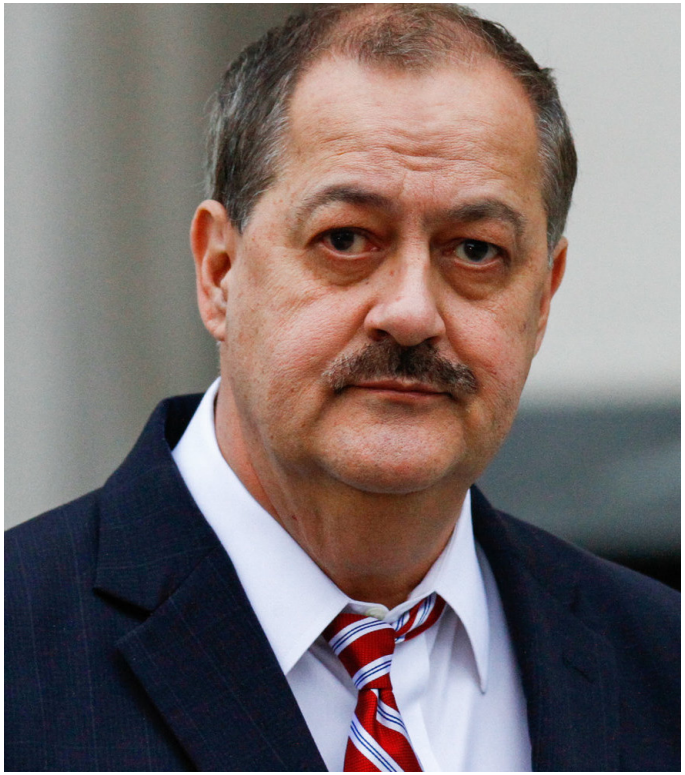
Don Blankenship Criminal Trial

- Upper Big Branch Mine disaster kills 29 miners
- Don Blankenship, the Fmr. Massey CEO, was charged with conspiring to break safety laws, defrauding mine regulators, and lying to financial regulators and investors about safety



Don Blankenship continued…

- After a lengthy trial, Blankenship was convicted of conspiring to willfully violate mine safety standards.
  - Received the maximum 1 yr prison sentence for this misdemeanor and a $250,000 fine.
- The US Attorney touted the verdict as a "landmark day for the safety of coal miners," adding that it's the first time he is aware of a chief executive of a major corporation being convicted of a workplace safety crime.

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Don Blankenship continued…

- The conspiracy conviction rested on evidence of Blankenship's bullish management style
- Blankenship constantly monitored every detail of his operation, and prosecutors painted him as a micromanager.
- Despite numerous violations, he instructed Massey execs to postpone safety improvements.
  - "We'll worry about ventilation or other issues at an appropriate time. Now is not the time."

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Don Blankenship continued…

- On appeal at the 4th Circuit, Blankenship argues that ignorance of the law is an excuse and that he was prevented from presenting key evidence at trial.
- Several Coal Associations also filed an amicus brief to the Fourth Circuit
  - The brief explicitly states that it is not addressing the specifics of Blankenship's conviction.

Don Blankenship continued…

- The brief states that in a heavily regulated industry where non-criminal MSHA violations are routine, it is "imperative that the line between business decisions and criminal conduct be clear, concrete, and defined."
- "In an industry where regulatory citations will be received for a myriad of unforeseen circumstances, it must prove beyond a reasonable doubt that a defendant charged with willfully violating the Act (possess the requisite means) and not merely that his or her acts or omissions caused or failed to eliminate violations."

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Don Blankenship continued…

- The brief also expresses concerns about the definition of “willful” criminal conduct in situations where “men and women in the coal industry are called upon to make difficult management decisions on almost a daily basis.”

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DOJ Yates Memo

- Directs all federal law enforcement officials (including the DOJ Environmental and Natural Resources Division) to prioritize the prosecution of individuals for corporate misconduct.
- Directs US attorneys to “focus on individual wrongdoing from the inception of the investigation.”
- DOJ indicates that it will provide individuals protection from liability through corporate resolution “only in extraordinary circumstances.”

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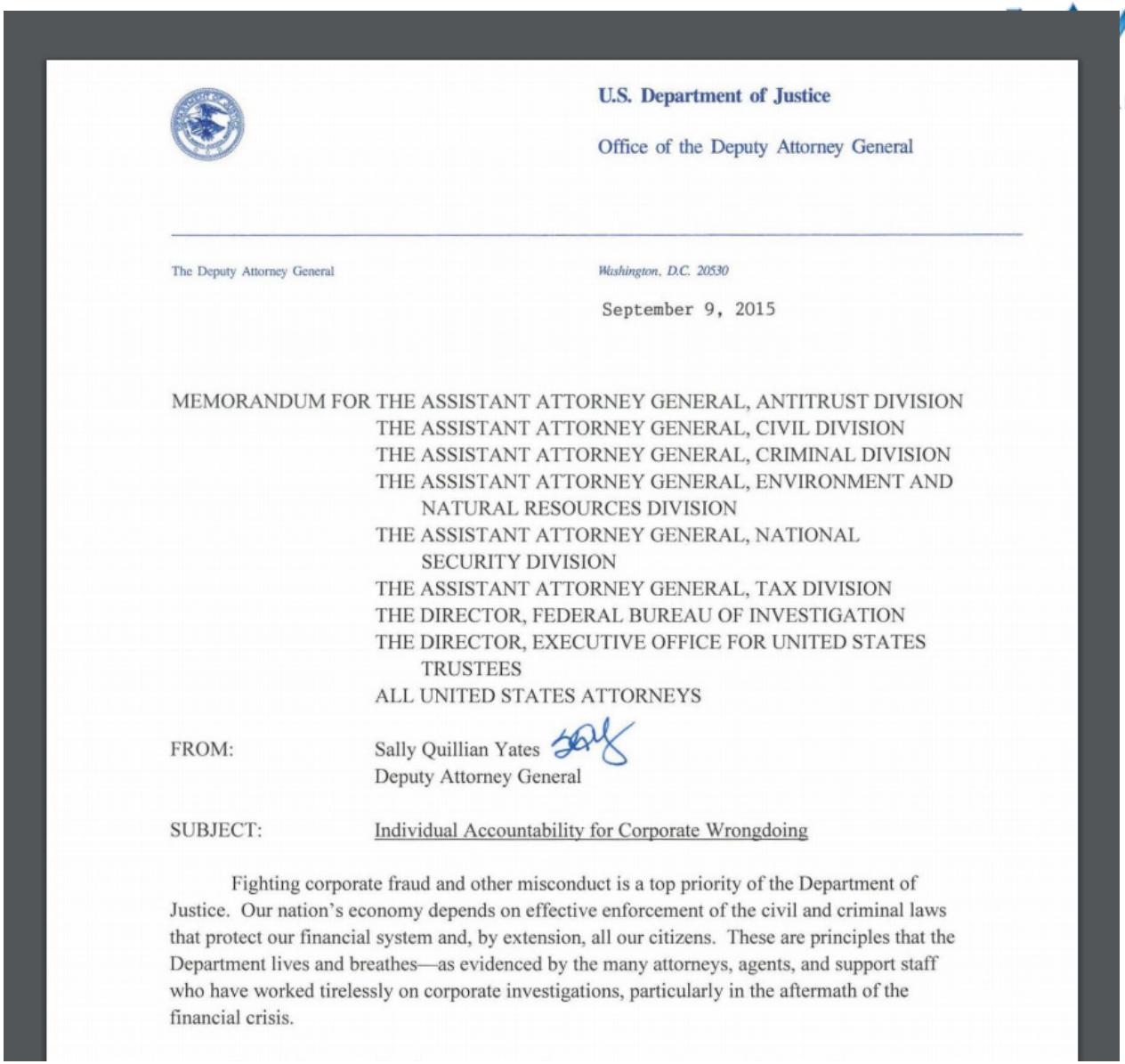
DOJ Yates Memo

- Traditional civil enforcement investigations can be extended to include individuals involved in environmental compliance decisions.
- EPA/DOJ could pursue civil penalties against a corporation and seek separate penalties from an individual deemed responsible for the violation.
- Companies should re-examine environmental compliance management practices



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

https://www.justice.gov/dag/file/769036/download

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