

Constant Vigilance: Why Environmental Criminal Enforcement Still Matters



According to Syracuse University’s Transactional Records Access Clearing House (TRAC), federal prosecutions for environmental crimes are down 40% from 2013 levels. Still, despite these recent declines, environmental criminal enforcement remains a potent regulatory tool.

By Jillian C. Kirn | [November 15, 2018](#) | [The Legal Intelligencer](#)

On Oct. 25, Syracuse University’s Transactional Records Access Clearinghouse (TRAC) reported that federal criminal prosecutions under environmental laws dropped 10 percent in the 2018 fiscal year from 2017 levels. According to TRAC, federal prosecutions for crimes are down 40 percent from 2013 levels.

Federal prosecution of environmental crimes has always been somewhat limited. At its peak, the U.S. Department of Justice (DOJ) prosecuted fewer than 300 cases per year in the categories analyzed by TRAC. The 109 new environmental cases brought by federal prosecutors last fiscal year is approximately half the number from two decades ago.

Still, despite these recent declines at the federal level, environmental criminal enforcement remains a potent regulatory tool. States, tribes, and localities maintain authorities to bring criminal enforcement actions—and are sometimes tempted to increase such enforcement when federal actions decline. Indeed, Pennsylvania Attorney General Josh Shapiro has frequently highlighted his office’s intention to prioritize the prosecution of environmental crimes. More importantly, when criminal enforcement is declining, federal, state, tribal and local prosecutors are required to focus on making a bigger statement with marquis cases. However, the second and perhaps most important reason is that criminal enforcement of

environmental violations is highly unpredictable and the best athletes are made during the off-season, so to speak. Meaning, much as an athlete shouldn't expect to win a race or game without any training, clients would be remiss to ignore environmental compliance until facing an enforcement action.

Many environmental attorneys' practices are focused on civil actions. There is an assumption that environmental criminal prosecutions arise in instances of knowing violations that cause significant damage. In actuality, federal criminal prosecutions generally arise from knowing violations, but significant damage is not mandatory for criminal prosecution. At the federal level, the U.S. Environmental Protection Agency (EPA) draws a distinction between civil matters and criminal matters by noting that every environmental violation gives rise to civil liability. By contrast, criminal liability relies heavily on the statutory definitions of criminal offenses and two other factors: intent and agency discretion.

Generally, environmental criminal liability is triggered by some level of intent. Felonies are a result of "knowing" behavior and misdemeanors are a result of "negligent" behavior under all federal environmental statutes except the toxic substances and pesticide statutes. Most of the EPA's approximately 800 open criminal investigations each year are centered on violations of the Clean Water Act (CWA), Clean Air Act (CAA) and Resource Conservation and Recovery Act (RCRA). Despite the general rules, however, because criminal liability can plausibly arise under any environmental statute, almost anyone, from a single individual to the largest corporation, across all industries, could find themselves facing criminal environmental liability. Further, the standards for what is considered "knowing" and "negligent" are low. For example, an entity can be convicted for a criminal violation of the CWA even if it was unaware that it needed a permit or unaware that it was violating the permit.

Some examples of federal environmental crimes that were prosecuted in EPA Region 3 in 2018 include:

- A painting contractor pleaded guilty to violations of the CWA arising from work on the George Wade Bridge Project. The contract and environmental laws governing the project prohibited the discharge of pollutants without a permit. The DOJ and the EPA alleged that the contractor failed to construct the required "containment" to cover bridge areas being cleaned and repainted and the contractor and the contractor's employees utilized a variety of methods and equipment to discharge pollutants, including abrasive paint blasting materials and waste paint into the Susquehanna River (rather than collecting them for recycling or disposal as hazardous waste).
- Five Pennsylvania men were charged with conspiring to modify the emissions systems on approximately 30 heavy-duty diesel trucks by using "defeat devices," in violation of the CAA.
- A construction company pleaded guilty to violations of the Toxic Substances Control Act caused by power grinding without a shroud or containment system equipped with a high-efficiency particulate air vacuum.
- A couple was sentenced to a combined 138 months of incarceration and \$50,000 in fines. The couple had been convicted on multiple charges related to their web-based business of selling unregistered and misbranded pesticides, animal drugs and counterfeit DVDs in violation of several statutes, including the Federal Insecticide, Fungicide and Rodenticide Act.

As you can see from these examples, while Region 3 has seen enforcement of the more common CWA and CAA variety, there have also been cases arising under other, less commonly enforced, statutes. The parties enforced against have been smaller companies and individuals. By contrast, outside of this region, CWA, CAA, and RCRA cases are in the majority, but the enforcement targets and judgments have been larger. For instance:

- In Region 2, a corporation was sentenced to pay a fine of \$3 million and serve a five-year term of probation resulting from its discharge of sewage through a point source that ultimately flowed into Puerto Rico’s La Plata River, without a permit, in violation of the Clean Water Act.
- In Region 2, a man was sentenced to 87 months in prison and a money judgment of \$10.5 million, for conspiracy to commit wire fraud, making false statements related to the Clean Air Act, and participating in a multi-state scheme to defraud biodiesel buyers and U.S. taxpayers by fraudulently selling biodiesel credits and fraudulently claiming tax credits.
- In Region 7, one of the nation’s largest chicken producers was sentenced to pay a \$2 million criminal fine, serve two years of probation, and pay \$500,000 to directly remedy harm caused by violations of the Clean Water Act. The charges arose from discharges at the corporation’s facility that allegedly caused a major fish kill event.
- In Region 9, three corporations were charged with illegally transporting wastewater containing arsenic in violation of the Resource Conservation and Recovery Act and the Hazardous Materials Transportation Act.

Not all environmental violations that can be prosecuted as crimes are enforced as crimes. Though the EPA is not the only agency to refer crimes for enforcement (several other federal and state agencies and even individuals can do so), like other agencies, the EPA exercises broad discretion in investigating and referring crimes. In choosing what crimes should be prosecuted, the EPA considers numerous factors related to environmental and public health benefits and selects criminal cases in part to help deter illegal behavior by corporations and individuals. Some of the factors that can tip the scales towards criminal enforcement are death, serious injury, human exposure, or costly remediation, impacts caused by hazardous or toxic pollutants, false statements, repeat or continuing violations, and certain responsible party characteristics like whether the entity is a national corporation or a repeat violator. It is not an exact science. Whether the EPA is at its most flush or it is experiencing a severe dearth in resources, environmental crimes enforcement is unpredictable and could affect a wide variety of clients.

When environmental crimes enforcement appears to be dwindling, businesses of all sizes may be tempted to cut corners. However, criminal enforcement tends to consider a company or individual’s history of compliance and operational behavior as one of the primary elements of establishing the “knowledge” or “negligence” required for a crime. The line between civil and criminal violations is a fine one, and on a continuum; there are no bright lines. To that end, civil noncompliance is far closer to criminal noncompliance than anyone would ever want to be.

Therefore, even with environmental criminal enforcement currently declining at the federal level, preparedness is still a best practice—including internal auditing, implementation of robust compliance programs, strong record-keeping practices and updated record-keeping systems, and identification of targeted compliance areas. Now, in what appears to be a criminal enforcement “off-season,” is an opportune time for businesses of all sizes to evaluate their environmental compliance culture and to continue investing in environmental management systems within their organizations.

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