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Steinzor: With DuPont, OSHA's tough talk falls faint

Agency too quick to make deal with employers, offering weak penalties

By Rena Steinzor | May 22, 2015

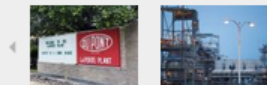
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Photo By Marie D. De Jesus/MBI

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Four workers were killed last November during a hazardous chemical leak at DuPont's plant in La Porte. OSHA fined the company \$99,000, which some critics say is too small a penalty for the violations found there.



The nation's top guardian of workplace safety talked tough earlier this month when announcing that 11 citations were being issued against DuPont's La Porte plant for the 2014 release of poisonous methyl mercaptan that choked four employees to death. **U.S. Occupational Safety and Health Administration** chief **David Michaels** sounded like he thinks DuPont managers behaved very badly. Reading his statement, you might even think criminal misconduct had occurred. But take a close look at the agency's paperwork and the tough talk dissolves to a faint whisper.

Despite ample evidence that gross and reckless neglect of fundamental safety protocols caused the tragedy, OSHA could only muster alleged violations totaling \$99,000 in civil penalties, an amount that DuPont could pay out of petty cash. Penalties this small relative to a company's size and revenues do not deter future misconduct by DuPont or its competitors. Instead, they are written off as a mere cost of doing business. That outcome is particularly troubling because the reckless mismanagement that killed brothers Gilbert and **Robert Tisnado, Wade Baker** and Crystle Wise should have qualified for OSHA's most stringent punishment. Choosing citations that allege "serious" - rather than "willful" - violations means that senior managers are immunized from federal indictments for criminal recklessness.

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Michaels has argued in the past that a weak statute is to blame for his agency's feeble enforcement, and it's certainly true that the law imposes penalties that are far too weak. For example, it caps penalties for willful violations at \$70,000 and criminal culpability is prosecuted as a mere misdemeanor. Members of Congress have succumbed to big business pressure not to strengthen these provisions, although they have upgraded comparable laws that punish environmental crimes. The flaw in OSHA's effort to blame Congress is that in far too many cases, agency staff shrinks from charging willful violations and pursuing criminal prosecutions. Instead, it works to clear cases quickly by cooperating with employers.

OSHA defines a willful violation as a circumstance where an employer demonstrates "intentional disregard" for the law or "plain indifference" to employee safety. These are understandable, nontechnical words. Let's consider them in the context of what happened at DuPont's 400-acre La Porte plant, as reported by the [Houston Chronicle](#) and other media since the deadly November leak.

As with many fatal industrial incidents, managers had ample warning that La Porte had very serious safety problems. Between 2007-2012, DuPont reported three toxic leaks, landing it at the top of a national list kept by the [U.S. Environmental Protection Agency](#). In 2007, thousands of people were required to shelter in place and two were injured when the plant released 325 pounds of highly corrosive oleum into the ambient air. OSHA assessed a grand total of \$1,800 in penalties for that frightening incident.

The "Lannate unit" where the leak of methyl mercaptan occurred in November was built in 1946, and its structural integrity was compromised by long-deferred maintenance. Earlier in 2014, state environmental regulators ordered the company to rectify these problems after discovering that the unit had been leaking pollutants beyond its permit limits for years. Five days before the fatal incident, the five-story unit was shut down for repairs. Workers were attempting to start it up again when the leak began. Everyone in the chemical industry knows start-up is an extraordinarily perilous time, and DuPont claims to be a safety leader. Yet both its leak prevention and its response practices were shockingly inept.

According to OSHA's citations, the unit was plagued by jerry-rigging of equipment to the point that diagrams depicting the pipes' configuration were incorrect. Ventilation fans were out of commission, plugged pipes were never repaired and DuPont ignored fundamental safety requirements. Ultimately, a faulty valve failed on a redirected pipe, channeling the acutely toxic gas into the space where people were working.

As the poisonous vapor spilled from the valve, the worker standing nearby radioed for help and others ran to assist her. But the plant lacked enough emergency oxygen masks for rescue purposes. Later, two masks lay abandoned near two dead workers. Managers never set up an incident command center. They never called for help from a highly trained industry-sponsored response team organized to respond with specialized equipment. Most incredibly, no one called 911 until a full hour after the leak began. Even then, shift supervisor [Jody Knowles](#) lied to the 911 operator, claiming that the public was not at risk when DuPont had not yet measured exposure at the plant's fence line. Firefighters sent to the site risked their lives because DuPont never filed an inventory of hazardous chemicals.

All these details suggest that the possibility of sending someone to jail for this pattern of reckless neglect should still be on the table. If the federal government is too intimidated to bring a criminal case, maybe Harris County District Attorney [Devon Anderson](#) could step into the breach. She has the authority to charge responsible managers with reckless manslaughter when people die preventable deaths.

Steinzor is a professor at the [University of Maryland](#) Carey Law School and author of "Why Not Jail? Industrial Catastrophes, Corporate Malfeasance, and Government Inaction" ([Cambridge University Press](#) December 2014).



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