
THE EVOLUTION OF ENVIRONMENTAL CRIMES ENFORCEMENT AT THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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SUMMARY

This paper summarizes the dramatic expansion in the use of criminal enforcement at the United States Environmental Protection Agency (EPA or Agency), examines the results, and discusses the reasons behind the criminal program's growth. The paper traces the evolution of criminal enforcement at EPA, touches on the participation of the program in case screening processes at the Agency, and discusses at greater length the case selection criteria recently adopted by the Office of Criminal Enforcement (OCE). The paper, moreover, addresses the selection of appropriate targets for federal criminal environmental investigation, and identifies the future priorities of the EPA environmental criminal program.

1 INTRODUCTION

This Conference is premised, in part, on a shared recognition that the impact of environmental law on society is largely dependent upon effective enforcement of such law. This, in turn, requires the availability of sanctions that not only recover the economic benefit gained by violating the law, but also serve as a credible deterrent to noncompliance. One of the hard lessons learned in environmental law enforcement is that individuals and companies confronted with only administrative or civil judicial fines often find it advantageous to continue to violate the law and merely absorb such penalties as a cost of doing business. What few individuals making compliance decisions are willing to risk, however, is the prospect of a criminal conviction and imprisonment.

Over the last two decades, the international public has reached a consensus that serious violations of environmental laws, such as deliberate or intentional misconduct, repeated noncompliance, concealment or falsification of information and records, are properly viewed and prosecuted as crimes. This realization stems from the affirmation that environmental crimes are not "victimless", but have far-reaching and pervasive consequences, the effects of which are often concealed for years, or even decades. In response to public sentiment and support, many nations have now added criminal sanctions to their environmental laws, and placed ever greater emphasis on the criminal prosecution of environmental law violators.

This trend towards environmental crimes enforcement has been especially pronounced in the United States, and is reflected by EPA's rapid progress in developing a formidable capacity to investigate environmental crimes across the nation.

2 HISTORY OF THE U.S. EPA CRIMINAL ENFORCEMENT PROGRAM

In 1980, the EPA formally acknowledged that federal environmental crimes enforcement required the use of experienced investigators. Accordingly, on January 5, 1981, the Agency established a new office, which later was named the Office of Criminal Enforcement (OCE), and authorized this office to hire specialized, full-time, criminal investigators. Subsequently, in January, 1981, the Attorney General of the United States confirmed the authority of EPA criminal investigators to initiate or assist in the criminal investigation of potential violations of the nation's environmental laws.

In October 1982, twenty-three federal investigators from other federal law enforcement agencies were hired as the nucleus of the newly established OCE. The majority of these agents were located in each of EPA's ten regional offices in order to immediately investigate allegations of environmental crime when and where they occurred, and to also facilitate working relationships with state, local and other federal investigators in the field.

To supplement its small number of investigators, EPA entered into a Memorandum of Understanding (MOU) in 1982 with the Federal Bureau of Investigation (FBI). This MOU served as the basis for the two agencies to provide mutual assistance in environmental investigations, and committed the FBI to investigate at least 30 environmental cases a year upon U.S. EPA's request. This enforcement partnership with the FBI was refined in 1991, with a new MOU that reflected changes over the intervening years. The Agency has entered into similar cooperative agreements with other law enforcement agencies, such as the 1987 MOU with the U.S. Customs Service, and many less formal working partnerships with state and local law enforcement.

In 1982, EPA's criminal enforcement efforts received a major boost when the United States Department of Justice (DOJ) established an Environmental Crimes Section. One of the principal functions of this Section was to develop an expertise in environmental law enforcement, and thereafter provide assistance to regional United States Attorney's Offices lacking in such experience. Now, with increasing numbers of United States Attorneys' staffs developing environmental expertise, each passing year has witnessed a steady increase in the number of criminal matters referred by EPA to United States Attorneys and the amount of criminal penalties imposed for environmental offenses.

2.1 Legislative recognition and enhancement of EPA's criminal enforcement program

The continued growth and maturation of EPA's criminal enforcement program is largely attributable to four national legislative milestones. The first such milestone was the upgrading of the criminal provisions of environmental laws from misdemeanor to felony offenses, and the addition of new "knowing endangerment" crimes. These statutory criminal sections now more accurately reflect the importance assigned by Congress and society to the enforcement of environmental crimes.

The second major legislative development demonstrated Congressional confidence in EPA's criminal enforcement program. In this regard, on November 1, 1988, Congress passed a law granting full law enforcement powers to EPA criminal investigators. This law, codified at 18 U.S.C 3063, authorizes EPA agents to carry firearms, obtain and execute warrants, and make warrantless arrests in proper circumstances. With this change, Agency investigators no longer need to be designated special deputy U.S. Marshals each year in order to exercise law enforcement powers.

The third important milestone was enactment of the Pollution Prosecution Act on November 16, 1990. In enacting this legislation, Congress acknowledged the unique role of criminal enforcement in "motivat[ing] people and companies to comply with environmental laws in a way that civil judicial and administrative enforcement rarely can do." (1) Consistent therewith, the law requires unparalleled growth in EPA's criminal enforcement program, mandating, among other things, the hiring and deployment of 200 U.S. EPA criminal investigators by 1996. Concomitant with passage of this Act, EPA centralized and strengthened its criminal enforcement program by relocating OCE to Washington D.C. from Denver, Colorado, and by appointing as OCE Director a career criminal investigator with 22 years of investigative and management experience.

The fourth legislative milestone of significance to EPA's criminal enforcement program has been the development of uniform U.S. Sentencing Guidelines applicable to individuals and organizations that commit environmental crimes. These Guidelines enhance EPA's ability to achieve compliance and remediation through criminal enforcement. Before the Guidelines went into effect, the severity of sentences usually depended on the individual values and subjective views of the sentencing court. In contrast, the Guidelines now provide the public with a clear and formidable picture of the consequences of environmental criminal behavior.

Under the Sentencing Guidelines for individual defendants, which became effective on November 1, 1987, convicted environmental offenders now face, in most instances, stiff and often

lengthy jail terms and substantial criminal fines. The Sentencing Guidelines for organizational defendants, which became effective on November 1, 1991, empower U.S. judges to issue remedial environmental cleanup orders, require community service, and compel the appearance of top corporate officers at sentencing hearings, among other things.

Additionally, federal statutes prohibit facilities which are involved in criminal convictions under the Clean Air Act and the Clean Water Act from being used in the performance of federal contracts, grants, or loans. This provides a significant incentive to comply with environmental laws for any entity that participates in federal contracts, or receives federal financial assistance.

2.2 Enforcement networking and outreach efforts

Experience in investigating and prosecuting environmental crimes has taught EPA that cooperative efforts are essential in confronting the unique law enforcement challenges associated with the ubiquitous nature of pollution which, once released to the environment, respects no borders and defies traditional law enforcement jurisdictions. With this in mind, EPA has done much to promote structures for extensive cooperation between federal, state, local and international law enforcement authorities. Many states, local police, and other federal law enforcement agencies have become essential partners with EPA in environmental criminal enforcement. EPA's criminal investigators, moreover, regularly join task forces composed of specialized federal, state, and local law enforcement agencies to conduct high profile, multi-jurisdictional investigations.

EPA also provides substantial grant monies to regional associations comprised of state enforcement officials from almost every state in the nation, as well as several adjacent Canadian and Mexican jurisdictions. The primary mission of these associations is to foster the free exchange of criminal enforcement data and information, and to provide training for state and local environmental enforcers. EPA similarly provides environmental criminal investigator training for state, local, and tribal investigators at the Federal Law Enforcement Training Center located in Glenco, Georgia, as well as at other locations across the United States.

With an expanded cadre of investigators nationwide, EPA's criminal program has been able to further enhance its outreach efforts. OCE now engages in enforcement networks at the international level. Exemplifying this trend, OCE's Director headed the United States delegation to the international police organization INTERPOL's working group on environmental crime in September, 1993. He was subsequently elected Chairman of INTERPOL's work group on transboundary waste.

More recently, EPA has embarked on a program of outreach and education for chiefs of police, who represent the front line enforcers in any community. OCE's Director currently serves as co-chair of the International Chiefs of Police Standing Committee on Environmental Crime. Additionally, OCE has implemented an Environmental Crime Impact Program designed to identify the regional environmental crime priorities of more than 30 specified federal, state, and local law enforcement officials and agencies. OCE intends to use this information, as well as the strategic analysis of EPA's data bases, to determine appropriate targets for criminal investigation and the best use of available investigative resources.

2.3 Recent accomplishments and impacts of criminal enforcement

Since passage of the Pollution Prosecution Act, EPA has more than doubled the number of criminal investigators, and achieved a presence in nearly all federal judicial districts. This investment in criminal enforcement has paid enormous dividends. The criminal program has set new records virtually every year in terms of the number of cases initiated, number of referrals to DOJ for prosecution, number of criminal defendants, amount of fines, years of imprisonment, and value of environmental improvement projects (see Table 1).

These dramatic results have also been highly cost effective for the government. For example, in fiscal year 1992, the amount of fines imposed upon defendants totaled \$ 69.4 million, compared with OCE's \$8 million budget that same year. Moreover, the deterrence inherent in these

Table 1. Office of Criminal Enforcement, Criminal Investigation Division, Five Year Statistical Comparison

	Agents	Cases Initiated	Referrals	Defendants	Sentences*	Fines**	Other***
FY 1989	47	120	60	72	27.1	12.2	NA
FY 1990	51	112	56	100	75.3	5.5	NA
FY 1991	62	150	81	104	80.3	14.1	NA
FY 1992	72	203	107	150	94.6	37.9	6.5
FY 1993	110	410	140	161	74.3	29.7	9.8

NA = Not Available

* Years of Incarceration

** Millions of Dollars

*** Millions of Dollars for Community Projects, etc.

Source: U.S. Environmental Protection Agency, Office of Enforcement, Office of Criminal Enforcement.

accomplishments has been magnified many times over by newspaper reporting, magazine covers, and television stories. All significant industrial sectors have taken note, as evidenced by the attention paid by their trade associations and law firms to U.S.EPA criminal enforcement efforts. Also accompanying the rise of criminal enforcement in the U.S., has been a dramatic increase in the number and quality of corporate management efforts designed to improve environmental practices and oversight, and framed so as to mitigate the prospect of corporate officer criminal liability.

3 SELECTING APPROPRIATE CASES FOR CRIMINAL INVESTIGATION

Despite the impressive results of U.S.EPA's criminal enforcement efforts thus far, the touchstone of an effective and fair environmental crimes program remains the identification of environmental misconduct truly worthy of criminal sanction. Once it receives reliable information that a violation of a federal environmental law has occurred, EPA must decide whether to devote limited criminal resources to investigate the charge, or whether the violation is more appropriately the subject of Agency administrative or civil judicial remedies. Even though general agreement exists that less flagrant violations with lesser environmental consequences should be addressed administratively or civilly, and that the most egregious environmental violations ought to be investigated criminally, the challenge in practice is to correctly distinguish among such cases.

When it passed the Pollution Prosecution Act, Congress not only mandated the steady growth of EPA's criminal program, but it also directed the Agency to use its resources wisely by developing those cases with the greatest deterrent value. (2) Congressional intent underlying the criminal provisions of the nation's various environmental laws, moreover, is unequivocal: criminal enforcement authority should target the most significant and egregious violators.

While targeting the most significant violators has always been a principal goal of the criminal program, sometimes in the past, EPA lacked the manpower to invest in unraveling the more complex environmental violations in order to fully investigate the possibility of criminal wrongdoing. That era is past. With an established presence throughout the nation, EPA now devotes more of its criminal resources to identify the most significant violators and develop the highest quality criminal cases against them.

3.1 The evolution of criminal case selection

Since the criminal program's inception, EPA's Office of Enforcement has taken steps to ensure that environmental violations deserving criminal investigation are identified and brought to OCE's attention in a timely manner. Conversely, cases better suited to enforcement approaches other than criminal are referred to the appropriate civil or administrative enforcement authority within EPA, or in some cases, to state or local authorities. In fact, each EPA regional office has in place a process whereby Agency legal, technical and enforcement personnel review to ensure the most appropriate enforcement response for each significant enforcement case.

The fundamental purpose of regional case screening, as this process came to be called, is to consider criminal enforcement in the greater context of all available EPA enforcement and environmental response options, to do so early before extensive resources have been expended, and to identify, prioritize, and target the most egregious cases. Regional case screening is designed to be an ongoing process in which enforcement cases are periodically reviewed to assess not only the evidentiary developments, but should also evaluate the clarity of the legal and regulatory authorities upon which a given case is being developed.

A nationally managed criminal enforcement program cannot, however, rely exclusively on the case screening process, which may vary widely from region to region, to maintain the consistency and quality of its investigations. In order to ensure the undertaking of criminal investigations which reflect EPA's priorities and Congressional intent, OCE must initially articulate the rationale which governs its selection of cases.

Communicating the characteristics of environmental violations which invite criminal investigation enhances deterrence of the most egregious violations by providing notice to the regulated community and the public at large of where the Agency will employ its most powerful enforcement tool.

Moreover, clear guidance as to which violations merit a criminal investigation improves communication within the Agency itself. Making OCE's selection criteria widely known within EPA helps ensure that deserving violations are regularly brought to the attention of criminal investigators from the vast number of violations that are routinely processed by complex regulatory agencies.

With this in mind, on January 12, 1994, OCE issued a guidance which affirmatively established specific factors that merit EPA's criminal investigation into environmental violations, using criteria that promote the Agency's priorities and reflect the Congressional intent behind EPA's criminal program. (3) These factors will not only guide the criminal case selection process, but will represent the focus for the targeted use of OCE's investigative resources as well.

While this guidance is designed to identify misconduct worthy of criminal investigation, this is not to suggest that all cases meeting the criteria will proceed to prosecution. Indeed, the discretion of the Agency to criminally investigate a subject must be clearly distinguished, in the American criminal justice system, from the prosecutor's subsequent discretion on whether or not to proceed with criminal prosecution. The decision to investigate criminally, however, is an essential predicate to DOJ's subsequent exercise of prosecutorial discretion. Moreover, to the extent that EPA selects targets for criminal investigation consistent with its Congressional mandate and the Agency's priorities, and conducts thorough investigations of the most significant violations, the likelihood of DOJ declining to prosecute a case should be markedly diminished.

3.2 Criminal case selection criteria

The criminal case selection criteria set forth in the above-mentioned OCE guidance are based on two general measures : significant environmental harm and culpable conduct. These criteria, which are designed to identify misconduct worthy of criminal investigation, are not intended to establish legal sufficiency for prosecution. Rather, selection under any one of these criteria represent an affirmation that OCE has purposefully directed its investigative resources toward deserving targets.

3.2.1 Significant environmental harm

In conformance with the OCE guidance, the measure of significant environmental harm is construed broadly to include the presence of actual harm, as well as the threat of significant harm, to human health or the environment. The following factors are identified in the guidance as indicators that a potential case may warrant criminal investigation: (1) actual harm; (2) the threat of significant harm; (3) the failure to report environmental releases; and (4) a trend or common attitude within the regulated community towards noncompliance.

Actual harm is demonstrated by an illegal discharge, release or emission that has an identifiable and significant impact on human health or the environment. This measure is generally evident at the time of case selection. The threat of significant harm to human health or the environment may be demonstrated by either an actual or threatened discharge, release or emission. This factor may not be as readily evident, and must be assessed in light of all the facts available at the time of case selection.

The failure to report an actual discharge, release or emission within the context of actual harm or the threat of significant harm will serve as an additional factor favoring criminal investigation. This is not, however, a stand alone factor. While the failure to report in itself may be a criminal violation, EPA criminal investigative resources generally will be targeted towards only those cases in which the failure to report is coupled with actual or threatened environmental harm.

Finally, when certain illegal conduct appears to represent a trend or common attitude within the regulated community, criminal investigation may serve as the necessary deterrent to continued, widespread noncompliance. This is especially true where a single violation may have an insignificant impact on human health or the environment, but similar violations when considered in their entirety, may result in significant environmental harm.

3.3.2 Culpable conduct

As discussed in the OCE guidance, the measure of culpable conduct is not necessarily an assessment of criminal intent, particularly since criminal intent will not always be apparent at the time of case selection. Culpable conduct, nevertheless, may be indicated at the time of case selection based on several considerations. These include: (1) history of repeated violations; (2) deliberate misconduct; (3) concealment of misconduct or the falsification of records; (4) tampering with pollution monitoring or control equipment; and (5) conducting pollution related activities without necessary permits or approvals.

While a history of repeated violations is not a prerequisite to a criminal investigation, a potential target's compliance record should always be carefully examined. When repeated enforcement actions by other authorities have failed to bring a violator into compliance, criminal investigation may be warranted. Clearly, a history of repeated violations will enhance the government's ability to prove that a violator was aware of environmental regulations, had actual notice of violations, and then, again, acted in disregard of those regulations.

Thus, although environmental statutes do not require proof that a violator knew of, or specifically intended to violate the statute in question, evidence that violations occurred after an offender received notice of prior violations, may operate to impute a level of corporate culpability that warrants a criminal investigation.

EPA relies on self-reporting by industries to accomplish its regulatory mission. If reported data are false, the Agency is prevented from effectively carrying out its mandate. Accordingly, conduct indicating the falsification of data will always serve as the basis for serious consideration to proceed with a criminal investigation. Similarly, the overt act of tampering with monitoring or control equipment leads to the deliberate production of false data. Such a direct assault on the compliance monitoring infrastructure which supports EPA's regulatory decisions calls for a criminal investigation.

Additionally, EPA's criminal enforcement resources will clearly pursue those violators who choose to ignore environmental requirements altogether and operate completely outside of EPA's

regulatory scheme. Further, when there is evidence, direct or circumstantial, that a business sustains itself by conducting illegal environmental practices, especially those designed to assist others in thwarting government regulation, EPA criminal investigation is always warranted.

3.3.3 Additional considerations when investigating corporations

While the factors previously mentioned apply equally to individual and corporate targets, the recent OCE guidance recommends that several additional considerations be taken into account when the potential target is a corporation. Under United States law, a corporation is responsible for the criminal acts of its officers and employees who act within the scope of their employment and in furtherance of the purposes of the corporation. Accordingly, in a criminal environmental investigation, OCE's policy is to investigate every individual employee and corporate officer who may be culpable. Whether the corporate officer or employee personally commits the act, or directs, aids, or counsels other employees to do so, the corporation is always liable.

Corporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy any noncompliance or correct any harm done. Notwithstanding this general principal of corporate liability, EPA has a strong policy encouraging self-monitoring, self-disclosure, and self-correction. Therefore, a violation that is voluntarily revealed, but fully and promptly remedied as part of a corporation's comprehensive self-evaluation program generally will not be a candidate for scarce criminal investigative resources.

4 **FUTURE DIRECTIONS**

Together with EPA's other enforcement offices, regions, and our state and local enforcement partners, EPA's criminal enforcement program will continue to move toward larger, targeted cases against egregious environmental violators. To this end, OCE has commenced a significant data base project designed to identify individuals and corporations in the regulated community who have been the subject of repeated civil and administrative enforcement actions and continue to violate environmental laws. OCE will focus more of its investigative resources on such companies.

One of the hallmarks of EPA's enforcement program in the 1990's has been strategically targeted "enforcement initiatives", whereby EPA focuses the tools in its enforcement arsenal at a selected high priority problem simultaneously. The purpose of this concerted approach is to achieve greater impact, in terms of both overall enforcement remedies and public attention, in redressing the environmental harm to that area. Initiatives have been successfully brought to concentrate enforcement to protect a particular geographic area or an identified ecosystem, to deter the illegal use of a particularly dangerous pollutant, or to deter violations by a specific industrial sector that threatens unusual environmental harm. OCE has been and will continue to play an increasingly significant role in EPA's enforcement initiatives.

EPA's criminal enforcement program will continue to emphasize and improve the enforcement networks that reach every municipality and extend beyond our national borders. In addition to building alliances with other nations and international organizations, OCE is stepping up its efforts to work with state and local officials. The office is consulting with state attorney generals and local officials to explore ways in which OCE can better collaborate to fight environmental crime. Training, information sharing and joint operations are just three of the areas being explored. In this time of scarce public resources, it is more important than ever that government entities at all levels work effectively together. The EPA criminal program is committed to that effort.

5 CONCLUSION

Thus, the future direction of EPA's criminal program reflects the basic tenets which have been the foundation of our success thus far: improving outreach and the capacity to focus on violations which pose the most serious threat of harm to human health and the environment. The achievements of EPA's criminal enforcement effort can be directly attributed to the support of the American people and the commitment of their representatives in the United States Congress. While each Nation's enforcement processes will evolve distinctively, it is hoped that this discussion of how these fundamental principals continue to shape the development of EPA's criminal program in the United States may have wider application.

REFERENCES AND ENDNOTES

1. Pollution Prosecution Act of 1990, Statement of Congressional Purpose (S.2176). Report 101-336, 101 Congress 2nd Session.
2. Pollution Prosecution Act of November 16, 1990, Public Law No. 101-593, 42 USC 4321.
3. Memorandum from EPA's Director of Criminal Enforcement dated 1-12-94 entitled: The Exercise of Investigative Discretion. This memorandum is intended only as internal guidance to EPA. It is not intended to, does not, and may not be relied upon to, create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor does this guidance in any way limit the lawful enforcement prerogatives, including administrative or civil enforcement actions, of the Department of Justice and the Environmental Protection Agency.