AVOIDING OR REDUCING ENVIRONMENTAL ENFORCEMENT HEADACHES

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Companies in a broad range of industries face ever-increasing scrutiny from the U.S. Environmental Protection Agency (EPA) and state departments of environmental conservation – and all signs point to growth in that trend. EPA conducted approximately 20,000 inspections and evaluations in FY 2012.[1] The agency initiated just over 3,000 civil, judicial, and administrative enforcement cases and resolved about the same number. Most notably, EPA set a new record in FY 2012 for the amount of civil penalties imposed on companies – $208 million. Companies also agreed to spend more than $44 million in "Supplemental Environmental Projects," which are environmentally beneficial projects beyond those required by law.

On the criminal side, although it had fewer criminal enforcement agents in 2012 than in 2011, EPA still opened 320 criminal investigations, 44 percent of which resulted in charges filed against one or more defendants. Most criminal cases, 70 percent to be exact, included individual defendants, and the conviction rate was 95 percent. Criminal defendants were sentenced to a total of 79 years in prison and paid $44 million in fines.

While the civil and criminal risks may be potentially disastrous, there are both proactive and responsive steps business owners and their counsel can take to limit potential exposure in environmental enforcement actions.

INSPECTIONS AND REPORTING REQUIREMENTS

Those targeted by inspection requests should not refuse to comply unless they have a very compelling reason for doing so. A refusal flags the business as non-cooperative and only encourages further EPA attention. Further, a refusal to comply with EPA inspection requests can trigger enforcement penalties on its own. For example, the Resource Conservation and Recovery Act (RCRA) provides for the imposition of penalties up to $37,500 *per day* for failure to comply with EPA orders or requests.

Likewise, failure to comply with mandatory EPA reporting requirements – either before or after a business is under investigation – can expose an entity to potential penalties. For example, one company's failure to promptly submit accurate data about its production and use of chemical substances as required by the Toxic Substances Control Act (TSCA) resulted in its incurring a $55,901 civil penalty in 2012. Notably, this penalty was levied despite the fact that there was no evidence indicating the company's failure to comply with the reporting requirements had caused any real harm.

DEFENSES FOR CIVIL ENFORCEMENTS

Most environmental statutes come with a strict liability threshold – in other words, if you committed a violation, there's a very slim chance you'll get away with it upon discovery. However, there are defenses and tactics that can be used in limited circumstances to help shield a potential violator from some liability.

EPA regulations have created an affirmative defense of "upset" – i.e., that a violator's temporary noncompliance was permissible as a result of certain uncontrollable factors. Invoking this exception, however, requires certain reporting requirements, and some factors related to facility design and maintenance may act to prevent a party from invoking an upset defense.

If your organization may not be the only one responsible for an environmental violation, Rule 14 of the Federal Rules of Civil Procedure and state procedural laws allow defendants to "implead" entities that may ultimately owe them contribution. Additionally, environmental violations can be subject to a concept known as

"over-filing" – i.e., where the federal government files an enforcement action against an entity despite the fact that the entity is already undergoing state enforcement proceedings. In the event that your business is attempting to settle an action against it, it is important to include all of the relevant stakeholders in the settlement process. Otherwise, you face the possibility of defending a second action predicated on the same violation.

CRIMINAL INVESTIGATIONS

There are 19 pollution crime laws, and 26 wildlife crime laws, that include a criminal enforcement mechanism. A criminal enforcement action pursuant to one of these laws may be triggered by a variety of events, such as a major release (e.g., from a spill, explosion, or fire), a whistleblower, or a permitting dispute or protracted civil enforcement matter. In addition, the government may find a basis for criminal prosecution beyond the substantive environmental violations that provide for the same, such as false statements, falsification of inspection reports, and obstruction of justice.

As always, the best preparation for any criminal investigation is compliance. With this principle in mind, it is advisable to engage in self-audit programs designed to uncover compliance issues "in house," so they might be dealt with internally before an external investigation is commenced. Some law firms provide compliance audit services, which not only reduce the potential for environmental violations, but tend also to reduce penalties when violations are found.[2]

Of course, even the best self-audit program can not guarantee 100 percent compliance. Violations are bound to take place, and when they do it is imperative that you have a response strategy in place. Your response strategy should include preparation of response plans and notifications required by statute, such as those required under the Clean Water Act (CWA) and RCRA. In addition, it should contemplate steps intended to prevent enforcement escalation such as cooperation with the enforcement investigation with special attention to potential defenses, retaining consultants respected by the agency to prepare a remediation plan, and correction of continuing violations.

It is critical to consult with environmental legal counsel as early as possible in the process – early action can make a significant difference from the outset in the dissemination of Upjohn warnings (required notice to directors, officers, and others that counsel represents the corporation and not the individuals), formation of indemnification and joint defense agreements, preservation of evidence, voluntary disclosures, and the proper handling of whistleblowers. It is also necessary to ensure that all administrative remedies are exhausted and file declaratory judgment actions and/or seek pre-enforcement administrative review of compliance orders where necessary.

Time is an especially critical factor in developing potential defenses with respect to criminal enforcement actions. Although environmental statutes generally impose strict liability for civil violations, criminal violations still require proof of mens rea. For example, to obtain a felony conviction under the CWA, the government must prove a knowing violation, and the defendant's knowledge must be proven with respect to each and every element of the offense. This means that a mistake of fact which negates the existence of the necessary criminal intent constitutes a viable defense.

Additionally, if defense counsel are consulted early on in the investigation, they will be in a better position to determine whether any regulatory of statutory exemptions apply. For example, the CWA contains numerous exemptions to its Section 404 permitting program that, if applicable, would prevent criminal prosecution under the act. Environmental prosecutions are often scientifically complex, thus expert assistance during the discovery process is crucial. The defendant will be in the best position to challenge the government's scientific evidence and methodology if it consults with a competent expert from the outset and throughout the investigative process.

LIMITING PENALTIES THROUGH SELF-REPORTING

As noted above, companies can be rewarded for showing diligence in environmental risk control and honestly reporting when potential environmental violations have occurred. Any potential penalty reduction depends, of course, on a number of conditions set forth by the EPA. But the incentives are such that some entities are working with qualified counsel to perform a critical self-evaluation and disclosure to the EPA in exchange for waivers of the penalties the EPA would have assessed had it performed an inspection and discovered the violations itself. By way of example, one institution that worked with a member of our team faced over $11 million in potential penalties that were waived by the EPA.

PREVENTION: THE BEST MEDICINE

In the end, the best defense to an environmental enforcement action is an early defense. That begins with implementing an active, well-developed environmental compliance program well before any inspection or incident actually occurs. Elements of such a plan include: management accountability for compliance and a well-trained staff; clearly outlined compliance, self-inspection, monitoring, and reporting procedures; plans for investigating and addressing environmental incidents; and periodic compliance auditing with available corrective measures to correct existing problems.

With the right plan in place, and the appropriate response when an inspection or incident occurs, companies can drastically reduce the liability headache brought on by an environmental enforcement action.

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[1] EPA civil and criminal enforcement statistics taken from EPA 2012 Annual Results Data and Trend Charts found at: http://www.epa.gov/enforcement/data/eoy2012/eoy-trends.html.

[2] See EPA Audit Policy: "Incentives for Self Policing: Discovery, Disclosure, Correction and Prevention of Violations," 65 Fed. Reg. 19,618 (Apr. 11, 2000).