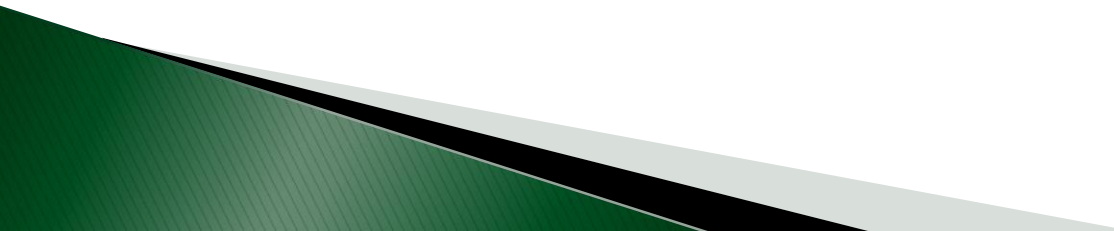


Environmental Crimes

Walter D. James III

James_{PLLC}

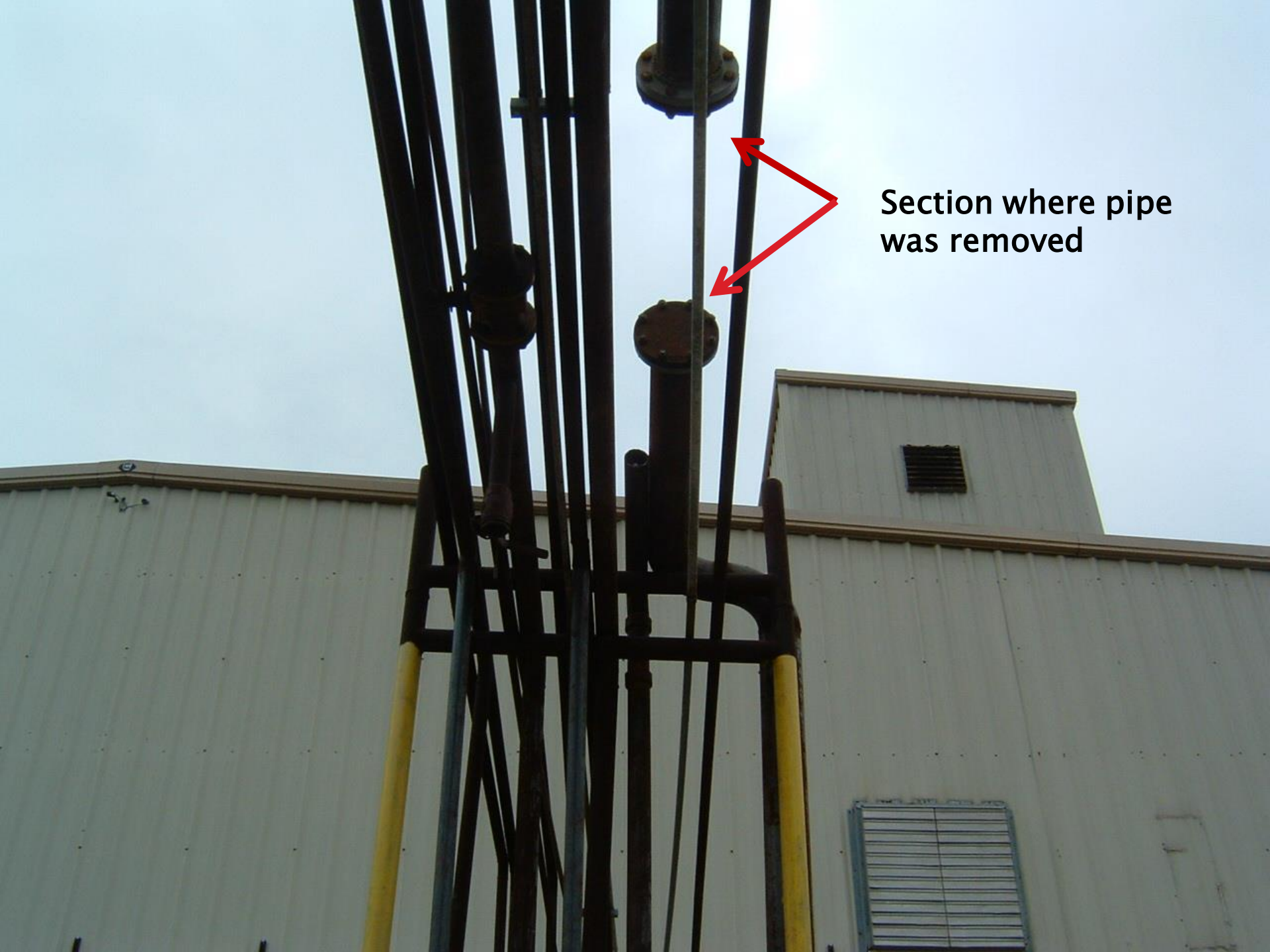
Criminal Investigations

- ▶ How do they get started?
 - Catastrophic event(s).
 - Tip from the public.
 - Newspaper article or television stories.
 - Tip from competitor.
 - Tip from a disgruntled ex-employee or current employee.
 - Self disclosure.
 - Agency review of company submitted records.
 - Bad luck.
- 





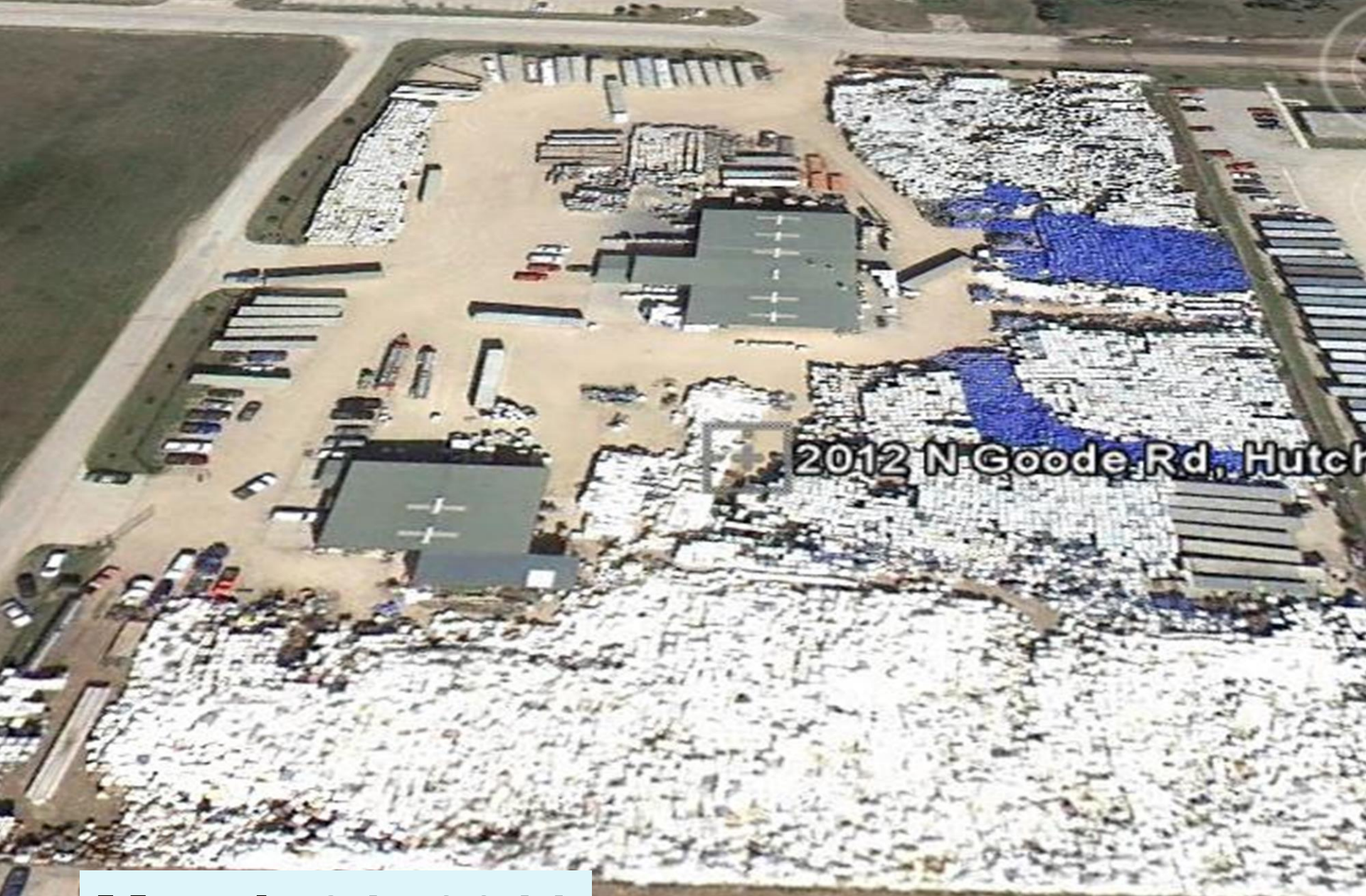




Section where pipe
was removed








2012 N Goode Rd., Hutch

March 31, 2011

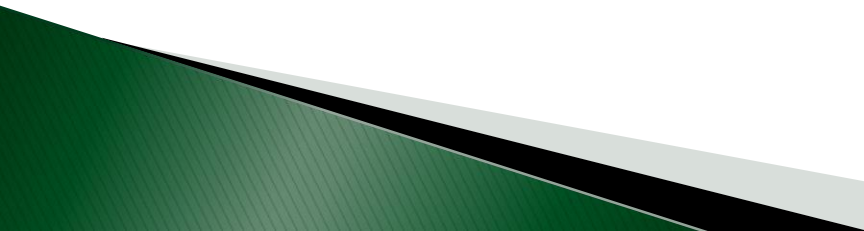
Criminal Investigations cont.

- ▶ Preparation is key – by the time the search warrant is executed, it is too late to wonder how to respond.
 - ▶ USEPA's criminal agents are authorized to investigate all federal crimes.
 - ▶ Typical Title 18 “non-environmental” crimes:
 - False Statements.
 - Obstruction of Justice.
 - Obstruction of Agency Proceeding.
 - Conspiracy.
 - Mail Fraud.
 - Wire Fraud.
 - Money Laundering.
- 

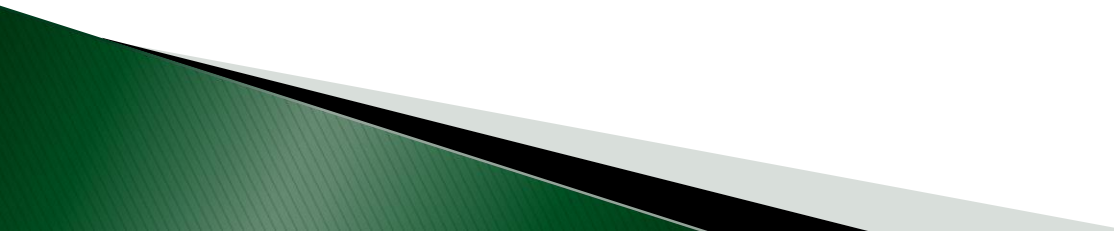
Criminal Investigation: Prelude

- ▶ The investigation never comes “out of the blue.”
 - Interviews.
 - Grand jury subpoena.
 - Search warrant.
- ▶ Agents:
 - Unannounced.
 - Must identify themselves and show credentials.
 - Employee interactions.
- ▶ If company learns that agents are snooping around, it can advise employees of options, but should **NOT** advise the employee not to cooperate – that could be considered obstruction.

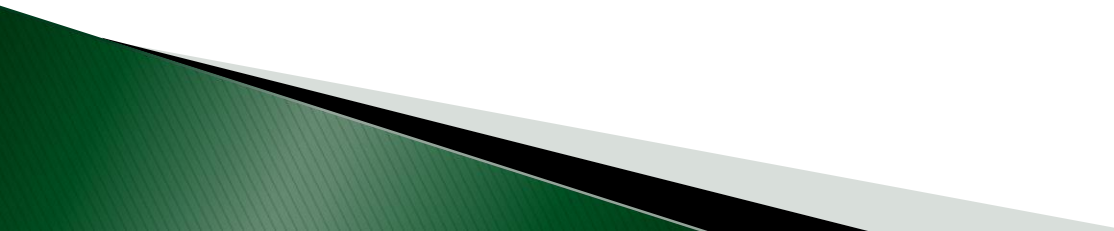
Search Warrants

- ▶ Search warrant is based on a written affidavit setting forth the probable cause that:
 - a crime has been committed; and
 - evidence of the crime is believed to be on the premises to be searched.
 - ▶ Agents are authorized to conduct a search only if they have a **warrant** or if the party **consents**.
 - ▶ The agent must present proper identification and keep the identification in plain view at all times.
 - ▶ The search must be conducted in strict accordance with the search warrant.
- 

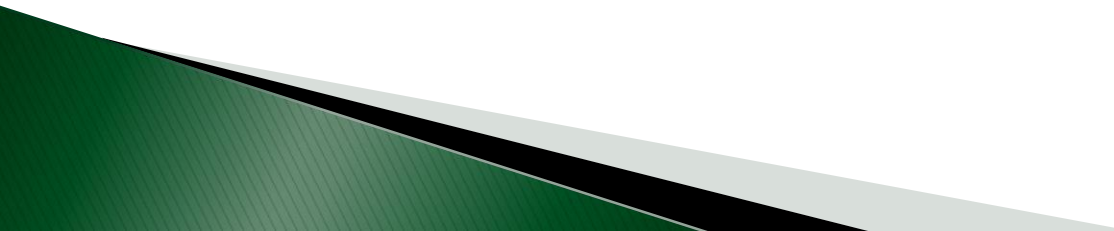
The Search: Top Tips

- ▶ When the search warrant is served, ***get a copy of it!!***
 - ▶ **READ THE SEARCH WARRANT.**
 - ▶ Identify the precise areas/premises to be searched – it must be specified in the search warrant.
 - ▶ You should accompany the agent at all times as best you can – **DO NOT OBSTRUCT THE SEARCH.**
 - ▶ Take notes.
 - ▶ Make sure you get a complete inventory for everything taken under the search warrant.
 - ▶ Finally, **DO NOT DESTROY** documents or advise employees to do so.
- 

Seized Documents and Files


- ▶ Agents will “mirror” computer files and drives.
 - ▶ They may take servers, computers, or hard drives.
 - ▶ The agents will also seize hard copies of documents.
 - ▶ Anything taken, however, must be authorized by the search warrant.
 - ▶ The company has a right to get copies of any original documents or files needed for operational purposes.
- 

Sample Collection: Top Tips

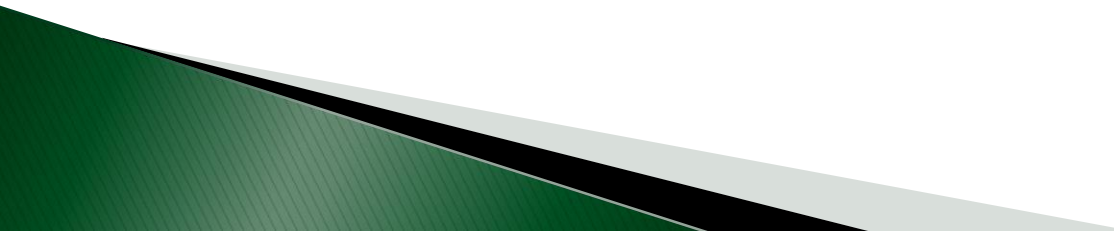
- ▶ The search warrant may authorize the taking of samples.
 - ▶ Always ask for split samples. Agents may or may not be willing to provide split samples.
 - ▶ Watch the agents, take careful notes about the location and type of testing the agents conducted, and then attempt to replicate the samples.
 - ▶ Videotape and/or photograph the sample site. If the agent objects, document the objection.
 - ▶ Hire a consultant to take similar samples from the same locations.
- 



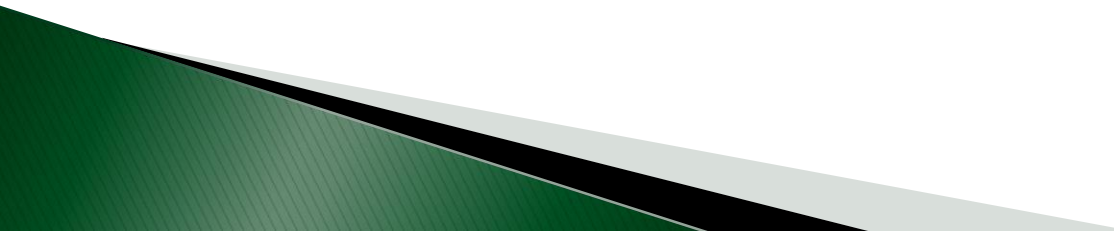
Employee Interviews

- ▶ The search warrant entitles the government to search and take things.
 - ▶ The search warrant does not entitle them to interview employees; however, the agents may ask the company (or an employee) to grant them an interview.
 - ▶ The employees are free to talk with them, they are free to say no, they are free to request a lawyer before they do talk to the government. They are also free to tell the government that they want a company representative to sit in as well.
 - ▶ If not allowed to sit in, debrief the employee as soon as possible afterwards.
- 

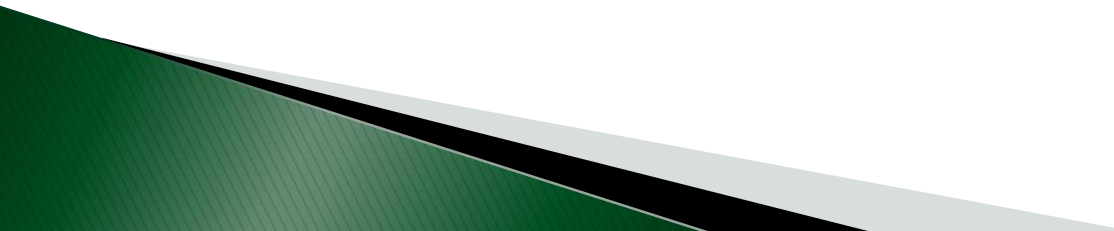
Grand Jury

- ▶ Grand jury is used in addition to, and may be used in *lieu* of, the search warrant to obtain physical evidence.
 - ▶ The grand jury may issue subpoenas for documents or testimony.
 - ▶ Grand jury secrecy.
 - ▶ Electronically Stored Information (ESI) production.
 - ▶ Employees testifying before the grand jury.
 - ▶ Subject or target status.
- 

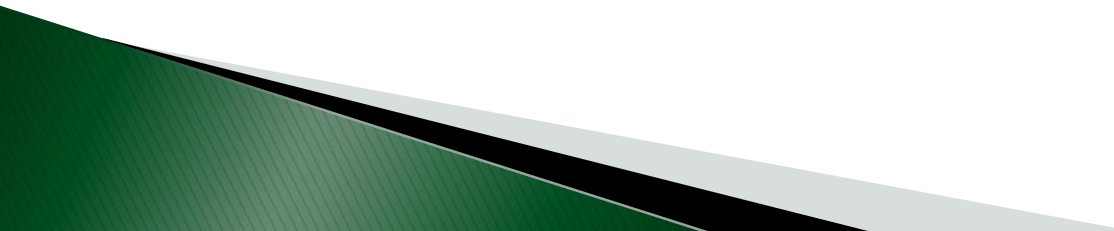
Internal Investigations

- ▶ The internal investigation: get ahead of the government investigation!
 - ▶ Develop a team.
 - ▶ Who retains and pays outside counsel?
 - ▶ Employee interviews – notes or no notes.
 - ▶ Review of all seized documents and files.
 - ▶ Litigation holds.
 - ▶ Computer forensics.
 - ▶ Internal reporting.
- 

Voluntary Disclosure

- ▶ Is it worth it?
 - ▶ Statistics show that if voluntary disclosure is made, there is a good chance that no criminal charges will be brought.
 - ▶ Disclosure must be made within twenty-one (21) days of the discovery of the non-compliance.
 - ▶ Be very familiar with the voluntary disclosure guidance.
 - ▶ Cautionary tale – be over-inclusive, even if not complete in all detail, in the disclosure.
 - ▶ Cooperate, but do not capitulate.
- 

Indictment

- ▶ Once an indictment is issued it is difficult, if not impossible, to change the prosecutor's mind.
 - ▶ Negotiations post-indictment.
 - ▶ Challenges to sufficiency?
 - ▶ What the indictment does say and does not say about the defendant's conduct.
- 

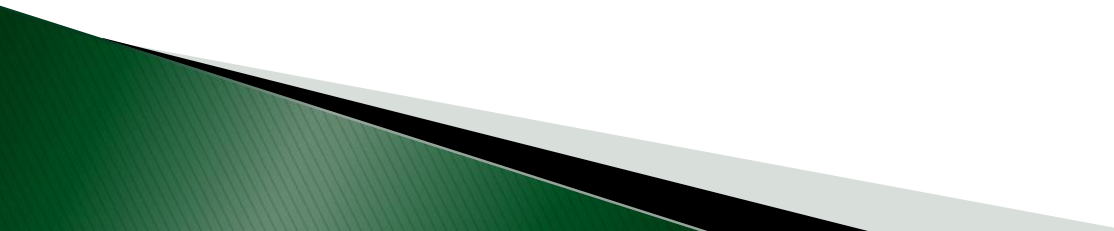
Global Settlement Policy

- ▶ No trade-off between criminal and civil settlements.
 - Up to defendants to raise the issue of a global settlement.
- ▶ Must satisfy criminal/civil settlement criteria.
- ▶ Separate settlement documents.
- ▶ Release language must be limited.
- ▶ Requires Assistant Attorney General review and approval.
- ▶ <https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings>

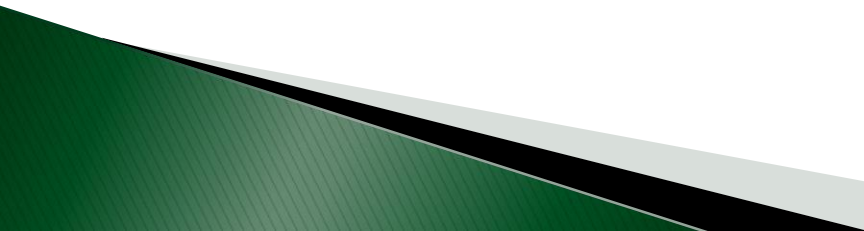
Trial

- ▶ Statistics from the USEPA Office of Criminal Enforcement (January 2017).
 - When a search warrant is issued – charges result about 70% of the time.
 - Who is charged – on average, the charges are on a ratio of 85% individual defendants and 15% corporate.
 - Once charged, there is a 94% conviction rate.
 - If you go to trial, the conviction rate is slightly lower – the government currently has an 79% success rate in trial.

USEPA Enforcement – Annual Results 2019

- ▶ <https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2019>
 - ▶ Criminal enforcement is up slightly from 2018.
 - ▶ In 2010, there were 213 USEPA CID agents. As of the end of 2018, there were 157 USEPA CID agents.
- 

Final Considerations

- ▶ Some of the civil enforcement programs (State and Federal) in the USEPA Regions have a very good relationships with the Criminal Program – and there is information exchanged.
 - ▶ Often times, the only difference between civil enforcement and criminal charges is who gets to your door first.
 - ▶ The cost of compliance pales in comparison to the cost of enforcement.
- 

Questions?

Walter D. James III

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