Trends in Civil and Criminal Environmental Enforcement

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Overview

- Background
  - Broad authorities and Significant Liability
  - Strict liability
- Past Results
  - Penalties and Injunctive Relief
  - Selected civil/criminal cases
- What can we expect in 2013 and beyond
  - Enforcement Priorities
  - Resources
  - New Approaches/emerging issues
- Avoiding and responding to enforcement
  - What to do when EPA knocks
  - Voluntary disclosure
EPA Enforcement Authorities

- Civil
  - Administrative
  - Judicial
- Criminal
- All Major Pollution Control Statutes:
  - Clean Air Act
  - Clean Water Act
  - Resource Conservation and Recovery Act
  - Oil Pollution Act
  - Safe Drinking Water Act
  - CERCLA, EPCRA, TSCA, and FIFRA
Where Does EPA Get Its Cases?

- Referrals from State Regulatory Agencies
- Referrals from Other Federal Agencies
- Tips and Complaints from Citizens
- Current and/or Former Employees of Businesses
Civil Administrative Enforcement

- Some statutes authorize EPA to issue administrative penalty and compliance orders.
- Penalties typically limited in scope and subject to administrative hearing
- Some, but not all, compliance orders judicially reviewable
  - *Sackett v. EPA* (Sup. Ct. 2012) – Clean Water Act ACOs are final and reviewable.
  - But some statutes (e.g., CERCLA) explicitly preclude judicial review
  - Likely to alter EPA’s use of ACOs
Civil Judicial Enforcement

- EPA statutes authorize civil judicial enforcement for statutory, regulatory and permit violations.
- Significant daily and accumulating penalties – Up to $37,500 per day per violation.
- Statutes typically impose strict liability.
- 5 year statute of limitations, but some courts apply “continuing violation” standard to some statutes.
- Civil enforcement focused on corporate or governmental entities, not individuals.
EPA’s Enforcement Priorities

- New Source Review for Major Air Pollution Sources
  - Utilities, Refineries, Cement, Glass, Chemical
- Hazardous Air Pollution Sources
  - Flares, Leaks, Excess Emissions
- Sewage Treatment Plants
- Water Discharges from CAFOs
- Oil and Gas Exploration and Extraction
- Mining and Mineral Processing Operations
Sector and Geographic Enforcement Priorities

- Energy Extraction
- Air Emissions Polyvinyl Chloride Manufacturing
- Telecommunications
  - Lead-acid batteries and backup generators
- Sources of Pollution to Chesapeake Bay
  - Point and non-point discharges, including agriculture and stormwater
- Air Emissions from Animal Feeding Operations
DOE Energy Efficiency Enforcement

- Energy Policy and Conservation Act
  - DOE administered
  - Energy efficiency standards for appliances, light bulbs, water products
  - Testing and Certifications
- Primarily administrative enforcement
  - Civil penalties for “knowing” violations
  - Injunctive relief
- Since 2010 - Increased and Aggressive Enforcement
  - Generally smaller civil penalties compared to EPA
Criminal Enforcement

- Statutes also authorize significant criminal fines and imprisonment.
- Most statutes (including Clean Water, Clean Air, RCRA) impose liability for negligent violations, typically misdemeanors.
- Felonies require “knowing” violation
  - But typically do not require specific intent
  - Knowledge of the acts comprising the violation but not knowledge that those acts violated the law
- Related crimes of false statements, obstruction of justice, perjury, in heavily regulated industries with large amounts of paperwork; reporting violations.
EPA Targeting

Targeting Methodology: EPA will focus efforts on the most important environmental and public health benefits and help deter illegal corporate and individual behavior. EPA will tier its cases primarily focusing on three categories:

- **Human health and environmental impacts** (e.g., death, serious injury, human exposure, remediation)
- **Release and discharge characteristics** (e.g., hazardous or toxic pollutants, continuing violations)
- **Subject characteristics** (e.g., national corporation, repeat violator)
How Does EPA Select A Criminal Case?

- 1994 Devaney Memorandum:
  - Significant Environmental Harm
  - Culpable Conduct

- Factor 1: Significant Harm
  - Actual Harm
  - Threat of Significant Harm
  - Failure to Report
  - Illegal Conduct – Represents a Trend or Attitude

- Factor 2: Culpable Conduct
  - History of Repeated Violations
  - Deliberate Misconduct/Falsification
  - Concealment of Misconduct or Records
  - Tampering with Monitoring Equipment
  - Operating with Required Documentation
Evidence of Criminal Intent: Easy to Establish

- Conscious avoidance evidence
  - History of violations, including prior criminal activity on part of employees
  - Failure to audit or review employees responsible for compliance tasks
  - Strong circumstantial evidence of knowledge and failure to correct
Evidence of Criminal Intent: Easy to Establish

- Actions taken by officers and/or employees
  - Commit or direct commission of prohibited acts
  - Tampering with monitoring equipment and/or records
- Supervisors with duty to ensure compliance cannot consciously avoid information which may indicate employee is committing a crime
- Conscious avoidance evidence
  - History of violations, including prior criminal activity on part of employees
  - Failure to audit or review employees responsible for compliance tasks
  - Strong circumstantial evidence of knowledge and failure to correct
Vicarious Liability – *Respondeat Superior*

- The “responsible corporate official” doctrine holds that corporate officers and upper management employees may be held criminally liable where the Corporate officer or supervisor:
  - knowingly authorizes or directly participates in the unlawful activity
  - indirectly participates in such activity as a conspirator or aider-abettor
  - has purposely “hid his/her head in the sand” to shelter himself from illegal acts which occur within the scope of his authority (the “willful blindness” theory of criminal liability)
Vicarious Liability – *Respondeat Superior*

- Companies are held criminally liable for an unlawful act of one or more of their (high-level or low-level) employees where:
  - The act was committed within the scope of the employee’s employment and
  - With an intent, at least in part, to benefit the corporation
False Statements (18 USC 1001): Elements of the Offense

1. False statement
   - Speaker falsifies, conceals or covers up a material fact through any trick, scheme or device or
   - Makes a material false or fraudulent statement or representation or
   - Makes use of any false document or writing when he knows it contains materially false or fraudulent information

2. Made to the federal government
   - Any federal agency
   - An private person or agency or institution that implements federal program including programs delegated to state
Parallel Proceedings

- 2007 Policy: reaffirms that EPA will pursue parallel criminal and civil enforcement where it believes both remedies are needed.
- Creates unique risks for defendants
- Policy sets out factors for prosecutors to consider in deciding whether and how parallel proceedings should be pursued and the sharing of information between the criminal and civil teams.
Suspension and Debarment

- Criminal conviction under Clean Air Act or Clean Water Act leads to statutory suspension or debarment until condition giving rise to conviction has been corrected.

- Often resolved through separate agreement with EPA debarment office.
Crime Victim’s Rights Act

- CVRA - victims of a federal crime may appear and be heard during some phases of the prosecution of the defendant charged with that crime, including sentencing. 18 U.S.C. 3771(a).
- Recent Citgo case – court allowed persons living near refinery convicted of unauthorized and excessive emissions to participate in sentencing as crime victims.
- Creates significant risk of collateral consequences (e.g., tort suits) from victim participation in environmental crime cases.
FY 2011: Civil Enforcement Results

Civil Penalties: $152 Million
Value of Injunctive Relief: $19 Billion (highest ever)

19,000
Inspections/Evaluations
177 of these were civil investigations
Down slightly from previous years

3,283
Civil enforcement cases initiated
Down from 3,762 in 2007, but EPA pursuing larger, more complex cases

3,241
Civil enforcement cases concluded
Vast majority of cases involve administrative penalty or compliance orders

182
Civil judicial cases concluded
Another 199 referred to DOJ
FY 2011: Criminal Enforcement Results

Criminal Defendants’ Penalties
- Individuals’ Total Jail Sentences: 89.5 years
- Fines And Restitution Total: $35 million
- Courts Ordered Environmental Projects: $2 million

371 New environmental crime cases opened
- 7% increase from 346 in 2010, and the second highest number of new cases since FY 2005

249 Criminal charges brought
- 13% decrease from FY 2010, but the second highest number since FY 2005

197 Included charges against at least one individual defendant
- (as opposed to a business or corporation)

93% Conviction rate (either plead or at trial)
Selected Civil Cases

- **Toll Brothers** - $741,000 civil penalty to resolve alleged violations of the Clean Water Act stormwater permitting program at 370 sites in 23 states. The company also agreed to implement a comprehensive nationwide stormwater compliance program and other measures.

- **Dairyland Power Cooperative** - $950,000 civil penalty and installation of $150 million of controls to resolve alleged violations of the New Source Review provisions of the Clean Air Act.

- **BASF** - $780,000 civil penalty and corrective action to address alleged violations of the leak detection and repair requirements of the Clean Air Act at its chemical manufacturing facility.

- **Sterling Suffolk Racecourse** - $1.25 million civil penalty to resolve alleged violations of the Clean Water Act at racetrack facility. The company also committed to spending more than $3 million to prevent polluted water from entering nearby waterways and perform three environmental projects worth approximately $742,000.
Selected Criminal Cases

- **Scott’s Miracle-Gro** - $12.5 million in criminal fines and civil penalties under FIFRA for misuse and mislabeling of pesticides and falsifying records.

- **Chemical and Metal Industries** - $1 million in criminal fines, $2 million restitution under Clean Air Act for mislabeling cylinder whose explosion lead to death of employee.

- **Pelican Refining Company** - $12 million for felony violations of the Clean Air Act and obstruction of justice

- **Horizon Lines** - $1.5 million for making false statements based on knowing failure to maintain an accurate Oil Record Book in which all transfers and discharges of oil and oily wastes are to be recorded.

- **Demolition and Salvage Company** – 3 individuals and company fined and jailed for conspiracy and criminal violations of the Clean Air Act asbestos requirements, as well as obstruction of justice in relation to salvage and demolition activities.
EPA Resources

- EPA has approximately 200 special agents on-board and assigned to environmental criminal investigative duties

- Budget pressures impinging on EPA’s enforcement capacity

- EPA to focus enforcement resources on violations with the greatest potential for deterrence, such as repeat offenders, major threats to statutory enforcement regimes, and significant toxic releases
EPA 2013 Enforcement Plans

- Reduced focus on acid rain, biosolids, EPCRA 311/312, Audit Policy/Self-Disclosure, wood heater program, asbestos, PCBs, pesticide imports and other areas.

- Reduction in resources devoted to underground injection program, USTs, Superfund and criminal enforcement. (particularly in areas where other agencies share criminal enforcement authority and where civil enforcement should be sufficient)
Avoiding Criminal Enforcement

- Potential areas for government focus need to be identified in advance to ensure that compliance is targeted to these areas.
- Internal audits need to be conducted regularly and carefully to develop a record of compliance.
- Sampling techniques and monitoring need to be emphasized in any compliance program.
- Quick and effective responses need to be documented to any potential problems.
- Update record-keeping systems in order to avoid potential record-keeping errors which government could use as obstruction evidence or in false statements prosecutions.
- Evaluate advantages and disadvantages to voluntary disclosure under EPA Audit Policy.
Voluntary Disclosure

- EPA Policy
  - Discovery during audit or compliance program
  - Voluntary and prompt correction and disclosure
  - Independent of government discovery

- Benefits:
  - Reduced civil penalties
  - No recommendation for criminal prosecution

- Special policy specific to new owners who discover violations after purchase
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