

Keeping Government Environmental Investigations Civil

By Ronald H. Levine and
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The threat of criminal environmental prosecutions is real. Most federal and state environmental statutes provide for criminal prosecution in appropriate circumstances, often for knowing violations of environmental law, but sometimes even on a negligence or strict liability basis. *See, e.g.*, the Pennsylvania Solid Waste Management Act (strict liability, reckless disregard and knowing violations); the federal the Clean Air Act (CAA) and Clean Water Act (CWA) (negligence and knowing violations); and the federal Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (knowing violations).

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The U.S. Environmental Protection Agency (EPA) maintains an Office of Criminal Enforcement, which refers cases to the U.S. Department of Justice (DOJ) for criminal prosecution.

The DOJ Environmental Crimes Section (ECS) makes much of the fact that from Oct. 1, 1998 through Sept. 30, 2014, it concluded criminal cases against more than 1,083 individuals and 404 corporate defendants, resulting in a total of 774 years of incarceration and \$825 million in criminal fines and restitution. In fiscal year 2014, 271 criminal environmental cases were opened by the DOJ, resulting in 187 defendants being charged. *See generally* www.justice.gov/enrd/environmental-crimes-section. DOJ ECS also notes its coordination with state enforcement agencies: "In order to conserve resources and improve the efficiency of environmental enforcement efforts, ECS attorneys have often helped assemble environmental crimes task forces ... of federal, state, and local personnel, [which] have successfully identified and handled many environmental crimes cases." *See* <http://1.usa.gov/1FWU7pI>. Conversely, state environmental regulatory agencies maintain civil investigative units that will refer appropriate cases for prosecution to their state Attorneys

General or seek to work jointly with the "feds."

Individuals are not exempt from prosecution. As a matter of policy, "[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation." U.S. Attorney's Manual (USAM) at § 5-11.114. Of course, federal Sentencing Guidelines contain specific provisions related to environmental crimes, with base offense levels allowing for incarceration. *See, e.g.*, U.S.S.G. §§ 2Q1.1-2Q1.3 (eff. Nov. 1, 2014).

The EPA explicitly recognizes the discretionary nature of what constitutes an environmental crime:

An environmental crime is a type of environmental violation for which Congress has provided criminal sanctions (prison time and/or criminal fines) because individuals or companies have consciously decided to violate the environmental law or have acted so negligently that their behavior has resulted in a serious violation ... *it is also possible that the same conduct could be dealt with through a combination of civil/administrative action against the company* while the individuals within the company who are responsible for

the violations could be prosecuted criminally and sentenced to prison for their actions. See <http://1.usa.gov/1GId2KM> (emphasis added).

Given the ambiguity of determining at what point a seemingly one-off or accidental violation of environmental law might be viewed by regulatory agencies and prosecutors through the prism of criminal activity, the regulated entity must seek to put its best foot forward at the earliest stages of a civil environmental investigation.

RECENT CRIMINAL PROSECUTIONS

A review of recent federal environmental criminal prosecutions corroborates DOJ's relatively vigorous criminal enforcement agenda in the environmental arena. By way of a non-exhaustive list, during just March through May 2015:

- Subsidiaries of Duke Energy Corporation, the nation's largest utility, pleaded guilty to Clean Water Act violations, with a \$68 million criminal fine and an agreement to spend \$34 million on environmental projects, resulting from a coal ash spill into a river.
- A Norwegian shipping company, Det Stavangerske Dampskibsselskab AS (DSD Shipping), and four employees were indicted on charge of violating the Act to Prevent Pollution from Ships (APPS), related to the alleged discharge of waste oil and oil-contaminated waste water into the sea.
- Tap Root Dairy, LLC and its owner were sentenced in federal court for discharging cow feces into a river.
- A metal finishing company, So-Cal Plating, and its owner were convicted of illegally storing hazardous waste and unlawfully discharging the waste into the

local sewer system.

- Mann Chemical Company agreed to plead guilty for failure to develop a risk management plan to minimize the risk of release of hydrofluoric acid.
- A Pennsylvania man was sentenced to jail for failure to notify EPA of an asbestos "rip and strip."
- A former Wisconsin pipeline employee was sentenced and fined for knowingly failing to conduct required pipeline safety tests and submitting false data to the Pipeline and Hazardous Material Safety Administration (PHMSA).

See generally EPA's monthly Environmental Crimes Case Bulletin, <http://1.usa.gov/1KSSXkG>.

At the state level, and by way of example, a current Pennsylvania prosecution has sent shockwaves through Pennsylvania's booming unconventional natural gas (hydraulic fracturing) industry: A major oil and gas producer was criminally charged by the Pennsylvania Attorney General with releasing 57,000 gallons of contaminated wastewater at a drilling site in alleged violation of Pennsylvania's Clean Streams Law and Solid Waste Management Act. See *Commonwealth of Pennsylvania v. XTO Energy*, CR-002-2014 (C.C.P. Lycoming). The prosecution occurred even though the producer: 1) promptly remediated site contamination under the direct oversight of the Pennsylvania Department of Environmental Protection (PADEP); and 2) agreed to a \$100,000 settlement to resolve federal civil claims under the Clean Water Act. See <http://1.usa.gov/1GHALCv>; <http://bit.ly/1GiffWA>. The criminal case is pending.

CIVIL INVESTIGATIONS AND PARALLEL PROCEEDINGS

In many instances, environmental prosecutions begin as civil investigations, often at the local level. But

at both the federal and state levels, under the "right" circumstances, civil or administrative environmental investigations can morph into threatening criminal investigations, and parallel proceedings are encouraged in such instances. See USAM at § 5-11.112 ("Because many of the environmental statutes specifically provide for criminal, civil, and administrative sanctions ... this is an area of the law especially susceptible to parallel proceedings. Such proceedings may be appropriate, for example, when in the course of a civil case the government receives evidence of deliberate violations of the law meriting criminal prosecution ...").

For example, in Pennsylvania, the Pennsylvania Department of Environmental Protection (PADEP) Office of Chief Counsel employs a Bureau of Investigation (BOI) to investigate potential environmental wrongdoing in close coordination with PADEP technical staff. The BOI typically will interview landowners, employees and corporate representatives, and prepare a summary of factual circumstances (sometimes referred to as an "After Action Review") for the Office of Chief Counsel. Based on the findings of the BOI, the Chief Counsel may then elect to refer certain matters to the Pennsylvania Attorney General for criminal prosecution.

Thus, it is absolutely crucial here, as in other white-collar contexts, to seek to nip civil inquiries in the bud lest larger, more dangerous exposures emerge.

BEST PRACTICES

Civil investigations should be approached strategically by clients and counsel to maximize the probability that an environmental investigation is cabined to the civil realm. Measures to consider both before and during a civil investigation include:

- Proactively documenting compliance with the terms and conditions of applicable environmental permits, including compliance with all on-site record-keeping requirements.
- Ensuring from the outset that contractors and subcontractors involved on client environmental projects are appropriately identified as co-permittees on any relevant and applicable environmental permits issued by environmental regulatory agencies.
- Internally investigating non-frivolous reports or complaints of environmental violations or of conduct which creates a risk of violations, hopefully before such allegations reach the attention of the government.
- Assessing whether or not to self-disclose a violation and, if so, to what regulatory agency of what sovereign.
 - a. If an environmental violation is unearthed in advance of a regulatory agency civil investigation and during the course of a systematic environmental audit, considering the potential risks and benefits to entities and individuals of voluntary disclosure pursuant to the EPA policy. EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (April 11, 2000) (“ ... EPA generally does not focus its criminal enforcement resources on entities that voluntarily discover, promptly disclose and expeditiously correct violations ... EPA will generally not recommend criminal prosecution for the disclosing entity, although the Agency may recommend prosecution for culpable individuals and other entities.”)
 - b. On May 20, 2015, EPA announced its effort to “modernize the implementation of the audit policy” by soon introducing “a new centralized, web-based system for more efficiently receiving and processing violations disclosed to EPA under these policies” which will be called “e-Disclosure.” See <http://1.usa.gov/1FiZBcV>.
- Maintaining a cooperative relationship with the civil investigative agency to the maximum extent practicable.
- Timely responding to civil information requests and notices of violation issued by environmental regulatory agencies (including appealing notices of violation as necessary), but also preserving/asserting important objections should the matter later evolve into a criminal investigation.
- If possible, interviewing employees and conducting internal investigations prior to interviews by the civil investigator.
- Seeking to have counsel present during all civil investigative interviews.
- Considering documenting the physical evidence via photographs, videos and independent consultant site examinations — in a way which, of course, does not alter evidence or interfere with the work of the agency’s civil investigator.
- Rapidly responding to any inappropriate or mistaken findings of fact by the civil investigators.
- Promptly taking steps to mitigate and remediate any ongoing instances of alleged environmental violation.
- Implementing compliance and audit program and policy amendments, as well as re-training and disciplinary measures, as appropriate.
- Determining, with counsel, when and how to assert claims of Confidential Business Information (CBI) during document or physical evidence production to the investigator, to ensure, to the maximum extent practicable, that sensitive commercial or proprietary information is not subject to public disclosure under the Freedom of Information Act (FOIA). See 5 U.S.C. § 552(b)(4).
- Generally, working closely with in-house or outside counsel knowledgeable about relevant environmental regulation and the criminal law, to help preserve attorney-client privilege and work product protections.

CONCLUSION

Environmental regulations are lengthy. The Clean Air Act alone contains 4,000 pages of regulations. These regulations are complex and subject to misinterpretation, even by those charged with enforcing them. Given the tremendous downside of exposures to companies and their employees for environmental law violations, it is critical to approach civil environmental investigations proactively to minimize the risk of criminal prosecution.

