



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT

January 12, 1994

MEMORANDUM

SUBJECT: The Exercise of Investigative Discretion

FROM: Earl E. Devaney, Director
Office of Criminal Enforcement

A handwritten signature in black ink that reads "Earl E. Devaney".

TO: All EPA Employees Working in or in Support of the Criminal
Enforcement Program

I. Introduction

As EPA's criminal enforcement program enters its second decade and embarks on a period of unprecedented growth, this guidance establishes the principles that will guide the exercise of investigative discretion by EPA Special Agents. This guidance combines articulations of Congressional intent underlying the environmental criminal provisions with the Office of Criminal Enforcement's (OCE) experience operating under EPA's existing criminal case-screening criteria.¹

In an effort to maximize our limited criminal resources, this guidance sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities.²

¹ This guidance incorporates by reference the policy document entitled Regional Enforcement Management: Enhanced Regional Case Screening (December 3, 1990).

² 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.



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Indeed, the Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.

II. Legislative Intent Regarding Case Selection

The criminal provisions of the environmental laws are the most powerful enforcement tools available to EPA. Congressional intent underlying the environmental criminal provisions is unequivocal: criminal enforcement authority should target the most significant and egregious violators.

The Pollution Prosecution Act of 1990 recognized the importance of a strong national environmental criminal enforcement program and mandates additional resources necessary for the criminal program to fulfill its statutory mission. The sponsors of the Act recognized that EPA had long been in the posture of reacting to serious violations only after harm was done, primarily due to limited resources. Senator Joseph I. Lieberman (Conn.), one of the co-sponsors of the Act, explained that as a result of limited resources, "... few cases are the product of reasoned or targeted focus on suspected wrongdoing." He also expressed his hope that with the Act's provision of additional Special Agents, "... EPA would be able to bring cases that would have greater deterrent value than those currently being brought."

Further illustrative of Congressional intent that the most serious of violations should be addressed by criminal enforcement authority is the legislative history concerning the enhanced criminal provisions of RCRA:

[The criminal provisions were] intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them. It [RCRA sec. 3008(d)] is not aimed at punishing minor or technical variations from permit regulations or conditions if the facility operator is acting responsibly. The Department of Justice has exercised its prosecutorial discretion responsibly under similar provisions in other statutes and the conferees assume that, in light of the upgrading of the penalties from misdemeanor to felony, similar care will be used in deciding when a particular permit violation may warrant criminal prosecution under this Act. H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. Code Cong. & Admin. News 5036.

While EPA has doubled its Special Agent corps since passage of the Pollution Prosecution Act, and has achieved a presence in nearly all federal judicial districts, it is unlikely that OCE will ever be large enough in size to fully defeat the ever-expanding universe of environmental crime. Rather, OCE must maximize its presence and impact through discerning case-selection, and then proceed with investigations that advance EPA's overall goal of regulatory compliance and punishing criminal wrongdoing.

III. Case Selection Process³

The case selection process is designed to identify misconduct worthy of criminal investigation. The case selection process is not an effort to establish legal sufficiency for prosecution. Rather, the process by which potential cases are analyzed under the case selection criteria will serve as an affirmative indication that OCE has purposefully directed its investigative resources toward deserving cases.

This is not to suggest that all cases meeting the case selection criteria will proceed to prosecution. Indeed, the exercise of investigative discretion must be clearly distinguished from the exercise of prosecutorial discretion. The employment of OCE's investigative discretion to dedicate its investigative authority is, however, a critical precursor to the prosecutorial discretion later exercised by the Department of Justice.⁴

At the conclusion of the case selection process, OCE should be able to articulate the basis of its decision to pursue a criminal investigation, based on the case selection criteria. Conversely, cases that do not ultimately meet the criteria to proceed criminally, should be systematically referred back to the Agency's civil enforcement office for appropriate administrative or civil judicial action, or to a state or local prosecutor.

IV. Case Selection Criteria

The criminal case selection process will be guided by two general measures - significant environmental harm and culpable conduct.

³ The case selection process must not be confused with the Regional Case Screening Process. The relationship between the Regional Case Screening Process and case selection are discussed further at "VI," below.

⁴ Exercise of this prosecutorial discretion in all criminal cases is governed by the principles set forth in the Department of Justice's Principles of Federal Prosecution.

A. Significant Environmental Harm

The measure of significant environmental harm should be broadly construed to include the presence of actual harm, as well as the threat of significant harm, to the environment or human health. The following factors serve as indicators that a potential case will meet the measure of significant environmental harm.

Factor 1. Actual harm will be demonstrated by an illegal discharge, release or emission that has an identifiable and significant harmful impact on human health or the environment. This measure will generally be self-evident at the time of case selection.⁵

Factor 2. The threat of significant harm to the environment or human health may be demonstrated by 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.

Factor 3. Failure to report an actual discharge, release or emission within the context of Factors 1 or 2 will serve as an additional factor favoring criminal investigation. While the failure to report, alone, may be a criminal violation, our investigative resources should generally be targeted toward those cases in which the failure to report is coupled with actual or threatened environmental harm.

Factor 4. When certain illegal conduct appears to represent a trend or common attitude within the regulated community, criminal investigation may provide a significant deterrent effect incommensurate with its singular environmental impact. While the single violation being considered may have a relatively insignificant impact on human health or the environment, such violations, if multiplied by the numbers in a cross-section of the regulated community, would result in significant environmental harm.

B. Culpable Conduct

The measure of culpable conduct is not necessarily an assessment of criminal intent, particularly since criminal intent will not always be readily evident at the time of case selection. Culpable conduct, however, may be indicated at the time of case selection by several factors.

⁵ When this factor involves a fact situation in which the risk of harm is so great, so immediate and/or irremediable, OCE will always cooperate and coordinate with EPA's civil enforcement authorities to seek appropriate injunctive or remedial action.

Factor 1. History of repeated violations.

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 activities or actions, whether by EPA, or other federal, state and local enforcement 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 capacity to prove that a violator was aware of environmental regulatory requirements, had actual notice of violations and then acted in deliberate disregard of those requirements.

Factor 2. Deliberate misconduct resulting in violation.

Although the environmental statutes do not require proof of specific intent, evidence, either direct or circumstantial, that a violation was deliberate will be a major factor indicating that criminal investigation is warranted.

Factor 3. Concealment of misconduct or falsification of required records.

In the arena of self-reporting, EPA must be able to rely on data received from the regulated community. If submitted data are false, EPA 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.

Factor 4. Tampering with monitoring or control equipment.

The overt act of tampering with monitoring or control equipment leads to the certain production of false data that appears to be otherwise accurate. The consequent submission of false data threatens the basic integrity of EPA's data and, in turn, the scientific validity of EPA's regulatory decisions. Such an assault on the regulatory infrastructure calls for the enforcement leverage of criminal investigation.

Factor 5. Business operation of pollution-related activities without a permit, license, manifest or other required documentation.

Many of the laws and regulations within EPA's jurisdiction focus on inherently dangerous and strictly regulated business operations. EPA's criminal enforcement resources should clearly pursue those violators who choose to ignore environmental regulatory requirements altogether and operate completely outside of EPA's regulatory scheme.

V. Additional Considerations when Investigating Corporations

While the factors under measures IV. A and B, above, apply equally to both individual and corporate targets, several additional considerations should be taken into account when the potential target is a corporation.

In a criminal environmental investigation, OCE should always investigate individual employees and their corporate⁶ employers who may be culpable. A corporation is, by law, responsible for the criminal act of its officers and employees who act within the scope of their employment and in furtherance of the purposes of the corporation. Whether the corporate officer or employee personally commits the act, or directs, aids, or counsels other employees to do so is inconsequential to the issue of corporate culpability.

Corporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the noncompliance and correct any harm done.⁷ On the other hand, EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction.⁸ When self-auditing has been conducted (followed up by prompt remediation of the noncompliance and any resulting harm) and full, complete disclosure has occurred, the company's constructive activities should be considered as mitigating factors in EPA's exercise of investigative discretion. Therefore, a violation that is voluntarily revealed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal investigative resources.

VI. Other Case Selection Considerations

EPA has a full range of enforcement tools available - administrative, civil-judicial, and criminal. There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while the most serious environmental violations ought to be investigated criminally. The challenge in practice is to correctly distinguish the latter cases from the former.

⁶ The term "corporate" or "corporation", as used in this guidance, describes any business entity, whether legally incorporated or not.

⁷ In cases of self-auditing and/or voluntary disclosure, the exercise of prosecutorial discretion is addressed in the Department of Justice policy document entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (July 1, 1991).

⁸ See EPA's policy on environmental audits, published at 51 Fed. Reg. 25004 (July 9, 1986)