

## CRIMINAL CORPORATE LIABILITY WHAT OPERATORS MUST KNOW ABOUT THE XTO ENERGY PROSECUTION

By: Christopher D. Carusone

Reprinted from *The PIOGA Press* (October 2013)  
*Pennsylvania Independent Oil and Gas Association*

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Pennsylvania Attorney General Kathleen Kane recently charged XTO Energy, Inc., a subsidiary of ExxonMobil, with criminal violations of the Pennsylvania Solid Waste Management Act and the Clean Streams Law, based on an alleged discharge of waste water in Lycoming County, Pennsylvania. In so doing, Attorney General Kane used a Pennsylvania Statewide Investigating Grand Jury, ordinarily impaneled to conduct investigations of organized crime and public corruption, to conduct an investigation of the company and its practices. Employees of XTO Energy, Bosque Disposal Systems, LLC, Clark Trucking, and agents from the Pennsylvania Department of Environmental Protection and Pennsylvania Office of Attorney General were called to testify before the Grand Jury.

Executives in the energy industry and business groups have expressed alarm over the charges, particularly because of the use of the Pennsylvania Statewide Investigating Grand Jury and the fact that the company had already settled with the U.S. Environmental Protection Agency and the U. S. Justice Department over the same incident. However, this state criminal prosecution of a company actively operating in Pennsylvania's shale region should not come as a huge surprise. The political conditions on the ground in Pennsylvania – such as a dynamic energy industry, reduced state government spending due to less than anticipated tax revenues, repeated calls for a severance tax on natural gas production, and the 2012 election of two, new powerful statewide row officers, both of whom have taken aim at the natural gas industry– make this type of state prosecution a permanent part of the new regulatory landscape in Pennsylvania.

The criminal case here was brought by new Pennsylvania Attorney General Kathleen Kane. While running for office to become Pennsylvania's chief law enforcement officer, Ms. Kane was asked how she would shape the Pennsylvania Attorney General's Office to better serve the people of Pennsylvania. She replied, in relevant part:

[I] would fight to increase funding for the Attorney General's Environmental Crimes Unit. Since the discovery of natural gas in Marcellus Shale regions dozens of companies have descended upon Pennsylvania to extract our resources. Using a process known as fracking, these companies pump unknown chemicals into the ground, poisoning our water and harming our children. As attorney general, I would fight to ensure this process is stopped, and that those companies that destroy our environment are held accountable.

Allentown Morning Call (April 14, 2012).

Joining Attorney General Kane in scrutinizing Pennsylvania's natural gas industry is new Pennsylvania Auditor General Eugene DePasquale. Recently, Mr. DePasquale issued the following press release about his ongoing audit of the Pennsylvania Department of Environmental Protection (DEP)'s water quality enforcement efforts:

*Auditor General hints at DEP water monitoring problems.*

A highly anticipated audit on the Department of Environmental Protection's protection of clean water, an audit that Eugene DePasquale promised throughout his campaign, is near completion. The audit focuses on DEP's work in protecting the Commonwealth's water from pollution due to the natural gas drilling boom that has hit the state in recent years. While tight-lipped when it came to the details of the audit, DePasquale said it would be out by January 2014. He let out one little bit of information through. "The only thing I could say is, it's a good thing we're doing the audit," DePasquale said.

DePasquale for Pennsylvania Press Release (September 6, 2013).

These statements suggest that the likelihood of increased scrutiny of companies operating in Pennsylvania's shale region will extend well beyond the recently announced criminal prosecution.

The facts giving rise to the prosecution are unremarkable. According to the charges, on November 16, 2010, DEP conducted an unannounced inspection at the company's site in Penn Township, Lycoming County, Pennsylvania. The site, referred to in the Grand Jury's Presentment as the Marquardt site, hosted two wells and a series of mobile storage tanks. At the time of the inspection, the mobile tanks were being used to store waste water produced from XTO Energy's wells at the Marquardt site as well as nearby company sites. Although it was raining steadily, the DEP inspector testified that he heard the sound of running water coming from the rear of a waste water storage tank. Upon closer inspection, he noted that the drain plug had been removed from the rear valve of Tank 18174 and that the rear valve was partially open, allowing the waste water to run onto the ground and into an unnamed tributary. Tank 18174 was attached to five other tanks that were connected by a manifold system to allow water to run freely between the tanks. Samples of the water on the ground at the site revealed elevated levels of chlorides, barium, strontium, and total dissolved solids. Similarly, samples from the tributary revealed elevated levels of chlorides, aluminum, barium, and total dissolved solids. Records and testimony compelled by the Grand Jury revealed that 57,000 gallons of waste water were unaccounted for at the site as a result of the spill.

In July 2013, the federal government reached an agreement with the company over the incident, based on an alleged violation of the Clean Water Act. Under the agreement, the company agreed to pay a \$100,000 fine and implement a comprehensive plan to improve its waste water management practices. Significantly, the consent decree with the federal government stated that

the agreement “expressly does not resolve any enforcement action of the Commonwealth of Pennsylvania under any federal and state law and any such claims are not precluded or limited in any way by resolution of this matter.” Two months later, the Pennsylvania Attorney General filed its criminal charges against XTO Energy as a corporation predicated on the same incident that was at issue in the federal consent decree.

Following the filing of criminal charges, XTO Energy issued a press release blasting the charges as “unwarranted and legally baseless” and as “an abuse of prosecutorial discretion.” The company defended itself on the ground that none of its employees intentionally, recklessly or negligently caused the discharge of water. Rather, the company noted that the most likely explanation for the spill was that an independent contractor that had been managing the site before the spill did not close the valve properly after a transfer of water. The company further observed that it acted quickly to remediate the spill and worked cooperatively with state and federal authorities to eliminate any temporary environmental effects, none of which were significant or lasting. In fact, upon the remediation, which occurred with active guidance from the DEP, the site was fully remediated. Later, as noted above, the company agreed with federal authorities on reasonable civil penalties and preventative measures—well before the sudden charges from the Attorney General. Finally, the company observed the potential deleterious message these charges send to operators statewide: namely, if even a small spill occurs and a company takes measures to remediate it in good faith and in cooperation with authorities, the company still risks criminal exposure.

XTO Energy is being prosecuted under principles of corporate criminal liability contained in the Pennsylvania Solid Waste Management Act and Pennsylvania Clean Streams Law. While it is perhaps not surprising to environmental law practitioners that corporations can be held criminal liability for violations of these acts, what may be surprising is that corporate officers can also be held criminally liable for the criminal acts of the corporation. For example, the definition of “person” under the Solid Waste Management Act specifically provides: “In any provisions of this act prescribing a fine, imprisonment or penalty, or any combination of the foregoing, the term ‘person’ shall include the officers and directors of any corporation or other legal entity having officers and directors.” 35 P.S. § 6018.103; *see also* 35 P.S. § 691.602(f) (similarly defining “person” under the Clean Streams Law); 18 Pa.C.S. § 307(e) (Pennsylvania Crimes Code provision stating that a “person is legally accountable for any conduct he performs or causes to be performed in the name of a corporation . . . or in its behalf to the same extent as if it were performed in his own name or behalf.”). The Pennsylvania Superior Court has also held that: “It is well settled that individuals are subject to indictment for acts done under the guise of a corporation where the individual personally so dominated and controlled the corporation as to immediately direct its action.” *Commonwealth v. Wood*, 432 Pa.Super. 183, 201, 637 A.2d 1335, 1344 (1994).

The Pennsylvania Attorney General used the Pennsylvania Statewide Investigating Grand Jury to investigate XTO Energy and its contractors. The Grand Jury’s powers under Pennsylvania law are broad, and include the power to compel testimony and evidence (including electronic evidence) through the issuance of Grand Jury subpoenas, the power to issue search warrants, and

the power to engage in electronic surveillance. Since many Presentments issued by the Grand Jury are built on electronic evidence, a company's policies on crisis communications and electronic document management are critically important. It is also important to point out that Grand Jury process is criminal, not civil, in nature. It is not uncommon for companies and their attorneys who treat Grand Jury process as civil discovery to find themselves on the other end of a criminal obstruction of justice charge.

Fortunately, there are proactive steps operators can take to greatly reduce the chances of state criminal investigation and prosecution. First, operators should expand their legal teams to include an experienced criminal practitioner who can take a fresh look at the company's policies and procedures from a criminal perspective (specifically those related to incident management and electronic document management) to help ensure that the company's actions following an environmental incident will be satisfactory to even the most demanding prosecutor. Second, operators should review all prior environmental incidents occurring within the applicable statute of limitations period to determine whether any suspicious circumstances are present that could draw the attention of law enforcement, and then take appropriate action. Third, operators should invest in a competent, neutral investigation of any incident that has drawn the attention of law enforcement or is likely to trigger a criminal investigation. Finally, operators should communicate regularly with criminal counsel as soon as incidents occur to avoid behaviors that may be interpreted as suspicious and trigger a costly, full-blown criminal investigation.

In conclusion, the old saying that "an ounce of prevention is worth a pound of cure" has never been truer in Pennsylvania's regulatory environment. The Pennsylvania Crimes Code has essentially codified this principle, stating that in certain corporate criminal cases "it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission." 18 Pa.C.S. § 307(d). Given the billions of dollars being invested in Pennsylvania's energy market every year, and the draconian direct and collateral consequences that flow from a criminal conviction, a modest investment to bullet proof your business from criminal exposure can really pay off in the long run.

*Christopher D. Carusone is a partner in the Pennsylvania-based law firm Conrad O'Brien, P.C. Prior to joining Conrad O'Brien, Mr. Carusone served as Chief Deputy Attorney General in charge of the Pennsylvania Statewide Investigating Grand Jury, Executive Deputy General Counsel in the Governor's Office of General Counsel, and Secretary of Legislative Affairs. Mr. Carusone may be reached at (717) 943-1210 or [ccarusone@conradobrien.com](mailto:ccarusone@conradobrien.com).*

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