

Chapter Two

Environmental Protection Agency Criminal Enforcement Policies

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EPA CRIMINAL ENFORCEMENT POLICIES

"There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders."

Earl Devaney

Director, EPA Office of Criminal Enforcement (1994)

"I'm a salesman. I sell jail time to people."

EPA Special Agent

Criminal Investigation Division (2003)

Overview. Established in 1970 by President Nixon, the Environmental Protection Agency (EPA) has grown into a large federal regulatory and enforcement agency, with over 17,000 employees around the country and a budget of \$7 billion. Over the last 30 years, EPA has also developed a robust enforcement program that also has grown in size and budget, with a proposed 2009 budget of \$563 million, of which a record high \$52 million is allocated for criminal enforcement. EPA conducts over 20,000 inspections a year, any one of which could turn into a criminal action that can result in substantial fines and lengthy prison sentences.

Instead of utilizing more reasonable and effective administrative and civil remedies provided by Congress in the environmental statutes — and indeed, as recommended by EPA's own enforcement policy — the EPA has often resorted to using criminal proceedings in cases where they are unwarranted, because either there was no (or minimal) environmental

harm or a lack of criminal intent or culpability, or both. Moreover, EPA has exercised its enhanced criminal investigative and enforcement powers in an arbitrary, aggressive and abusive manner, running roughshod over the constitutional rights of businesses, managers, and employees.

Unfortunately, the EPA and the Department of Justice (DOJ) have exploited judicial rulings, as discussed in Chapter One, which relaxed the standard of mens rea or scienter required for "knowing" violations for environmental infractions, thereby making it easy to prosecute and convict by showing only general intent rather than specific intent for felony violations. Similarly, EPA and DOJ have invoked criminal misdemeanor provisions to prosecute acts of simple negligence and have exploited the public welfare offense and responsible corporate officer doctrines, also making it easy to level criminal charges and extort plea bargains or obtain convictions. As will be discussed in Chapter Three, DOJ has

aided and abetted EPA in its zeal to criminalize regulatory enforcement by accepting questionable referrals for prosecution from the agency as well as from other federal agencies that administer other environmental laws, such as the U.S. Army Corps of Engineers, the Department of Interior, and the National Marine Fisheries Service.

To be sure, even EPA's administrative and civil enforcement activities, which comprise the bulk of EPA's enforcement program, are themselves often arbitrary, unfair, and punitive. However, this chapter will focus on the growth of EPA's criminal enforcement program, discuss EPA's enforcement practices, provide case examples of arbitrary and abusive criminal enforcement, and offer recommended reforms.

Growth of EPA's Criminal Enforcement Resources and Powers. In June 1976, the EPA began to develop guidelines for the criminal prosecution of the earlier enacted environmental laws, such as the CWA, CAA, RCRA, as well as the myriad of often vague and confusing EPA regulations promulgated pursuant to those laws.

On January 5, 1981, EPA authorized the creation of the Office of Criminal Enforcement and by September 1982, had hired 23 experienced criminal investigators. By August 1985, EPA's staff of criminal investigators grew by 50 percent to 34 criminal investigators located throughout each of EPA's 10 regional offices. The investigators lacked police powers, could not execute search warrants, or make arrests. They relied instead on the agents from the Federal Bureau of Investigation (FBI) to provide assistance in conducting criminal investigations.

In 1988, Congress responded to EPA's request for increased police powers for its agents. In a provision of the Medical Waste

Tracking Act, Congress conferred law enforcement powers on EPA agents, allowing them to carry firearms and to execute search warrants. By November 1990, the number of EPA Special Agents had again doubled to 55. In response to calls for even more criminal enforcement resources, Congress enacted the Pollution Prosecution Act of 1990. That law required an almost a four-fold increase in the number of criminal agents by requiring the hiring of at least 200 Special Agents, and provided for increased funding for enforcement training. Despite its enhanced powers, EPA continued to use FBI and local law enforcement agents to carry out searches.

In 1994, EPA Administrator Carol Browner reorganized EPA's enforcement office and established the Office of Enforcement and Compliance Assurance (OECA), headed by an Assistant Administrator. In that same year, EPA's Office of Criminal Enforcement developed guidelines for selecting criminal cases, which are discussed later in this chapter. In August 1995, the Office of Criminal Enforcement, Forensics, and Training (OCEFT) was established within OECA to manage the Criminal Investigation Division (CID), which had grown by then to 210 agents, as Congress mandated. By 2003, the CID staff increased to a record number of 237 agents, highly dispersed, with 90 percent located in area and resident offices around the country. By 2007, the number of CID agents dropped to 172, but more are expected to be hired as Congress presses the agency to beef up its cadre of Special Agents.

State/EPA Enforcement. The EPA is able to leverage its enforcement resources by relying heavily on state enforcement actions. Major federal environmental statutes have delegated enforcement authority to those states meeting certain EPA requirements, which, in turn, allows the states to initiate civil actions and

penalties. These laws also permit the EPA to take enforcement action when the states fail to act or are not tough enough when they do. This so-called "overfiling" option raises serious statutory authority and double jeopardy questions, which the courts have addressed with mixed results.

However, EPA's criminal enforcement program is not "delegated" to the states, although EPA often refers environmental cases to the states for enforcement under their own laws. The states are increasingly using their resources to bring criminal actions against companies at the state and local level. Indeed, the EPA, states, and local agencies work closely together, collect data, share information, and conduct joint investigations via the four Regional Environmental Enforcement Associations (REEAs), which include four Canadian Provinces, Law Enforcement Coordinating Committees (LECCs), and Environmental Crime Task Forces on which EPA-CID Special Agents serve.

Increased Criminal Penalties. In addition to having more criminal enforcement resources at its disposal, EPA's criminal enforcement program was also shaped by the increase in statutory criminal penalties. In 1987, Congress amended the CWA by upgrading "knowing violations" from misdemeanors to felonies, and kept simple negligent violations as misdemeanors, subjecting violators to up to one year in prison. Filing a single incorrect monitoring report, even if no harm occurs, is a felony that can land a plant manager in prison for up to two years. Other knowing violations, such as violating permit conditions, however minor, provide up to three years in prison; and "knowing endangerment" violations can result in up to 15 years in prison. A few years later, Congress similarly amended the CAA in 1990 by adding felony provisions that provided up to

five years in prison.

In the meantime, the U.S. Sentencing Commission issued new Sentencing Guidelines for individuals convicted of federal offenses, including environmental offenses that arbitrarily imposed unusually severe prison sentences, quite unlike the typical probationary sentence meted out before 1987 for the relatively few criminal prosecutions. Because parole was abolished, white-collar defendants would no longer be eligible for parole after serving only one-third of their sentence. Thus, as explained in Chapter Seven on the Sentencing Guidelines, a post-Guideline determinate sentence of two years in prison is functionally equivalent to a pre-Guideline sentence of six years, which was then considered to be a very severe sentence.

Thus, since 1987, the combination of felony statutory penalties and tougher prison sentences for environmental violations propelled overzealous EPA criminal agents to refer cases to DOJ and local federal prosecutors for criminal prosecution. And if the local U.S. Attorneys were reticent in pursuing certain cases due to a lack of interest or resources, EPA attorneys would volunteer to be appointed as Special Assistant U.S. Attorneys to prosecute the cases.

Criminal Enforcement Quotas. EPA's criminal enforcement program appears to be partly driven by a desire to increase enforcement statistics rather than to improve environmental quality, seemingly as a way to justify its congressionally-funded resources. Indeed, the EPA sets yearly targets for the number of criminal cases it should generate. For example, for fiscal year 2004, the target number set by EPA for criminal investigations was 400; the actual number was 425 criminal investigations. In order "to meet or beat its numbers," EPA enforcement personnel are

therefore likely to treat what should be a civil or administrative matter as a criminal one. In fact, EPA criminal agents report that they have a quota of two criminal referrals a year. [U.S. ENVTL. PROTECTION AGENCY, REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS, AND TRAINING 56 \(Nov. 2003\).](#) Thus, a cadre of 200 criminal agents is expected to yield 400 criminal referrals per year. As one EPA CID Agent put it, "I'm a salesman. I sell jail time to people." *Id.* at 57.

While the number of DOJ environmental criminal prosecutions have decreased slightly, EPA investigations continue to proceed at a relatively brisk pace. The recent Supreme Court rulings, which struck down the mandatory feature of the Sentencing Guidelines (discussed in Chapter Seven), have resulted in somewhat lower prison sentences. However, many judges are still wedded to the unreasonably severe and flawed Guidelines, particularly the Part 2Q Environmental Sentencing Guidelines, and mete out harsh sentences at the urging of aggressive prosecutors. *See, e.g., United States v. Hagerman*, 525 F. Supp. 2d 1058 (S.D. Ind. 2007) (five-year prison sentence imposed on owner of treatment facility for making false statements on discharge monitoring reports under the CWA, even though no environmental harm resulted and no charges were filed that facility exceeded its permit levels).

In addition to the harsh sentences, corporations have spent tens of millions of dollars for court ordered Supplemental Environmental Projects (SEPs) that were effectively tagged onto their sentences. SEPs require businesses to spend money for pollution control equipment and projects that otherwise are not required by law. For example, the costs of the SEPs were \$6 million in FY 2004 and \$29 million in FY 2006. One year later, it skyrocketed to \$135 million for FY 2007, a 350

percent jump from the previous year.

Increased criminal prosecutions can be expected as EPA acquires more criminal investigators, spends millions of dollars for enhanced training and facilities, and continues to promote EPA's criminal enforcement as a priority. Furthermore, a lack of uniform case selection procedures among EPA's 10 regional offices and the 93 U.S. Attorney Offices means that one can never know whether a minor violation will be handled by non-criminal or criminal remedies. *See generally* [U.S. GEN. ACCOUNTING OFFICE, ENVIRONMENTAL PROTECTION: MORE CONSISTENCY NEEDED AMONG EPA REGIONS IN APPROACH TO ENFORCEMENT \(June 2000\).](#) Hence, the regulated community should not be lulled by a somewhat lower number of criminal prosecutions by DOJ in 2007 into thinking that an infraction will be disposed of by non-criminal remedies.

This is particularly so in light of public statements by EPA enforcement officials in 2006 and 2007 that criminal enforcement will remain a priority. Indeed, EPA, as part of its public awareness efforts, urges citizens to file complaints against alleged polluters through a link on its Internet homepage, which has generated additional criminal investigations. Other efforts include the annual National Environmental Crime Prevention Week held in April. Launched by the Bush Administration in 2002, the activities include having EPA Special Agents teach middle school students how to detect and report environmental crimes, using lesson plans and comic books that depict polluters as slimy-looking monsters.

The larger public policy question is whether this increased emphasis on criminal enforcement not only runs afoul of EPA's long-standing policy on the exercise of criminal enforcement discretion, but also jeopardizes the

civil liberties of individual businesses and their employees, both of whom are both entitled to the fair enforcement of environmental laws and regulations.

The Devaney Memorandum: Exercising Criminal Enforcement Discretion. As noted, EPA conducts over 20,000 inspections a year, any one of which can turn into a criminal enforcement action. Accordingly, it is imperative that the EPA provide clear case selection guidance to its enforcement staff. On January 12, 1994, EPA attempted to do just that when it updated its criminal enforcement policy. See [Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement Program, The Exercise of Investigative Discretion](#) (Jan. 12, 1994) (Devaney Memo). The Devaney Memo, which outlines case selection criteria, was issued in apparent response to criticism about EPA's aggressive and indiscriminate use of criminal proceedings. Hence, the Devaney Memo "sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities." *Id.* at 1. Notably, the Devaney Memo recognizes the seriousness of EPA's criminal enforcement duties:

[T]he 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.

* * *

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.

Id. at 2 (emphasis added). The Devaney Memo further emphasizes congressional intent, noting that criminal enforcement is not appropriate for "minor or technical variations from permit regulations or conditions." *Id.* Accordingly, the memo specifies that the case selection criteria for criminal prosecution "will be guided by two general measures - significant environmental harm and culpable conduct." *Id.* (emphasis added).

The Devaney Memo defines "significant environmental harm" as "actual harm" that "has an identifiable and significant harmful impact on human health and the environment" or the "threat" of such significant harm. *Id.* at 4. Simple failure to report emission data or information to the EPA, although a regulatory violation, should be subject to criminal investigation only when the failure to report "is coupled with actual or threatened environmental harm." *Id.*

As for "culpable conduct," the Devaney Memo lists several factors to consider, such as a history of repeated violations and concealment of misconduct or falsification of records. Significantly, a "major factor" indicating culpable conduct is "deliberate" misconduct: "[a]lthough 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." *Id.* at 5 (emphasis added). Thus, despite the erosion of mens rea or criminal

intent discussed in Chapter One, the Devaney Memo, to its credit, calls for a heightened showing of intent to warrant a criminal investigation.

More importantly, the Devaney Memo concludes with a cautionary note on initiating criminal enforcement actions:

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.

Id. at 6 (emphasis added).

On its face, then, the Devaney Memo appears to recognize that criminal enforcement of environmental laws should be the last resort, to be undertaken only where there is both significant environmental harm and genuine culpable conduct, taking into account any past history of violations. Yet, as the following case examples illustrate, one has to wonder whether EPA agents and officials (as well as federal prosecutors) have even read, let alone heeded, the criminal enforcement principles outlined in the Devaney Memo. At any rate, EPA officials are not meeting the challenge in practice to distinguish between conduct that warrants criminal as opposed to civil enforcement actions.

Case Examples of EPA's Disregard of Devaney Memo Guidance

Trinity Marine Baton Rouge, Inc. and Hubert Vidrine. On September 5, 1996, a "SWAT Team" of some two dozen armed Special Agents from EPA's CID, FBI, U.S. Coast Guard, and other state and local law enforcement officers with police dogs, 9mm handguns and automatic rifles, raided Canal Refinery Company. Canal is a small Louisiana refinery that allegedly received hazardous waste in violation of RCRA from Trinity Marine Baton Rouge, Inc. EPA criminal agents, lead by Special Agent Ivan Vikin, confronted Canal's new plant manager, Hubert Vidrine, accusing him of storing hazardous waste and lying about it; yelling at employees that Mr. Vidrine had been poisoning them and giving them cancer; threatening employees with imprisonment unless they provided damaging evidence against Mr. Vidrine; and preventing female employees from using the rest rooms for several hours or allowing them to make arrangements to have their children picked up from school and day care, all while EPA agents continued to ransack offices and search the facility for several hours.

After more than three years had elapsed since the raid, Mr. Vidrine was shocked to hear the news on the radio on December 15, 1999 that he (but not his company) and Trinity Marine, along with its manager, had been indicted for violating RCRA. Mr. Vidrine was charged with one count of knowingly storing hazardous waste in a tank at Canal Refinery; he faced five years in prison and a daily fine of \$50,000. He denied any wrongdoing and steadfastly rejected all attempts by the prosecutors to force him to plead guilty and receive prison time.

During the pre-trial proceedings, serious questions were raised by Mr. Vidrine and his

co-defendants about the nature of the "hazardous waste" and about the way in which this case was initiated and prosecuted by the Assistant U.S. Attorney, Howard Parker, and EPA agents, employees, and consultants. EPA's chief witness, informant Mike Franklin, claimed that he had taken samples of the alleged hazardous waste and had it tested. However, neither the EPA nor federal prosecutors could produce the test results allegedly proving RCRA violations. Nevertheless, federal prosecutors and the EPA insisted on using Mr. Franklin as their key witness, even though subpoenas issued by the prosecutors to chemical testing laboratories failed to turn up any lab results of the alleged hazardous waste in question. Desperate prosecutors went so far as to place Mr. Franklin under hypnosis in a vain attempt to obtain information about the alleged testing samples. Defense attorneys investigated the unsavory background of EPA's star witness. Mr. Franklin's credibility was questionable because of a history of cocaine addiction which can cause hallucinations. The court ordered that Mr. Franklin's testimony could not be used.

Undaunted, the federal prosecutor, at EPA's urging, continued to insist that the government should be able to use Mr. Franklin as their key witness and filed a notice of appeal to the Fifth Circuit of the judge's ruling. He reluctantly withdrew the appeal when the Solicitor General's Office wisely decided not to approve it. On September 17, 2003, on the eve of trial — seven years since the initial September 1996 raid — federal prosecutors filed a motion to dismiss the indictment against all three defendants, stating that "[d]evelopments in this matter since the indictment have revealed facts and circumstances which, in the interests of justice, warrant dismissal of the indictment." The district court granted the motion the next day.

Mr. Vidrine was forced to spend his entire retirement savings of \$180,000 on attorney's fees to mount a four-year defense against the bogus charges, when his company, which was not charged, refused to pay his defense fees. "Anybody who has to go through this and not lose their sanity or life, it's just amazing. I didn't think it could happen in America," Vidrine said after the dismissal.

On July 23, 2007, with assistance from the Washington Legal Foundation, Mr. Vidrine filed a malicious prosecution lawsuit under the Federal Tort Claims Act against the United States after the EPA failed to respond to the FTCA administrative claim for damages submitted to EPA and DOJ in September 2005. *Vidrine v. United States*, No. 6:07-cv-1204 (W.D. La). On October 31, 2007, the government filed an Answer, denying the allegations in the Complaint and asserting various immunity and other defenses. In December 2007, the court ordered that copies of the Grand Jury transcripts be released to the parties for use in the civil suit. Pretrial discovery is scheduled through 2008. Clearly, considering the lack of evidence of any violation, the absence of environmental harm, and no prior violations, this case did not meet the criteria for a criminal prosecution under the Devaney Memo.

Riverdale Mills Corporation and James M. Knott, Sr. Riverdale Mills Corporation (RMC) is a small manufacturing company located in Northbridge, Massachusetts that produces plastic-coated steel wire mesh used for lobster traps and erosion control. On October 21, 1997, two EPA civil inspectors came to the facility to take samples of the company's rinsewater, and were granted conditional consent to do so by RMC's owner; namely, that RMC personnel were to accompany the investigators at all times. Two weeks later, on November 7, 1997, "a virtual

'SWAT team' consisting of twenty-one EPA law enforcement officers and agents, many of whom were armed, stormed the RMC facility to conduct pH samplings. They vigorously interrogated and videotaped employees causing them great distress and discomfort." [United States v. Knott, 106 F. Supp. 2d 174, 180 \(D. Mass. 2000\)](#). Business records and computers were also seized during the all-day search.

With much fanfare, EPA's Regional Office in Boston and the then-U.S. Attorney for Massachusetts, Donald K. Stern (former Chair of the Attorney General's Advisory Committee), announced to the media on August 12, 1998, that RMC and its 70-year-old owner, James M. Knott, Jr., had been indicted on two felony charges under the CWA and faced six years in prison and a \$1.5 million fine. Their "crime" was allegedly polluting the nearby Blackstone River by the facility's discharge into the public sewer of a small volume of "acidic" rinsewater, with a pH level of less than 5.0 standard units, in violation of EPA's pre-treatment CWA regulations. Mr. Knott vigorously denied any wrongdoing.

The EPA did not claim that the town's wastewater treatment facility was damaged in any way by RMC's allegedly acidic rinsewater. Nor were there any allegations that RMC's rinsewater caused the town's treatment facility to violate any EPA regulations governing its discharge of treated water into the nearby Blackstone River, the very purpose of these regulations. Indeed, the facility's pH levels were well within the permitted levels at all times. In short, there simply was no environmental harm, let alone significant harm; nor was there any history of prior CWA violations.

When the government was forced by Mr. Knott to turn over the original EPA log books of the water sample tests from the first visit, the

agents' hand-written notes revealed that lawful and neutral pH readings of 7 were marked over to look like a 4 and 2, below the required minimum of 5 pH. Moreover, the pH readings from the subsequent SWAT team raid all showed lawful pH readings of 5 or above at the point where the public sewer line actually connected to the end of RMC's sewer pipe. On April 23, 1999, shortly before trial was to begin, the U.S. Attorney dismissed all charges against RMC and Knott. The grueling two-year legal battle cost the Harvard-educated businessman and his award-winning company (for developing pollution control technology) hundreds of thousands of dollars in lost business and legal defense fees, not to mention great humiliation and distress.

Subsequent lawsuits by RMC and Mr. Knott against the government and EPA agents under the Hyde Amendment, Federal Tort Claims Act, and *Bivens* claims, assisted by the Washington Legal Foundation, produced mixed results and were ultimately denied due to qualified immunity defenses. [Riverdale Mills Corp. v. United States, 392 F.3d 55 \(1st Cir. 2004\)](#). Nevertheless, the district court pointedly "reproved [the EPA] for its sloppy recording of pH values . . . and subsequent heavy-handed treatment of RMC, including the conduct of an unconsented and therefore unconstitutional search of the plant. That negligent conduct caused the Plaintiffs, a law enforcement agency and, ultimately, the taxpayers unnecessary expense." [Riverdale Mills Corp. v. United States, 345 F. Supp. 2d 50, 60 \(D. Mass. 2004\)](#).

The EPA's heavy-handed criminal enforcement tactics against RMC, Mr. Knott, and his employees, were featured on a special segment of CBS's *60 Minutes* that aired on March 25, 2001. Even if the allegations were true, Mr. Knott clearly was not one of the "most significant and egregious violators" who caused

"significant environmental harm" as specified in the Devaney Memo so as to warrant using criminal enforcement rather than non-criminal remedies.

American Carolina Stamping. On April 15, 1999, in a raid similar to the ones carried out at Canal Refining Company, and Riverdale Mills, 34 armed EPA CID agents, led by Special Agent in Charge Ivan Vikin (who also led the raid at Canal Refining), U.S. Marshals, and North Carolina state and county police officers, some wearing flak jackets, helmets, and body armor, stormed a small family-owned metal stamping plant, American Carolina Stamping (ACS), in rural Penrose, North Carolina. The "crime" was disposing of a commercial solvent, which EPA alleged was a hazardous waste, in violation of RCRA. The owner, Steve McNabb, denied any wrongdoing, and when he tried to retrieve his tape recorder to record the event, he was threatened by EPA agents who drew weapons and placed him in handcuffs. Meanwhile, other EPA agents from the Science and Ecosystem Support Division, wearing protective moon suits, took a small soil sample, while other agents searched the premises for over nine hours. Seven boxes of files and computer backups were hauled away. Mr. McNabb vigorously complained about EPA's strong-armed tactics to his congressman, then-U.S. Rep. Charles Taylor, who investigated the matter.

A grand jury was convened shortly thereafter, and Mr. McNabb insisted on appearing before it, which he did. No criminal charges were filed. Nevertheless, in the meantime, McNabb's small company had been cut off from all government contracts, upon which his business primarily relied. His case was featured, along with the Riverdale Mills case, on CBS's *60 Minutes* in 2001. Unfortunately, McNabb's subsequent lawsuit for damages against state and federal officials

was dismissed on immunity grounds. *McNabb v. North Carolina*, 2001 U.S. Dist. LEXIS 13181 (W.D.N.C.). But this would not be the end of the matter.

On September 19, 2003, well over four years after the 1999 raid (but within the five-year statute of limitations) — during which time ACS was never told to cease activity or clean up waste — EPA Region 4 suddenly decided to initiate administrative proceedings. A Complaint and Compliance Order was issued that day alleging the storing and disposing of hazardous waste in eight drums without a permit, and three related RCRA charges. The Order specified penalties up to \$27,500 per day, which, computing from the date of the 1999 raid, amounted to several hundred million dollars. McNabb vigorously objected to the baseless and belated charges.

On October 17, 2003, the EPA, noting such mitigating factors as the lack of history of noncompliance, reduced the proposed penalty to \$78,759. McNabb complained this time to the EPA Administrator for Region 4 in Atlanta, Jimmy Palmer. After an on-site visit by Palmer's Chief of Staff, Allen Barnes, Region 4 wisely filed a Notice of Withdrawal on November 10, 2003, dropping all charges against McNabb's business. Clearly, this abusive criminal enforcement action should never have been initiated under the case selection criteria in the Devaney Memo. Indeed, as is evident from the withdrawal of all charges, it did not even merit administrative action.

United States v. Wabash Valley Service Co. 426 F. Supp. 2d 835 (S.D. Ill. 2006). While EPA seems to have curbed its penchant for SWAT Team-type raids in recent years, it continues to bring criminal cases that are unwarranted, as determined by the Devaney Memo. In 2005, a company, its operations

manager, and another employee were criminally charged for applying fertilizer pellets containing pesticides on a farm in a manner contrary to the label instructions, in violation of the Federal Insecticide Fungicide and Rodenticide Act (FIFRA). One general provision on the label said that the product should be applied in a way that would not cause it to come in contact with people, while another provision advised to avoid "spray drift" in "windy" conditions. The defendants moved to dismiss the criminal charges because the labeling was unconstitutionally vague.

In a thorough and well-written 29-page ruling, the court agreed, stating that the label did not provide the user with "reasonable notice of what conduct it proscribes." *Id.* at 846. Furthermore, since the pesticide was in pellet rather than liquid form, the term "windy" was too vague. The court said this was analogous to telling drivers not to drive "too fast." *Id.* at 849. Indeed, the court noted that EPA guidance suggests that the warning applies only to liquid rather than solid sprays. The court concluded that the label instructions were unconstitutionally vague as applied, but not before rebuking the government for even bringing the case as a criminal matter in the first place:

When experienced trial attorneys decide whether to file a lawsuit, they often look at the instructions the court will give to the jury if the case makes it to trial. By analyzing what he must prove to the jury, an attorney can make a reasonable approximation of the strength of his case. The Court wonders if the government considered this simple question.

Id. at 844-45. The Court also was disturbed to learn that, because some drift will almost always occur, "every applicator is potentially

subject to criminal liability for what is essentially an unavoidable byproduct of his work." The prosecutor replied to a skeptical court that he "hope[d] that the government would use its discretion." *Id.* at 845. In short, the court's ruling suggests that even as a civil matter, the government's case was exceedingly weak. The court concluded that "[u]nder this label it is not just [that] the marginal situations are unclear, it is all but the most egregious situations that are unclear." *Id.* at 853. Similar to the other cases discussed in this section, bringing this case as a criminal matter against the company and two of its employees clearly violated the Devaney Memo's guidance that only the "most significant and egregious violators" where there is "significant environmental harm" should be criminally prosecuted.

United States v. Chief Ethanol Fuels Inc. (D. Neb. No. 4:06-cr-03153). Chief Ethanol Fuels of Nebraska, the nation's leading producer of ethanol, which reduces air pollution from auto emissions, was charged in 2006 with filing false discharge monitoring reports about the temperature of the wastewater discharges from its facility. The water discharged into the river ranged between 90 degrees and 94 degrees Fahrenheit, but the discharge report stated that the temperatures were within the 90 degree limit set by its discharge permit. The government did not allege there was any environmental harm caused by the slightly warmer wastewater. In fact, the company subsequently received a new permit to allow for discharges of up to 104 degrees. Nevertheless, the company was criminally prosecuted, pled guilty on October 25, 2006, fined \$100,000, forced to pay another \$100,000 to a National Audubon Society affiliate, and was placed on probation for one year. This reporting violation, which apparently caused no environmental harm, is a perfect example of a case that should have been

handled administratively or civilly under the Devaney Memo.

United States v. McWane, Inc., 505 F.3d 1208 (11th Cir. 2007). McWane, Inc., a cast iron pipe manufacturing plant, and three of its managers were charged with discharging wastewater into a navigable river from more than one permitted discharge point in violation of the company's permit. The company was also charged with one count of making a false statement under 18 U.S.C. § 1001 based on certifications by its manager. The Eleventh Circuit reversed the convictions. The court held that the government failed to show under Justice Kennedy's "significant nexus" test in *Rapanos v. United States*, that the nearby creek was connected to a "navigable water." *Id.* at 1221. The court also noted that the EPA failed to show any actual harm or injury, or risk of harm, to the river that was the navigable water. *Id.* at 1212. Finally, the court ruled that 18 U.S.C. § 1001 is a specific intent crime, and that the government failed to show actual knowledge of the falsity of the statement submitted. *Id.* at 1229. Because of the lack of any environmental harm and questionable jurisdiction, this case should have been resolved with non-criminal penalties.

EPA Management Review. In November 2003, EPA officials completed a management review study of its enforcement programs and issued its findings and conclusions. [EPA REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS, AND TRAINING \(NOV. 2003\)](#). Some candid observations were made that should hopefully guide and redirect EPA's criminal enforcement efforts. For example, the report noted that as an enforcement agency which reacts to complaints, there is "little distinction between important and trivial cases, and a preoccupation with traditional statistics rather than real accomplishments, in this case in preventing

pollution." *Id.* at 58. As the report further observed:

[T]here is a palpable sense within OCEFT, and especially CID, that the desire to produce favorable traditional enforcement statistics — the so-called "bean count" — creates pressures for action which may not represent the most effective strategic use of limited investigative and prosecutorial resources. As one agent report, "It's always quality over quantity until the end of the year comes."

* * * *

Many within OCEFT . . . think of criminal enforcement as a value in itself. As such, they argue that "success" in the traditional measures — investigations, referrals, indictments, convictions, sentences, probations — justifies the Agency's investment in such activities, and indeed with more investment, they could get more "results."

* * * *

Without [reform], the program will continue [to] be judged solely on numbers of investigative and prosecutorial activities without asking the more important question of what these numbers signify for environmental protection.

Id. at 54-55. In a May 2007 memorandum, Granta Nakayama, EPA's Assistant Administrator for Enforcement and Compliance, directed EPA's criminal agents to better document their requests for prosecutorial assistance and made a passing reference to the 1994 Devaney Memo as the governing case

selection guidance. Other than that, EPA has not announced what concrete steps it has taken or plans to take in light of this management report and the criticism it has received from the regulated community, to redirect and refocus its criminal enforcement program as originally intended by the Devaney Memo.

New Enforcement Partnerships: EPA and SEC. The Sarbanes-Oxley Act of 2002 imposes reporting obligations in addition to the Securities and Exchange Commission's (SEC) 20-year-old requirements to disclose environmental liabilities. Under the law, companies are required to disclose "material" environmental liabilities to better inform investors about the company's financial exposure; however, the SEC has not provided any clear definition of what is "material," relying instead on case law. SOX requires corporate management to sign or certify the accuracy of the annual environmental compliance certifications. If a company guesses wrong as to what is "material," individuals certifying a periodic report are subject to one million dollars in fines and 10 years in prison for simple "knowing" offenses, which, as Chapter One discussed, require only a showing of general intent. For "willful" offenses, company CEOs are subject to a \$5 million fine and 20 years in prison.

As one leading practitioner observed, "Sarbanes-Oxley has spawned a new era of cooperation between the U.S. Environmental Protection Agency and the SEC." [Steven P. Solow, *Greening the Bottom Line: Environmental Management as a Competitive Tool*, EXECUTIVE COUNSEL \(Fall 2004\).](#) In 2003, EPA launched its "environmental liability enforcement initiative" to enhance sharing of information with SEC about EPA enforcement actions against publicly-traded companies. The EPA is also cross-checking information required to be disclosed in SEC

filings against its own data for consistency and completeness.

New Enforcement Partnerships: EPA, OSHA, and DOJ. EPA and the Occupational Safety & Health Administration (OSHA) began a joint effort in 1991 to enforce certain worker safety violations under related EPA statutes because the penalties for environmental laws are much tougher than those for OSHA violations and because they are easier to prove. A "knowing endangerment" conviction under RCRA with respect to the storage or disposal of hazardous waste is a felony that can bring stiff sentences of up to 15 years whereas a "willful" violation of OSHA rules is a misdemeanor, but only if the violation results in the death of a worker. The maximum prison sentence is six months for the first offense or one year for a repeat offense. In addition, fines for OSHA violations are much lower than those for environmental offenses. This same strategy was launched by then-Attorney General Eliot Spitzer in 2004 to use New York environmental laws to prosecute workplace safety violations that otherwise would come under the jurisdiction of OSHA.

A prime example of the misuse of environmental laws to enforce workplace safety laws was [*United States v. Hansen*, 262 F.3d 1217 \(11th Cir. 2001\).](#) As discussed in Chapter One, the owner, his son, who agreed to temporarily serve as CEO, and the plant manager were indicted and convicted of "knowing endangerment" of employees at the chemical plant and received prison terms ranging from four to nine years. OSHA had inspected the plant and the company took some corrective actions to prevent workers from being exposed to certain chemicals. One worker testified that he had slipped on the floor and simply rinsed himself off, without seeking medical treatment for his "minor burns" or reporting the incident to the company. In short,

this case should have been handled by OSHA or, at best, by administrative or civil remedies under the environmental statutes.

To be sure, there are some cases where serious workplace injuries have occurred. In *United States v. Elias*, the owner of a fertilizer company received a 17-year sentence for knowing endangerment under RCRA when an employee, who was exposed to cyanide fumes in a sludge tank, suffered brain damage. 269 F.3d 1003 (9th Cir. 2001). While this was a significant injury, and the prison sentence was longer than the average sentences for murder and rape, the policy question is whether Congress should revise OSHA penalties rather than have prosecutors use EPA laws to punish safety violations at the workplace.

In May 2005, the EPA, OSHA, and DOJ launched a more formal initiative to investigate and prosecute violations of environmental laws and regulations that have harmed workers, rather than the public at large. EPA's vigorous pursuit of these and other OSHA-related violations, however, seems to conflict with information posted on its website about submitting complaints to EPA of suspected environmental violations. Under the category of "What Not to Report," EPA provides the following guidance to the public:

Problems with the environment **inside the workplace**, such as the presence or handling of chemicals or noxious fumes, are under the jurisdiction of the Occupational Safety and Health Administration, an arm of the U.S. Department of Labor.

www.epa.gov/tips (emphasis in original). Despite this disclaimer, EPA is expected to continue to be an active partner not only with OSHA, but with other federal, state, and local agencies and enforcement authorities in using

its criminal investigation and enforcement resources.

New Enforcement Partnerships: EPA, DOT, and DOJ. In September 2003, EPA began to work with the Department of Transportation (DOT) and DOJ in coordinating enforcement of the Hazardous Materials Transportation Act regulating the shipment of hazardous materials to thwart possible terrorist attacks. The result was the prosecution of defunct Emery Worldwide Airlines, which pled guilty in 2003 for failing to provide its pilots with proper paperwork that hazardous materials were shipped in 1998 and 1999. The company was fined the maximum of \$500,000 for each of the dozen regulatory violations, for a total of \$6 million. Further criminal enforcement is expected to continue in this area to demonstrate the government's efforts to combat terrorism.

Parallel Investigations. Another major EPA initiative also suggests that greater criminal enforcement activity may be looming on the horizon: closer coordination between EPA's criminal and civil enforcement staff. Beginning in July 2005, EPA began to physically co-locate civil and criminal staff in EPA's regional offices, with a pledge by EPA's Nakayama in early 2006 to continue the process and spend millions of dollars on training and equipment. The publicly stated goal was to focus on all major civil enforcement cases as possible candidates for criminal investigation and prosecution. However, sharing information between civil and criminal enforcement staff raises serious questions about potential abusive and unfair criminal prosecution, such as using civil investigations as a pretext to gather incriminating information for criminal cases. Indeed, as discussed in Chapter Four, the right to due process, right to counsel, and the rights against self-incrimination and double jeopardy, are weakened by improper joint or parallel

investigations by the civil and criminal enforcement staff.

Conclusion. EPA's Granta Nakayama has vowed to "protect the public by criminally prosecuting *willful, intentional, and serious* violations of the federal environmental laws." [U.S. ENVTL. PROTECTION AGENCY, 2006-2011 EPA STRATEGIC PLAN: CHARTING OUR COURSE 128 \(2006\)](#) (emphasis added). The use of these three modifiers suggests a strong reaffirmation of the Devaney Memo guidance on criminal case selection. "Willful" violations generally require a finding of specific intent rather than the general intent standard associated with "knowing" violations, the standard of mens rea in many environmental statutes. However, Nakayama's statement does not mean that EPA will criminally prosecute *only* serious or culpable cases. As one commentator observed, "when it comes to case selection, the Exxon Valdez is definitely in, but the mom-and-pop dry cleaners is not ruled out." David A. Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1409 (2002). Until there is better supervision over the case selection process, unwarranted criminal investigations, referrals, and prosecutions will likely continue.

RECOMMENDATIONS

1. Congress should conduct oversight hearings on EPA's abusive criminal enforcement policies and practices and request the Government Accountability Office (GAO) to investigate and report on those policies and practices.
2. EPA should conduct a thorough review of the Devaney Memorandum and its application to ensure that EPA's criminal enforcement program and case selection procedures, both on paper and in practice, do not resort unnecessarily to criminal investigation and referral when more appropriate administrative and civil remedies are available.
3. EPA should act on its 2003 management review report and enact specific procedures and reforms to ensure that criminal enforcement resources are properly utilized.
4. Before any criminal investigation is undertaken in the field, pre-approval and close supervision from the appropriate EPA Regions should be required to determine whether administrative or civil remedies should be used instead. EPA Headquarters should approve any referral to DOJ or a U.S. Attorney's Office for criminal prosecution. This would help ensure uniformity and procedural fairness.
5. Once a field investigation is authorized, EPA CID Agents should not use strong- armed tactics and harassment in executing search warrants. EPA Agents should advise company officials and employees of their rights, including the right to refuse to answer questions and the right to consult an attorney. Armed EPA agents should refrain from contacting and intimidating employees at their home after work.
6. EPA should consider whether, as a matter of law and economics, a combination of increased fines and criminal enforcement actions is an efficient use of resources or whether it is likely to cause over-deterrence.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

Charles J. Babbitt, et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L. & POL'Y F. 1 (2007).

David A. Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387 (2002).

Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. & CRIMINOLOGY 1054 (1992).

JOHN F. COONEY, ET AL., ENVIRONMENTAL CRIMES DESKBOOK (Envtl. Law Inst. 1996).

JAMES V. DELONG, OUT OF BOUNDS, OUT OF CONTROL: REGULATORY ENFORCEMENT AT THE EPA (Cato Inst. 2002).

Inside EPA, *New EPA Data Conflict With Agency's Criminal Enforcement Emphasis* (Dec. 8, 2006).

Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, Cato Policy Analysis no. 223 (1995).

DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL (New York Law Journal Press 2007).

Steven P. Solow, *The State of Environmental Crime Enforcement: Survey of Developments in 2006*, in BNA ENV'T REP. (Vol. 38, No. 9, March 2, 2007).

Steven P. Solow, *Greening the Bottom Line: Environmental Management as a Competitive Tool*, EXECUTIVE COUNSEL (Fall 2004).

U.S. ENVTL. PROTECTION AGENCY, 2006-2011 EPA STRATEGIC PLAN: CHARTING OUR COURSE (2006).

U.S. ENVTL. PROTECTION AGENCY, FY2007 ENFORCEMENT & COMPLIANCE ANNUAL RESULTS: CRIMINAL ENFORCEMENT PROGRAM.

U.S. ENVTL. PROTECTION AGENCY, REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS, AND TRAINING (Nov. 2003).

U.S. GEN. ACCOUNTING OFFICE, *Environmental Protection: More Consistency Needed among EPA Regions in Approach to Enforcement*, GAO/RCED-00-108 (June 2000).

TIMELINE: EPA CRIMINAL ENFORCEMENT POLICIES

- 1969: National Environmental Policy Act of 1969 is enacted.
- 1970: Environmental Protection Agency (EPA) is created by an Executive Reorganization Plan to assume regulatory authority over certain environmental and health related laws administered by other agencies.
- 1970: Congress enacts the Clean Air Act (CAA).
- 1972: Congress enacts the Federal Water Pollution Control Act, and later amends it in 1977 as the Clean Water Act (CWA).
- 1976: EPA begins to develop guidelines for criminal investigation and enforcement of environmental laws under its jurisdiction.
- 1985: EPA's criminal enforcement staff grows to 34 agents, 50 percent higher than the 1982 level.
- 1987: Congress amends the Clean Water Act (CWA) to add felony penalties for the first time. Filing false monitoring reports provided for up to two years in prison; other "knowing" violations provided for up to three years in prison; and "knowing endangerment" violations provided up to 15 years in prison.
- 1988: Congress enacts provision in the Medical Waste Tracking Act that confers police power on EPA criminal agents and authorizes them to carry firearms in conducting searches.
- 1990: Congress amends the penalty provisions of the Clean Air Act (CAA) to provide for felony violations similar to those found in the CWA.
- 1990: Congress enacts the Pollution Prevention Act (PPA) and directs EPA to hire 200 criminal enforcement agents.
- 1991: EPA and OSHA begin joint program on enforcing certain worker safety violations.
- Jan. 1994: Earl Devaney, Director of EPA's Office of Criminal Enforcement issues a Memorandum, *The Exercise of Investigative Discretion*. The Devaney Memo sets forth criteria for criminal enforcement standards, limiting criminal investigations to cases where there is both significant environmental harm and a high degree of culpability. However, Memo is ignored in a number of cases where there was little or no environmental harm and a lack of criminal intent.
- Aug. 1995: EPA established the Office of Criminal Enforcement, Forensics, and Training (OCEFT) within OECA to manage the Criminal Investigation Division (CID),

which increased to 210 agents.

- Dec. 1995: EPA issues policy on "Incentives for Self Policing: Discover, Disclosure, Correction and Prevention of Violations" ("Audit Policy") that tracks Sentencing Guidelines' compliance criteria, which, if followed, may warrant reduced civil penalties and no criminal sanctions. Final version was issued April 2000 at 65 Fed. Reg. 19618.
- 1999-2003: EPA conducts an average of approximately 475 criminal investigations per year in FYs 1999-2003. Many searches are carried out in an aggressive manner by armed EPA agents, who threaten employees and harass them at their homes in the evening, demanding incriminating evidence of their company and their bosses. By 2003, EPA has criminal enforcement staff of 237.
- 2003: Following passage of Sarbanes-Oxley in 2002, EPA commences enforcement initiatives with the Securities and Exchange Commission (SEC) to ensure accurate reporting of material environmental liabilities.
- Nov. 2003: EPA officials complete a management review of its enforcement programs and issue findings and conclusions in a report entitled, U.S. EPA REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS, AND TRAINING. Notably, the Report criticizes EPA enforcement policy that measures its success by the number of prosecutions, fines, and jail time rather than by pollution prevention.
- May 2005: EPA, OSHA, and DOJ launched formal initiative to use tougher environmental laws to prosecute OSHA violations.
- 2003-2007: EPA coordinates enforcement efforts in various task forces with other regulatory agencies, including OSHA, Coast Guard, Postal Authorities, and the IRS.
- 2007: The number of CID agents is reduced to 172, but more agents are expected to be hired as Congress presses for more staffing. Criminal investigations continue at a relatively high rate.
- May 2007: Granta Nakayama, EPA's Assistant Administrator for the Office of Environmental Compliance Assurance (OECA), revises procedures for EPA's criminal agents for better documenting their requests for prosecutorial assistance and reaffirms the Devaney Memo as the governing case selection guidance.