

DOJ Refuses to Revoke BP's Probation Over Safety Violations at Texas City Refinery

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The Department of Justice (DOJ) has refused to pursue a probation revocation case against BP after the company was found to have violated a federal judge's March 2009 felony judgment, which required BP to fulfill the terms of a settlement agreement it entered into with government regulators five years ago to make certain safety upgrades at its Texas City refinery by September 2009, according to documents obtained by Truthout.

Instead, the DOJ will allow BP to spend two additional years to correct hundreds of safety problems that have plagued the refinery - the third-largest in the country - for a decade and have played a part in the deaths of 19 people over the past five years.

On March 23, 2005, 15 people were killed and 170 others were maimed and seriously injured in an explosion at the plant, which occurred "when a distillation [blowdown] tower flooded with hydrocarbons and was over-pressurized, causing a geyser-like release from the vent stack. The hydrocarbons found an ignition source and exploded," according to a two-year [investigation](#) conducted by the independent US Chemical Safety Board (CSB).

John Bresland, CSB's chairman, said his agency's probe, completed in 2007, "found organizational and safety deficiencies at all levels of the BP Corporation."

"Our investigation team turned up extensive evidence showing a catastrophe waiting to happen," Bresland [said](#) on March 24, the fifth anniversary of the refinery explosion. "Cost-cutting had affected safety programs and critical maintenance; production pressures resulted in costly mistakes made by workers likely fatigued by working long hours; internal audits and safety studies brought problems to the attention of BP's board in London, but they were not sufficiently acted upon."

In October 2007, BP Products North America (BPNA) and the Justice Department announced they reached a settlement, which called for BP to plead guilty to a felony Clean Air Act violation and pay a \$50 million fine. But the victims of the refinery explosion successfully held up the plea agreement for 18 months after the Fifth Circuit Court of Appeals ruled they were not properly consulted under the federal Crime Victims Act before the plea deal between the government and BP was hammered out behind closed doors. The victims objected to the plea deal, saying the negotiated fine was not large enough and BPNA's

parent company, BP Plc, was immunized as part of the settlement when evidence showed it played a direct role in the decisions that led to the blast.

On March 12, 2009, however, US District Court Judge Lee Rosenthal accepted the [plea agreement](#) and formally placed BP on three years probation. She told the victims she could not rewrite the plea agreement. She could only accept it or reject it.

The plea deal and the terms of BP's probation, according to Judge Rosenthal's [judgment order](#), were contingent upon BP correcting safety violations at the refinery discovered in the aftermath of the disaster as part of a separate settlement agreement BP entered into in September 2005 with the Occupational Safety and Health Administration (OSHA) and the Texas Commission on Environmental Quality (TCEQ).

Moreover, if BP committed any federal environmental and/or process-safety crimes related to its Texas City refinery operations, then BP would be in breach of its plea agreement and in violation of its probation. The government could then prosecute the company for other crimes it had evidence of during the course of its investigation into the refinery blast, the plea agreement states.

But three weeks ago, Daniel Dooher, a senior trial attorney with the DOJ's Environmental Crimes Section, sent letters to Judge Rosenthal stating that the DOJ has declined to revoke BP's probation because the company paid a \$50 million fine to OSHA last month to settle charges that it breached the 2005 settlement agreement with the agency by allowing "[hundreds of potential hazards to continue unabated](#)" and entered into a new agreement with OSHA to address safety concerns at the refinery.

"OSHA and BP have executed a [new agreement] resolving the allegations of non-compliance," says Dooher's September 8 [letter](#) to Judge Rosenthal. "In summary, the [new agreement] requires: 1) extending completion of the requirements under the [2005] Settlement Agreement until March 12, 2012.

"The Department of Justice has discussed the executed agreement in detail with OSHA and BP. In addition, the Department of Justice has been in contact with the U.S. Probation Office and explained the terms of the [new agreement] to ensure that the probation officer is apprised of the current status of the case. All requirements of the original Settlement Agreement must be completed by March 12, 2012, when BP's probation currently terminates. Therefore, it is the United States' position that the conditions of the [new agreement with OSHA] are also conditions of BP's probation under the Plea Agreement. BP agrees with this position and is filing a letter with the Court to that effect. As a result, the Department of Justice is not seeking a revocation or extension of probation at this time." [Dooher sent Rosenthal a [second letter](#) on September 10, clarifying some of the statements he had made.]

The [judgment order](#) in the case signed by Judge Rosenthal on March 13, 2009, however, does not state that BP must make the safety upgrades by the end of its probation, as Dooher claimed in his letter. The judgment order says, "As stated in the plea agreement, BP must comply fully with the Settlement Agreement ... if BP Products commits any federal environmental or process-safety crime relating to its Texas City refinery operations, it will breach the plea agreement."

BP was only given until the end of its probation to fulfill the terms of a separate settlement

agreement it signed with the TCEQ over the release of toxic emissions at the refinery and corrective actions BP was instructed to take to address air-quality issues.

“In the event BP Products is unable to complete its obligation under the TCEQ order within the three-year probation term, it must inform the United States sixty days before the end of the three-year term, and BP Products and the United States must jointly move the court to extend the term of probation up to five years and will ask the court to set compliance with and completion of the TCEQ order as the only terms of the extended probation period,” states the judgment order.

[David Senko](#) was manager of construction at the refinery and supervised 11 of the employees who were killed in the explosion. During an interview, he said BP continues to “suffer extreme leniency.”

“It just makes me sick,” said Senko, who was employed by Jacobs Engineering, a BP contractor, and is now on full disability. “Their probation should have been revoked. There is no reason, no justification not to [revoke BP’s probation] and prosecute them for violating the [settlement agreement]. There is plenty of evidence to support doing just that. This is just a tragedy against everybody, particularly the people [BP] has killed.”

One possible reason DOJ declined to revoke BP’s probation, according to a DOJ official who has worked on criminal environmental cases for the past six years, is that a culture still exists at the agency where prosecutors are encouraged to settle corporate criminal cases as quickly as possible as opposed to devoting resources toward lengthy investigations.

“That’s the directive,” said the DOJ official, who requested anonymity in order to speak openly about the issue. “It comes directly from the top [the attorney general’s office] and we are under pressure to make sure its carried out.”

It’s unknown who at DOJ was ultimately responsible for deciding against revoking BP’s probation.

Back in May, an attorney who blogs under the name bmaz posted an [article](#) about the Texas City refinery and noted that the settlement in the case was evidence of how the DOJ “under the politicized Republican rule of [George W.] Bush and [Dick] Cheney instituted a preference for coddling corporate malfeasants like BP and Exxon with lax civil measures instead of punitive criminal prosecutions and, in the process, created a get rich windfall program for their friends to serve as ‘monitors’ for the civil settlements.”

Citing an April 2008 New York Times report, bmaz wrote that the policy began when Bush was sworn into office and Deputy Attorney General Paul McNulty made it official DOJ policy in 2006.

A former EPA official said that’s a policy that clearly needs to change.

“What are [BP’s] incentives to comply when we will not enforce something as overt as conditions in a criminal judgment?” the former EPA official asked. “It sends the wrong message and gives a foreign corporation more leeway than we give US citizens and corporations.”

Another former EPA official said “DOJ’s failure to vigorously prosecute this foreign oil

company sends the message to company managers that it is ok to kill US citizens and violate US health, safety and environmental laws for profit—a treatment that not many human “persons” get under federal law.”

“This coddling is taking place in the wake of the worst environmental disaster in US history lying at BP’s feet,” the former EPA official said. “DOJ’s position is a pathetic lack of representation of the will of the American people as poll numbers obviously attest.”

BP spokesmen Daren Beaudou and Scott Dean did not return phone calls and emails seeking comment.

OSHA Probe

The path that led the government toward giving BP another shot at making good on its failed promises began in the spring of 2009.

Around the time Judge Rosenthal accepted BP’s plea agreement and signed the judgment in the case, OSHA launched an investigation to determine whether the company was meeting its obligations under the 2005 settlement agreement.

By July 2009, two months before BP faced a deadline to make safety upgrades at the refinery in accordance with the terms of the settlement agreement, it became clear to OSHA that the company was not in compliance.

OSHA contacted the DOJ’s Environmental Crimes Section and the US attorney’s office in Houston to alert them that BP had breached the terms of the settlement agreement, according to Doohar’s September 8 letter to Judge Rosenthal.

On August 3, 2009, Mark Briggs, who works in OSHA’s Houston office, sent a letter to Keith Casey, manager of the Texas City refinery, alerting him that OSHA inspectors who visited the refinery found severe safety problems associated with the functionality of equipment at the facility, including pressure relief valves.

Furthermore, Briggs wrote, even BP “identified a large number of uncontrolled or unmitigated hazards involving instrumentation ... throughout the refinery.”

“We believe that failure to correct the issues addressed in this letter ... by September 23, 2009 would constitute a failure to comply with the terms of the 2005 Settlement Agreement and failure to abate,” Briggs wrote.

Thomas Wilson, an attorney with BP’s Houston-based law firm Vinson & Elkins, disputed OSHA’s assertions about safety hazards, and noted in an October 3, 2009, [letter](#) to Briggs that it was the company’s position that it was in full compliance with the settlement agreement and believed it had more time to fulfill its commitments under the settlement agreement.

Three weeks later, on October 30, 2009, the agency [announced](#) it was imposing a \$56.7 million fine against BP and issuing the company 270 citations for failing to take corrective actions as required by the settlement agreement to fix safety hazards similar to ones investigators found after when they inspected the facility shortly after the refinery explosion.

Additionally, OSHA also fined BP \$30.7 million and issued 439 separate citations to BP for new, “willful” violations related to the company’s “failures to follow industry-accepted controls on the pressure relief safety systems and other process safety management violations.”

BP vehemently [denied](#) OSHA’s charges and vowed to mount a vigorous defense against the proposed penalties.

“We continue to believe we are in full compliance with the Settlement Agreement ... we strongly disagree with OSHA’s conclusions,” said Casey, the Texas City refinery manager, the day OSHA announced the penalties. “We believe our efforts at the Texas City refinery to improve process safety performance have been among the most strenuous and comprehensive that the refining industry has ever seen.”

Some of the safety violations OSHA cited BP for have resulted in four employee deaths at the refinery since the March 2005 explosion, including one where a contractor was electrocuted “on a light circuit in the [refinery’s] process area” and another when an employee was killed when the top head of a pressure vessel blew off. BP received four citations from OSHA regarding continued violations over process safety management.

The Texas City refinery has also been the subject of numerous complaints made by employees over the past four years to BP’s Office of the Ombudsman, and is the office’s second-biggest caseload since its inception in 2006, according to a confidential report that office prepared for Congress in March that was obtained by Truthout.

“When BP signed the OSHA settlement from the March 2005 explosion, it agreed to take comprehensive action to protect employees. Instead of living up to that commitment, BP has allowed hundreds of potential hazards to continue unabated,” Secretary of Labor Hilda L. Solis said when the record fine was [announced](#).

Dooher said the DOJ informed BP in January that if the company failed to resolve OSHA’s allegations that the company breached the settlement agreement to “OSHA’s satisfaction, then the government might seek revocation and/or extension of probation,” according to his September 8 letter to Judge Rosenthal.

But, “in the interest of judicial economy, the Department of Justice did not immediately move this court to modify or revoke BP’s probation, but has closely monitored the situation to determine if BP could resolve the alleged noncompliance with OSHA,” Dooher wrote.

“A Slap on the Wrist”

For attorney David Perry, who represents some of the victims of the refinery explosion, the DOJ’s decision not to revoke BP’s probation after OSHA determined that BP was in violation of the settlement agreement is a “terrible disappointment to my clients.”

“There is absolutely no accountability,” Perry said in an interview. “BP is literally a serial killer. It is objectively true that BP is a serial violator of federal laws and they should be subject to vigorous prosecution. But federal authorities continue to give them a slap on the wrist.”

Brent Coon, a Beaumont, Texas, attorney who also represents some of the victims of the refinery blast, including Eva Rowe, whose parents were killed in the disaster, said individual

executives at the company deserve to be prosecuted and jailed.

“If you had a drunk driver that killed 15 people they would have gone to jail. If the drunk driver killed 11 people they would have gone to jail. Why does BP, who has done the same thing, get off the hook?” said Coon, whose analogy referred to the number of people killed in the Texas City refinery blast and the number of lives lost when the Deepwater Horizon drilling rig exploded in April, spewing more than four million barrels of oil in the Gulf of Mexico. “I have clients from Texas City who would still request that the DOJ finish their investigation started in 2005 and turn the info over to a grand jury to consider indictment of individuals in management at BP who contributed to the tragedy.”

Coon and Perry and two other attorneys who represent victims of the disaster spoke with Dooher three times over the past year and have also sent letters urging him to revoke BP’s probation and prosecute the company for violating its probation by failing to make the safety upgrades as required under the terms of the OSHA settlement agreement and its plea deal with the government.

On July 2, Perry sent Dooher and Assistant US Attorney in Houston Mark McIntyre a [letter](#) recapping a meeting they had June 22 to discuss the case.

“On behalf of my clients who were permanently injured and whose family members were killed, I want to place in writing our request that the Department of Justice and the United States Attorney move promptly to revoke BP’s probation and to institute an immediate prosecution of BP for its original criminal conduct to which it has pled guilty,” Perry wrote.

Perry also noted in his letter, however, that Dooher has “not reported that any action of any kind is being taken to revoke BP’s probation ...”

“BP demonstrates that it holds itself above the law and scoffs at its legal obligation without fear of repercussions,” Perry wrote. “In allowing BP to continue on probation, the Federal authorities make a mockery of our criminal justice system while failing to protect the public.

“We were offered no reason why BP is being afforded the remarkable leniency being extended to it by Federal prosecutors in the face of multiple deaths that it has caused and clear violation of probation.”

Coon said he felt the meetings with Dooher, although a legal requirement, were largely held to “placate me” and other attorneys.

“Our meetings gave me the impression that the Justice Department was extending us a courtesy and allowing us to discuss how we felt about the case,” Coon said. “They were going through the motions. I do not feel what we said one way or another was going to make a difference in what they were going to do. [Dooher] has his marching-orders.”

Coon said Dooher indicated the DOJ wanted to wait to see what would transpire over the course of the next month, when a hearing was scheduled before an OSHA review commission over the 270 citations OSHA issued to BP for breaching the settlement agreement.

“Won’t Get Fooled Again”

On August 12, about a week before an OSHA review panel was scheduled to begin hearings,

BP and OSHA signed a new [“stipulation and agreement”](#) that will allow the company to spend the next two years – the remainder of its probation – to address the safety issues at the Texas City refinery.

BP also agreed to pay a \$50 million fine related to the 270 citations OSHA issued the company for failing to make the required safety upgrades by the September 23, 2009, deadline, as required under the original settlement agreement. The company also promised to set aside \$500 million to pay for the safety improvements. BP is still contesting the 439 “willful” violations and the \$30.7 million fine associated with those citations. Hearings in that matter are scheduled to begin soon.

Jordan Barab, OSHA’s deputy director, said that BP has essentially admitted guilt by accepting the citations and paying the fine, even though BP disputes that characterization.

“The [new] settlement means [BP] admitted they were not in compliance with the terms of the original settlement,” Barab said in an interview.

Barab said he was not privy to any of the discussions between the DOJ and OSHA over the Texas City refinery case.

The new agreement is tougher than the previous one OSHA signed with BP in 2005, Barab said, in that it gives OSHA unprecedented oversight and access to BP executives and requires BP to hire independent monitors to ensure the company is complying with the terms of agreement and will report back to OSHA.

“We told BP we won’t get fooled again,” Barab said. “We are going to have high-level BP executives meet with us to review their compliance. We’ll have regular monitoring inspections. We’ll be to the refinery quite a bit to make sure they do what they are saying they are doing.”

Barab said he realizes that OSHA cannot penalize BP enough to affect the company’s bottom line, but he believes this new agreement “sends a message to [BP] and to the entire industry.”

“I think they are serious about addressing [safety issues] and I think they got the message,” he said.

But Perry, the lawyer for the victims, said the new agreement still has “holes you can drive a truck through.

“All of the deadlines have exceptions,” Perry said. “The only penalty for not meeting the deadline is the deadline would have to be extended. There is no hard and fast deadline and no hard and fast enforcement authority.”

Barab said if BP “fails to live up to their side of the bargain there are a number of things we can do.”

“We can cite them for failure to abate. We can go to court and force them to comply. We can unilaterally terminate the agreement, which the DOJ will hear about,” Barab said.

Two weeks after OSHA and BP signed the new agreement, Dooher met with the victims’ attorneys for one last time. According to Coon, he asked them if the new settlement

changed the attorneys' position on probation revocation.

"I told him it did not," Coon said about his August 24 meeting with Dooher. "I said that I felt that the agreement to pay an additional \$50 million in fines only further validated our assertions that BP was in violation of the 2005 OSHA agreement and a therefore a violation of their plea agreement."

Dooher told Coon he would take his position back to Washington and discuss it with other DOJ officials. On September 8, Dooher informed Judge Rosenthal revoking BP's probation in light of the new agreement the company signed with OSHA was not necessary.

Perry said he has absolutely no faith BP has learned its lesson.

"I wish I believed that something would change, but it's hard to have any confidence that it will."

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