
A UNITED STATES PERSPECTIVE ON TRANSBOUNDARY INVESTIGATIONS: RECENT CASES AND ESSENTIAL STRATEGIES FOR INTERDICTION OF INTERNATIONAL ENVIRONMENTAL CRIME

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SUMMARY

This paper describes several recent investigations of suspected transboundary environmental crime conducted by the United States Environmental Protection Agency's (EPA) Office of Criminal Enforcement, Forensics, and Training in cooperation with other federal, state, local, and international law enforcement authorities. These case studies highlight investigative approaches which are critical to confronting the technical and logistical challenges of an international investigation that will satisfy the complex legal requirements of proving an environmental crime. The EPA's experience has demonstrated the utility of multidimensional, interagency enforcement teams which focus on particular border crossings or specialize in interdicting particular high priority pollutants and illustrates the need to enhance cooperative enforcement mechanisms on a regional, binational, and multilateral basis.

1 INTRODUCTION

1.1 The current context for the EPA's commitment to transboundary enforcement

The United States has long supported a strong national enforcement effort to deter illegal transboundary shipments of hazardous waste and other dangerous substances. In recent years, the EPA's enforcement and compliance assurance efforts have become more focused on the national borders and toward improving the capacity to track transboundary waste, to detect violations of U.S. or international law, and to identify and pursue violators who export waste in order to avoid the cost of disposing or reusing it in an environmentally sound manner.

In large part, this emphasis on border enforcement can be attributed to specific commitments under international agreements such as the North American Free Trade Agreement (NAFTA), and its Agreement on Environmental Cooperation or the mandate of recently enacted laws, such as the United States Clean Air Act amendments implementing the Montreal Protocol restricting the transboundary movement of ozone-depleting substances, and the practical requirements of enforcing them. Yet, while the rhetoric of environmental enforcement has gained unprecedented prominence in the conduct of international affairs, the technical capacity and resources necessary to investigate potential violations of complex environmental laws at distant border check points have barely coalesced. Still, governments and the public alike expect vigorous enforcement of environmental laws at the border.

Indeed, over the last decade, the American and international public have reached a consensus that significant violations of environmental laws are so serious that they are properly viewed and prosecuted as crimes. Increasingly, this affirmation has been expressed in national law and codified in international agreements such as the Basel Convention, which established

that illegal traffic in hazardous waste is criminal.(1) Only very recently, however, have nations developed the administrative measures and begun to deploy trained personnel in such a way as to facilitate any real enforcement of transboundary environmental crime.

The EPA has had some notable successes in convicting illegal exporters of hazardous waste and other dangerous substances, but only by virtue of extraordinary cooperation between specialized police agencies within the United States and with other nations' police forces abroad. The task ahead for the United States and other nations is to make successful international investigations of environmental crime less extraordinary. The international effort to implement laws designed to prevent the illegal transboundary movement of hazardous waste and confront pollution problems which pose a threat to human health and the environment is at a critical juncture. It is clear that the emerging legal framework will mean little unless the capacity to conduct international investigations of environmental crime improves dramatically.

1.2 Improving the infrastructure of international environmental enforcement

The EPA's Office of Criminal Enforcement, Forensics, and Training is committed to improving the EPA's capacity to conduct transboundary investigations on a number of different fronts. First, EPA's Criminal Investigation Division now deploys more of its Special Agents in port cities which are significant import/export centers than ever before. This fact alone has enabled a new level of cooperation with other law enforcement agencies at the border. Second, more of these trained environmental criminal investigators participate in task forces with other law enforcement agencies' specialized agents in order to collectively investigate violations in a specific border area or to coordinate joint investigations into criminal activity related to the import or export of specific high priority pollutants, such as ozone-depleting substances.

EPA is dedicated to improving cooperative enforcement networks on a binational, regional, and international basis. These efforts include working with INTERPOL's Working Group on Environmental Crime to improve the exchange of operational information between nations on both ends of a transboundary environmental crime, sponsoring joint training of Customs and EPA inspectors on both sides of a border, and entering into Memoranda of Understanding with the U.S. Customs Service and other law enforcement agencies in order to enhance cooperative working relationships and define the roles and responsibilities of each agency with respect to transboundary investigations.

These practical measures are designed to establish the relationships and cooperative mechanisms necessary to conduct the type of international investigation necessary to satisfy the complex legal requirements of proving an environmental crime. The EPA's contributions to these efforts are informed by its experience in confronting regulatory complexities and recurring criminal schemes in the investigation of transboundary environmental crime. The cases which follow illustrate the need for strengthening these basic enforcement tools.

2 CASE STUDIES AND INVESTIGATIVE STRATEGIES

2.1 The EXODUS investigation

In 1993, the EPA's criminal investigators in Texas launched an investigation of a potentially illegal export of hazardous waste from the United States to Mexico that would prove truly international in scope and ultimately led to a Mexican enforcement action in 1995. This case began with a strategically planned surprise inspection of all railway cars destined for Mexico from the port City of Laredo, Texas organized by the Texas Environmental Task Force.

2.2 The Task Force

The Texas Environmental Task Force is composed of designated personnel from seven distinct state agencies in Texas which share responsibility for enforcement of environmental laws and who meet once a month with EPA criminal investigators, federal prosecutors and other federal law enforcement agencies in Texas in order to coordinate the environmental enforcement activities of all involved, to share information, and to cooperate in the investigation and prosecution of violations of state and federal environmental laws. On December 11, 1991 the Governor of the State of Texas issued a formal proclamation establishing the task force and signed an executive order setting forth its goals and by laws. (See Figure 1).

Such task forces have proven to be such an effective mechanism for integrating state and federal enforcement capacity, that EPA has sponsored and supported formation of them across the country. Task forces can be organized geographically either by state, region, ecosystem, or organized around the functional and jurisdictional requirements of investigating particular types of environmental crime such as hazardous waste or ozone depleting chemicals.

EPA criminal investigators now participate in 60 task forces nationally and consider them an essential component of EPA's effort to build state and local capacity and maximize the return of scarce public resources devoted to environmental enforcement through pooling information, equipment and personnel. Task forces build teams which can prioritize cases, select the most egregious violations, implement investigate strategies, and prosecute highly complex cases which are beyond the capability of any one agency. They can also efficiently decide the most appropriate state, local, or federal jurisdiction in which to bring a case.

2.3 The Exodus Project

In 1992, the Texas task force developed a plan to conduct periodic spot checks at border crossings into Mexico. This cooperative endeavor, named the Exodus Project, made use of each agency's personnel, expertise, and jurisdictional authorities in a concerted approach to inspecting all border traffic fitting the profile of illegal hazardous waste traffickers at the border. On June 29, 1993, the task force, including agents from the Texas Natural Resource Conservation Commission, U.S. Customs Service, Federal Railroad Administration, U.S. Department of Transportation, U.S. Border Patrol, the Texas Water Commission, and the City of Laredo Fire, Environmental, and Bridge departments, set up border check points at both of the City of Laredo International Bridges as well as at the Union Pacific Railroad storage area. An organizational meeting was held the day before to delineate the roles and responsibilities of each unit and to coordinate with Mexican Customs officials.

As a matter of investigative strategy, this Exodus Project team had expanded the scope of its operations to target all modes of transportation, including rail cargo inspections for the first time. Previously, Exodus Projects had focused exclusively on inspecting trucks on the main highways to Mexico. A problem with that approach, however, was that truckers illegally transporting hazardous waste could easily elude the check point inspections once they had commenced due to radio communication between truck drivers and their trucks' inherent mobility; train shipments, on the other hand, could not avoid inspection.

2.4 The investigation

It was on the railway that investigators discovered two truckloads, which were loaded on top of freight cars in "piggyback" fashion, containing one hundred and twenty-seven 55 gallon drums of apparent hazardous waste destined for Mexico. They were not identified as hazardous

**EXECUTIVE ORDER
BY THE
Governor of the State of Texas**

THE STATE OF TEXAS
EXECUTIVE DEPARTMENT
OFFICE OF THE GOVERNOR
AUSTIN, TEXAS

AWR 91-18

CREATING THE TEXAS ENVIRONMENTAL ENFORCEMENT TASK FORCE

WHEREAS, Texas leads the nation in generation of toxic substances and also faces serious and diverse environmental problems that include polluted air in the state's major urban areas, contaminated surface and drinking water, degradation of coastal areas and critical wildlife habitats, and solid waste disposal needs; and

WHEREAS, Texas would be better served by more cohesive and consistent enforcement of state and federal environmental laws and regulations; and

WHEREAS, numerous state agencies have responsibilities for enforcement of Texas' environmental protection laws and regulations; and

WHEREAS, state agencies also share responsibility for environmental enforcement with several federal agencies; and

WHEREAS, specific environmental problems and potential violations may fall within the jurisdiction of more than one state or federal agency; and

WHEREAS, other environmental problems and potential violations may fall outside the direct authority of any one state or federal agency; and

WHEREAS, this fragmentation of responsibility has contributed to the state's failure to protect public health and the environment, to address citizen concerns, to respond to local government needs, and to distinguish environmental violators from those responsible businesses that comply with environmental standards; and

WHEREAS, legislation enacted by the 72nd Legislature creates additional administrative, civil, and criminal penalties for violations of the state's environmental laws and regulations; and

WHEREAS, no mechanism exists for coordinating the environmental enforcement activities of different state agencies or ensuring that complex environmental enforcement problems that fall under the jurisdiction of more than one state agency are addressed quickly and effectively; and

WHEREAS, no mechanism exists for coordinating the environmental enforcement activities of Texas state agencies and federal authorities,

NOW, THEREFORE, I, Ann W. Richards, Governor of Texas, under the authority vested in me, do hereby create the Texas Environmental Enforcement Task Force. The Task Force is composed of designated staff from the following state agencies: Texas Water Commission, Texas Air Control Board, Texas Department of Health, Texas Parks and Wildlife Department, Texas Attorney General's Office, General Land Office, Texas Railroad Commission, and the Governor's Office. The Task Force may be expanded to include additional agencies as appropriate.

The Task Force shall meet monthly or at the call of the Chair.

The goal of the Task Force is to increase federal and state cooperation in prosecuting criminal violations of state and federal environmental laws.

Designated staff of the participating state agencies will cooperate with the U.S. Attorney's Office, the U.S. Environmental Protection Agency, and the Federal Bureau of Investigation in conducting inspections, taking and analyzing samples, and performing other functions necessary to support criminal investigations and prosecutions. The state agencies will also cooperate with the federal agencies in identifying and initiating criminal investigations.

The designated staff within the governor's office will coordinate the efforts of the Task Force and serve as the primary contact person with the federal agencies. The Texas Water Commission will provide a staff person to chair the Task Force.

The participating agencies shall absorb the costs of the Task Force activities within their respective agencies.

waste on the manifests, nor were there notification and acknowledgment of consent as required by U.S. hazardous waste laws. The first question for investigators was whether these drums in fact contained a "waste" and whether the waste was "hazardous" as defined by law.

This can be a difficult question to answer definitively under United States law, even when there is knowledge of the source of the waste as well as the industrial process which produced the waste. When the waste is generated by a foreign nation by an unknown industrial process, however, and it has passed through the hands of waste brokers further obscuring its identity, this first question can thrust the investigation into a technical and legal quagmire. The greatest difficulty arises with regard to materials that are not clearly either wastes or recyclables, but is something in between.

This was the situation the Exodus investigation found itself in. Subsequent investigation revealed that a waste broker involved in exporting these drums claimed that they were legally exempt from the notification and consent requirements under U.S. hazardous waste laws because the drums contained "by-product" which was destined for tin "recycling" at a Mexican facility. Further investigation, including the scientific testing of the contents of 44 of the drums by the EPA's National Enforcement Investigations Center, determined that while it was technically possible to reclaim some tin from the sludge found in many of the drums, it was not practical or economically feasible to do so. Some drums, moreover, which were interspersed with the others contained a very different substance which was extremely toxic and whose constituents could not possibly be recycled. The laboratory determined that most all of the 44 drums contained hazardous waste under United States law.

In order to determine whether the recycling defense was viable, EPA's attention turned to the "recycling" facility in Mexico that was listed as the destination. Due to a close working relationship with Mexican environmental enforcers, which had been forged in the course of bilateral cooperative enforcement initiatives, EPA investigators learned that the facility in question was not operational. In fact, it had been shut down for four months because of environmental violations, and could not have recycled the materials in accordance with Mexican or United States law.

This is the type of information that international investigations must have access to. In a case like this, timely information about the receiving facility can make or break the investigation. Accordingly, EPA has taken steps toward making this type of information available to investigators on a regular basis by fostering better contacts between nations' environmental law enforcers and developing data on facilities which purport to recycle or reclaim products from waste.

Other critical questions in the investigation remained to be answered, including where the waste was generated and what its regulatory status was at its point of origin. The EPA investigation determined that much of this waste had been imported into the United States from Europe, and was only passing through U.S. borders in transit to Mexico. Because it had passed through the hands of various waste brokers on its way into the U.S., investigators could not readily identify the point of origination and thereby determine the precise nature of the waste. Subsequently, investigators were able to trace parts of the shipment through the ports of Belgium and into Germany. Without a network of knowledgeable law enforcement contacts to answer such questions, many investigations of environmental crime will fail.

The Exodus investigation determined that the waste made entry into the U.S. in an east coast state whose competent authority had rendered an interpretation that the waste in question was not hazardous waste under U.S. law because it was destined for recycling in Mexico. Although EPA ultimately disagreed with this determination, such a judgment by a competent state regulatory agency, absent evidence of fraud, made criminal prosecution untenable. If the state authority had been aware that legitimate recycling was impossible at the Mexican facility or knew the actual composition of the waste, they should have classified the waste differently or denied entry altogether.

Because appropriate treatment of waste products at an importing facility can determine how or if a substance is regulated as a hazardous waste, commentators have suggested that hazardous waste export laws, such as those implementing the Basel Convention, be fashioned in a way which makes the regulatory regime more enforceable.⁽²⁾ Those laws may require additional standardized information about generators and the contents of shipments on manifests, and enforceable certification that the generators and/or exporters have current knowledge that the importing facility is capable of reusing or reclaiming the material in an environmentally sound manner.

In 1995, the Mexican enforcement officials who were initially alerted to the attempted export from Laredo, Texas reported that the Mexican Government had obtained a substantial civil judgement against the receiving facility for illegally dumping some 20,000 tons of tin smelting waste. The Mexican Government has referred this case for additional law enforcement action.

2.5 United States versus Gaston Copper Recycling, Stoller Chemical, Southwire et al.

Another recent illegal export investigation resulted in the conviction of three individuals and two corporations in the United States for illegally attempting to export hazardous waste to Bangladesh and Australia after it was mixed with fertilizer. This case, commonly known as United States vs. Stoller Chemical Company again demonstrates the need to carefully scrutinize operations which purport to engage in recycling or reclamation processes which are exempt from hazardous waste regulation, but may in fact be processing regulated hazardous waste.

The Stoller Company had been lawfully authorized to use a certain category of waste product from copper processing plants as a feed stock in making fertilizer principally due to the waste's high zinc content. Because this reclamation process is recognized by law, the waste is exempt from hazardous waste regulations that otherwise would require reporting and environmentally sound disposal of such waste.

An investigation into Stoller's environmental management practices revealed a shortage of the lawful waste material during the period of time when Stoller was mixing a 3000-ton shipment of fertilizer for use in Bangladesh and Australia. At about the same time, a waste broker who regularly supplied Stoller with this waste had an excess of a similar waste product that also had the high zinc content desired for fertilizer supplementation. This waste, however, also contained high amounts of lead and cadmium, above the toxicity limits that render it a regulated hazardous waste, and which preclude its use as a fertilizer supplement.

The investigation established that it was this hazardous waste product that was mixed with the fertilizer and was being shipped abroad. When confronted with this finding, the suspect broker claimed that the waste had undergone treatment to remove the lead and cadmium. In fact, no such treatment existed. The lot of fertilizer which was used for the export shipments was tested and it was found to contain lead and cadmium above the legal limits. There was also evidence of \$50,000 in "commissions" from this waste broker to the general manager of Stoller who had authorized the purchase of the hazardous waste.

By the time the EPA criminal investigators had determined these facts, however, the shipment of contaminated fertilizer was already en route. There had been no notice of hazardous waste exportation to the receiving countries, nor acknowledgment of consent by those countries, as required by United States law, since the product was being shipped as fertilizer. It was only by virtue of emergent diplomatic communications that the EPA was able to alert the receiving countries and prevent the hazardous waste from being applied to crops.

Two corporations now stand convicted in connection with this case and were sentenced to more than one million dollars in fines, some of which was used to repatriate the waste which had been illegally shipped to Bangladesh. Three individuals have also been convicted, including the waste broker and company manager who authorized his "commission." Two were sentenced to significant terms of imprisonment and fines as well.

Were it not for a random inspection of the Stoller facility by state and local authorities, these crimes would not have been detected. No one can say how many similar schemes are taking place throughout the world. Under United States law, many waste products, including waste which many consider hazardous, avoid regulation with an assertion by an exporter that the waste is exempt because it is destined for recycling or reclamation or is otherwise not a waste. It is the exporter's decision how to classify the waste and thereby incur great transaction costs or to characterize the waste in a way that exempts it from notification and consent law.

Of necessity, investigators must focus attention on those facilities which import transboundary waste and which purport to be recycling, reclaiming products, or engaged in environmentally sound disposal practices. EPA criminal investigators are working with various environmental and criminal enforcement networks to make relevant information about such facilities more readily available to international investigations.

2.6 The new black market: illegal importation of chlorofluorocarbons (CFCs)

The most dramatic recent development in the United States transboundary enforcement effort has resulted in 16 EPA criminal investigations in the last 18 months into the smuggling of illegal ozone-depleting chemicals containing chlorofluorocarbons (CFCs). Importation into the United States is now strictly regulated as a result of U.S. Clean Air Act Amendments which implemented the Montreal Protocol. The importation of the most harmful CFCs, with some exceptions, is now banned, but the sale or use of stockpiles existing in the U.S. remain legal. The federal government has also imposed prohibitively high taxes on the production of new CFCs in the U.S. The tightening controls have created a huge market in illegal imports, since smuggled CFCs cost much less than the lawful alternatives. Illegal CFCs are now considered the most lucrative contraband in the U.S. after illicit drugs.

2.6.1 The investigative strategy and common schemes

To combat the flow of illegal imports, a joint task force was formed in October 1994 consisting of the EPA's Special Agents, the U.S. Customs Service, and agents of the Internal Revenue Service. Illegal importation of CFCs often involves violations of statutes related to smuggling and avoiding taxes and the data from all three agencies is analyzed and compared to identify discrepancies. Working from informants tips and business records the task force began to build cases in a process similar to tracking drug smugglers.

There are several common schemes that criminals have used to illegally import CFCs from production facilities in eastern Europe and Asia through ports in England and Belgium into the United States. Since it is generally legal to export CFCs from most nations, but becomes a violation of U.S. law only when someone imports it into the U.S. without an allowance approved by the EPA, illicit shipments have frequently been marked with fictitious destinations in Mexico or Caribbean nations, with Miami or New York as stop over transit points en route. Once in those transit ports, or in bonded warehouses, the traffickers simply remove the tanks of CFC and replace them with empty canisters or used tires, reseal the containers, and send the useless cargo on its way.

Other times, illegal shipments are misrepresented as lawful imports such as propane or CFCs destined for destruction or recycling, or as a different type of CFC which does not require an import allowance. Investigators have developed simple tests to distinguish illegal CFCs from closely related substances by using pressure gauges and other common devices. Investigators have begun to systematically integrate the Customs Import Data Base with the EPA Allowance Data Base to identify potential illegal shipments. Investigators can now compare, for example, the quantity and nature of CFC that an exporter has an allowance for with the actual quantity that is processed by Customs inspectors at the border.

Beginning in February of 1996, sophisticated machines developed in the last year which detect and analyze CFCs were deployed at Customs centers where considerable traffic in CFCs is suspected. These machines were developed by the chemical manufacturers in the U.S. who produce the lawful alternatives to CFCs and who suffer financial losses due to illegal imports. These companies donated this equipment to government investigators. The task forces have begun to work with Canadian and Mexican officials to interdict shipment that enter North America in those countries and then is illegally diverted to the United States.

This concerted interdiction effort has resulted in eleven indictments and nine convictions so far. The task force which was based in Miami has now spawned similar efforts in New York, Boston, and on the west coast. EPA has established a national coordinator for CFC smuggling to serve as a focal point among all criminal investigator area offices and to coordinate with Customs and the IRS. The following are the results of some recent investigations.

2.6.2 Case results and fact patterns: United States v. Adi Dara Dubash and Homi Patel

Following the nation's first prosecution under the Clean Air Act for illegal importation of CFCs, Adi Dara Dubash was sentenced on July 24, 1995 to 22 months in prison for smuggling 8,400 cylinders of CFC- 12 into the United States. He and his co-conspirators caused seven cargo containers of the CFCs to be shipped into New York-New Jersey area in bonded status. They further arranged for five of the seven to be forwarded to Miami, purportedly for reshipment out of the United States. The defendants submitted documents to the Customs Service to make it appear that the containers would be loaded on a vessel in Miami and shipped to Mexico. Instead, they offered bribes to the operator of a Customs licensed holding facility to assist in illegally diverting the CFCs into commerce in the Miami area.

2.6.3 Case results and fact patterns: United States v. Irma Henneberg

Irma Henneberg, manager of Caicos Caribbean Lines, Inc., was convicted by a federal jury on August 30, 1995 on 34 counts of making false statements on customs documents used to illegally smuggle CFCs into the United States. She had made false statements on shipping manifests to give the impression that 209 cargo containers of CFC were being shipped out of Miami. In fact, the contents of the containers had been diverted into commerce in the United States. Inspection of the outbound vessels revealed that cargo containers claimed to be on board were not there.

The falsely manifested CFCs had a retail value of approximately 52 million dollars and avoided federal excise tax in the amount of 32 million dollars. On November 8, 1995, the defendant was sentenced to 57 months imprisonment.

2.6.4 Case results and fact patterns: United States v. Casey Raja et. al.

On January 23, 1996, Casey Raja pled guilty to violations of the Clean Air Act for illegal importation of chlorofluorocarbons (CFC). Raja admitted to conspiring with his codefendant Bruce R. Burrell and others in a scheme in which 288 tons of CFCs were illegally imported into the United States through various ports. The CFCs were consigned to fictitious corporations,

and the defendants sold the CFC as if it had been properly imported pursuant to the EPA's allowance and that the excise tax had been paid. Proceeds of the sales were then laundered through bank accounts in South Florida which had been established under the names of the fictitious corporations.

One of the interesting aspects of this case is that Bruce Burrell's arrest was effected through the cooperative efforts of INTERPOL in the United States and Costa Rica and facilitated by EPA's representative at INTERPOL. Burrell is being held in Costa Rica pending an extradition hearing. This arrest marks the first international extradition effort by EPA and INTERPOL for a fugitive charged with an environmental crime.

2.6.5 Case results and fact patterns: first INTERPOL assisted extradition of environmental criminal

On December 15, 1995, Bruce Burrell was arrested in Costa Rica for the Clean Air Act violations described in the above case. Burrell's arrest was effected through the cooperative efforts of INTERPOL in the United States and in Costa Rica, and facilitated by EPA's representative at INTERPOL. Burrell is being held in Costa Rica pending an extradition hearing. This arrest marks the first international extradition effort by the EPA and INTERPOL for a fugitive charged with an environmental crime.

3 CONCLUSION

Thus, EPA is investigating more transboundary cases than ever before. In part this is due to our enhanced capacity to deploy personnel to work with Customs Agents and other enforcement agencies near the border. It also reflects the priority assigned to border enforcement in recent years and the increased sophistication that the EPA criminal enforcement program can bring to analyze environmental and customs data and target environmental criminals who engage in illegal transboundary trafficking. By continuing EPA's effort to improve enforcement coordination on both sides of our borders, and by strengthening multilateral mechanisms for international environmental investigations, it is hoped that the United States can maintain a credible deterrent to those who would profit from illegally exporting or importing hazardous waste and other dangerous substances.

ENDNOTES

1. 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal. Article 4, Section 3, states: "The parties consider that illegal traffic in hazardous wastes or other wastes is criminal."
2. See e.g. Wang, Xi, "The International Control of Transboundary Illegal Shipments of Hazardous Wastes: A Survey of Recent Cases That Happened in China", appearing in these same Proceedings.

