
MANAGING PARALLEL CIVIL AND CRIMINAL ENVIRONMENTAL CASES

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SUMMARY

The United States Environmental Protection Agency (EPA) has two primary objectives when enforcing federal environmental laws: bringing violators into compliance, and imposing penalties for deterrence.¹ These objectives may be achieved through civil actions, criminal actions or, less frequently, a combination of the two when the full range of these authorities is necessary for complete relief.

Most of the environmental statutes enforced by EPA include both civil and criminal remedies.² Both mechanisms are critical components of EPA's enforcement program. For some very practical reasons, which include ensuring a wise utilization of resources, EPA generally favors bringing only a civil or only a criminal action to resolve an environmental violation. The general preference may be overcome when the magnitude or range of the environmental violations (or the available sanctions) make both criminal and civil enforcement appropriate. This paper discusses the approach EPA is taking to manage parallel civil and criminal enforcement actions.

1 DEFINING A PARALLEL PROCEEDING

EPA broadly defines civil and criminal enforcement activities that are taken with respect to the same or related parties and deal with the same or a related course of conduct as "parallel proceedings," although the actions do not necessarily progress simultaneously or completely "in parallel." This definition is designed to capture related activities effectively throughout the enforcement process. "Proceedings" refers to enforcement activities from the investigative stage (including the use of entry and information-gathering authorities) to the conclusion of administrative or judicial actions. Enforcement activities include criminal sanctions, civil penalties, court ordered injunctive relief, compliance orders issued by EPA, and recovery of government cleanup costs.³

There are essentially two types of parallel proceedings. The most common parallel proceedings are criminal actions where there is a need for a parallel civil

administrative cleanup order. This type of parallel proceeding ensures that a cleanup action is not delayed by a criminal proceeding. The other type of parallel proceeding is taken where the nature of the conduct is sufficiently egregious that both civil and criminal responses are appropriate, or where complete relief cannot be obtained in the criminal action. These parallel proceedings tend to involve significant and complex enforcement actions, requiring careful case-by-case management and on-going effective communication and coordination.

2 CHALLENGES OF PARALLEL PROCEEDINGS

Parallel proceedings in the United States can present a number of practical challenges. These challenges include legal restrictions on sharing criminal information, the preference to protect witnesses from premature exposure, and different judicial rules for the scope of discovery and admission of evidence in civil and criminal cases. Careful management of the proceedings is necessary to navigate these issues.⁴

3 MANAGEMENT OF PARALLEL PROCEEDINGS

EPA's civil and criminal programs have historically functioned with more limited interaction than occurs today. As the Agency's enforcement program has matured, EPA has focused on larger, more complex cases in both the civil and criminal programs, which has increased the need for coordination and communication between the two programs. EPA recently issued a revised Parallel Proceeding Policy (Policy)⁵ that provides a structure for active consultation and cooperation between the civil and criminal programs on parallel proceedings, consistent with legal requirements.

EPA has found that the success of any parallel proceeding depends on coordinated decisions by the civil and criminal programs as to the timing and scope of enforcement activities. For example, it is often important for the criminal program to notify civil enforcement managers that a criminal investigation is about to become known to the subject. It is similarly important for civil enforcement staff to notify their criminal counterparts when there are legal or factual developments that might affect the criminal case. Communication and coordination is critical at both the staff and managerial levels, and continues through the resolution of all parallel matters. The Policy requires EPA's headquarters and regional enforcement offices to establish systems for communication and coordinated decision-making. Because the United States Department of Justice (DOJ) represents EPA in federal court, EPA also maintains open communication with DOJ civil and criminal enforcement staffs.

Emphasis is placed on ensuring that the activities of each program complement, but do not interfere with the other program, and that neither program directs the activities of the other. Emphasis is also placed on gathering information in such a way that it can be shared to the maximum extent appropriate. In all

parallel proceedings, EPA's civil and criminal staff meet to weigh the options and determine how to achieve the most complete and appropriate relief.

There are a number of ways that EPA can approach a potential complex parallel proceeding, including:

- Deciding that either the civil or criminal action will be sufficient to achieve the Agency's objectives;⁶
- Deferring the civil proceeding until the criminal case is resolved;
- "Carving-out" civil or criminal claims where allegations in either proceeding do not overlap or where the defendants are not the same; or
- Proceeding with the civil and criminal matters simultaneously.

Where a determination has been made that parallel proceedings are appropriate, decisions must be made about the timing of enforcement activities. A few of the factors that favor bringing the criminal proceeding to conclusion first include:

- The significant deterrent and punitive effects of criminal sanctions;
- The possibility that imposition of civil penalties might undermine a prosecution or the severity of a subsequent criminal sentence;
- Preventing a defendant from exploiting the broader civil discovery rules to obtain evidence for a criminal proceeding; and
- The Speedy Trial Act⁷ requirement that criminal trials be held within specified time frames after indictment.

Factors supporting the initiation or continuation of the civil judicial or administrative action prior to conclusion of the criminal action include:

- A threat to human health or the environment that should be expeditiously addressed through injunctive relief from the court or an order by EPA;
- A threat of dissipation of a defendant's assets;
- An immediate statute of limitations or bankruptcy deadline;
- Where only a marginal relationship exists between the civil and criminal actions; and
- Where the civil case is in an advanced stage of negotiation or litigation when the potential criminal liability is discovered.

4 MEMORIALIZATION

Once the civil and criminal programs decide to pursue parallel proceedings, staff memorialize the decision in a case-specific Parallel Proceedings Memorandum. The Memorandum contains a summary of the decision(s) regarding the timing and scope of the parallel proceedings and provides essential information, such as a description of the key factual allegations and potential statutory and regulatory violations. Limiting the scope of the information contained in the Memorandum serves to minimize damage in the unlikely event that the Memorandum is disclosed to the defendant, either inadvertently or by court order. As an additional precaution, the Memorandum is marked as privileged and maintained as an enforcement confidential record.

The Memorandum is signed by the appropriate managers in both the civil and criminal programs. As the parallel proceedings are developed and moved toward resolution, it may be necessary to supplement the decisions recorded in the Memorandum; any new or modified changes are documented and the revised Memorandum is distributed to the civil and criminal case teams.

5 KEY LEGAL ISSUES

Parallel proceedings in the United States present specific legal issues regarding investigations, discovery and litigation. The most significant issues relate to procedural protections that are afforded by United States law to criminal defendants. Several key legal and policy issues are restated in the Policy for emphasis.

One important legal issue is the requirement that grand jury materials remain confidential. Grand juries are convened in many criminal matters to determine whether there is sufficient evidence to charge an alleged violator with a crime. Grand jury proceedings are secret, and information cannot be disclosed to unauthorized persons. Civil attorneys are rarely authorized to receive grand jury information and the Policy discusses these limitations. Information that is obtained by the criminal enforcement personnel outside of the grand jury process may generally be shared with civil enforcement staff. It should be noted that these confidentiality issues do not arise in civil investigations because any information developed by the civil program for a legitimate civil purpose, including information obtained in discovery, may be shared with criminal enforcement personnel.⁸

The Policy includes a reminder that Agency staff cannot intentionally mislead any person as to the possible use of any responsive information in the criminal proceeding in such a way as to violate the Fifth Amendment's guarantee of due process and its privilege against self-incrimination. The Policy includes reminders that a threat of criminal prosecution cannot be used to obtain a civil settlement, and a threat of civil enforcement cannot be used to resolve a criminal matter. It also

notes that combined civil penalties and criminal sanctions must not be so grossly disproportionate to the underlying violations that it constitutes a violation of the United States Eighth Amendment's prohibition against excessive fines.⁹

6 SIMULTANEOUS OR COORDINATED RESOLUTIONS

Although civil and criminal staff communicate and coordinate their activities, the civil and criminal cases are separately conducted and separately resolved. However, in some instances a defendant or defendants may seek to have a simultaneous resolution of the civil and criminal claims. A "coordinated resolution" under the Policy is the simultaneous resolution of both civil and criminal liability. A coordinated resolution is not appropriate unless it can be accomplished in a manner that does not unduly delay or interfere with the criminal proceeding, and does not limit EPA's ability to obtain appropriate judicial injunctive relief to address the environmental problem.

Coordinated resolutions require separate settlement documents that are negotiated independently. Separate settlement documents are necessary to avoid the appearance of impropriety. The appearance of impropriety can arise because, as stated above, a threat of a criminal prosecution cannot be used to obtain a civil settlement nor can release of civil liability be used to influence a criminal resolution. EPA and DOJ policies therefore prohibit providing a release of criminal liability in a civil settlement, or waiving or resolving civil liability in a criminal plea agreement.

7 CONCLUSION

EPA is refining its approach to parallel proceedings to ensure that it can achieve the most effective resolution when faced with serious violations of environmental laws. Parallel proceedings allow coordinated solutions that provide significant deterrence and ensure that violators come into full compliance with the law.

8 REFERENCES

¹ EPA may also seek remediation of past harm in appropriate circumstances. In addition, there are some environmental statutes that are designed to seek remediation as the primary objective, *e.g.*, the Comprehensive Environmental, Response, Compensation, and Liability Act (Superfund), 42 U.S.C. § 9601, *et seq.* and the Oil Pollution Act, 33 U.S.C. § 2701, *et seq.*, which provide for cleanup of sites contaminated with hazardous substances.

² Most environmental statutes include full criminal enforcement authority. Exceptions to this general rule include the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.*, and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, both of which include criminal misdemeanor, but no felony, sanctions. The National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, and the mobile source (vehicles and other nonstationary sources) provisions of the

Clean Air Act, 42 U.S.C. §§ 7521 - 7590, do not include any criminal provisions. Conversely, criminal prosecutors may include claims in environmental cases that are not available to the civil enforcement program, such as claims for false statements under the authority of the federal criminal code, 18 U.S.C. § 1001.

³ EPA brings judicial actions to recover costs that the Agency has expended in a hazardous waste or oil spill cleanup.

⁴ Parallel civil and criminal proceedings do not give rise to double jeopardy prohibitions against trying a defendant twice for the same crime. The Fifth Amendment to the United States Constitution only protects against the imposition of multiple *criminal* punishments of the same person for the same offense. *Hudson v. United States*, 522 U.S. 93 (1997).

⁵ See, www.epa.gov/compliance/resources/policies/enforcement/index.html

⁶ It is EPA's general practice to go forward with only a criminal proceeding if it will provide complete relief. If the criminal matter has the potential to provide complete relief, but its outcome is uncertain, both the civil and criminal matters continue.

⁷ 18 U.S.C. § 3161, *et seq.*

⁸ *United States v. Kordel*, 397 U.S. 1 (1970).

⁹ See, *Hudson*, 522 U.S. at 103.

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