



INSIGHTS

Will New EPA Strategic Civil-Criminal Enforcement Policy Promote Fairness In Case Selection?

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It is common when defending environmental crimes for the defense to wonder why the Environmental Protection Agency (EPA) has referred the case to the U.S. Department of Justice for criminal prosecution rather than subjecting it to the commonly used civil enforcement process. The EPA's determination of what facts justify criminal treatment has traditionally been inconsistent and dependent on local decision-making by regional criminal investigation divisions that refer cases to local U.S. Attorney's offices.

Once a case is accepted by a U.S. Attorney, institutional factors within the EPA and DOJ influence whether a case remains in the criminal system, even if an investigation ultimately reveals the case is a better fit for civil enforcement.

A new policy issued April 17 by the EPA's Office of Enforcement and Compliance Assurance that is effective immediately endeavors to account for these institutional biases. If this new [Strategic Civil-Criminal Enforcement Policy](#) is implemented effectively, it should forge a more collaborative partnership between the EPA's civil and criminal enforcement offices that leads to a coordinated and more consistent case selection process based on joint strategic planning, rigorous case screening, and regular communication.

The EPA says the intent of the policy is to change current case-selection processes with the objective of exercising "enforcement discretion reasonably when deciding whether a particular matter warrants criminal, civil, or administrative enforcement." The policy establishes a decision-making process which, if followed, should not only help prevent the inconsistent use of the criminal case-selection process, but also remove

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institutional impediments to changing course if a case is later found to have been improperly designated as criminal.

More Equitable and Consistent Outcomes

Historically, criminal case selection by the EPA was informed by several guidance documents, including the 1994 “[Exercise of Investigative Discretion](#).” Though this policy took a reasonable approach for identifying what environmental violations should be prosecuted as criminal conduct, it put in the hands of the criminal investigation division the final say on whether a case would be referred to the DOJ as criminal case.

In stark contrast, the new policy encourages a strong partnership between EPA’s civil and criminal enforcement offices, arguing that cooperation and strategic planning will promote the efficacy of other enforcement processes, including case screening, national enforcement initiatives, regional strategic planning, and the PFAS Roadmap.

The new process will include collaboration on national initiatives and regional strategic plans “during regularly scheduled civil-criminal enforcement meetings to address how current or future matters fit into larger goals and to identify matters that may be appropriate for consideration by a different enforcement approach or handling by a state partner.” Regular meetings are also required to discuss individual new cases that are prescreened as having “enforcement equities” and to provide status updates and new developments for existing cases. Meetings must be held at least monthly, but are to be held more often if circumstances dictate the need for more frequent meetings.

Notably, the new policy requires civil and criminal offices to collaborate to consider which cases will be: 1) investigated criminally, 2) referred to the Department of Justice for civil enforcement or 3) handled as administrative matters. In addition, civil and criminal enforcement managers are directed to discuss whether parallel proceedings are appropriate as well as the timeline for any follow-up discussions on these proceedings. Collaboration will not end after cases are allocated, but will be required to continue “for the life of any resulting enforcement action.”

Recognizing that this additional layer of bureaucracy threatens to aggravate the current lengthy timetable for many civil and criminal matters, the EPA established a goal to “have clear direction in the first year about how the action will be handled so that most judicial cases, to the extent circumstances allow, will be filed, charged, or concluded within two to three years – and within 12 to 18 months for administrative matters.” Whether it will be possible to shorten or even maintain the status quo for the often lengthy enforcement process remains to be seen.

The policy also requires improved case management, including enhanced case tracking to promote information-sharing between agencies about violations and ensure ready access to compliance histories and case developments. Additionally, of particular importance for the success of this new policy, extensive EPA employee training is required in specific areas that include:

- “Best practices for collaboration between civil and criminal enforcement programs on strategic planning, including national initiatives and regional priorities;

- Procedures for compliance with this Policy, including how and when screenings occur in the relevant Region, tracking, resources, regional planning, and case selection;
- Factors that warrant civil enforcement program sharing information with their criminal enforcement program counterparts, including evidence of knowing or negligent conduct, as well as chronic violations;
- Factors that warrant the criminal enforcement program sharing information with their civil enforcement counterparts, such as imminent and substantial endangerment; ongoing discharge, emission, or release; or acts that may cause harm or risk of harm to human health and the environment; and
- Protection of programmatic integrity, including ensuring that criminal enforcement personnel cannot use civil enforcement tools to gather evidence for a criminal case and steps that criminal enforcement personnel must take to protect the secrecy of grand jury information.”

The new process also outlines how it will work alongside long-standing existing policies; for example, the existing [EPA Parallel Proceedings Policy](#) will remain unchanged. The policy “supersedes the Civil-Criminal Enforcement Coordination Policy from April 22, 2019 (which is no longer on the EPA website), as well as those portions of the December 1990 [Regional Enforcement Management: Enhanced Regional Case Screening guidance document](#) that pertains to integration of civil and criminal enforcement activities.

Potential Impediments to Successful Implementation

Key structural issues within the DOJ and EPA that are not directly addressed by the new policy include the difficulty – indeed, near impossibility – of moving a case from the criminal track to the civil track after the DOJ accepts a referral. U.S. Attorney’s offices generally lead criminal environmental prosecutions, with or without teaming up with its Environmental Crimes Section. Civil judicial environmental cases are typically handled by attorneys from DOJ headquarters by the Environmental Enforcement Section, in tandem with EPA Regional offices. This dynamic makes it cumbersome to convert a case being prosecuted criminally to a civil enforcement and it is rarely done. It is not clear how the policy will address this issue.

Another impediment to transferring a case from criminal to civil, and vice versa, is statutes of limitation. If transferred, the transferee will have a shorter time to make charging decisions, which could toll the statute of limitations. Though five years seems like a long time, many cases, especially criminal ones, often last this long or longer, which would make transferring the case impossible.

A separate but significant institutional factor that creates disincentives to collaboration is the “bean” system, under which EPA civil and criminal enforcement sections each publish their own annual metrics, such as penalty dollars collected, compliance activities required and, in the case of criminal enforcement, sentences imposed (including months of prison). The new policy does not address this “[metrics bias](#),” by which criminal

and civil sections have historically sought to maximize their respective achievements, and it is unclear how this conflict between the programs will be addressed.

Takeaways

The new policy promises to provide a method for the EPA to reasonably evaluate cases before prosecuting them criminally, and appears to be a more defensible way for the agency to justify bringing such consequential enforcement actions. It will also provide a good resource for defense counsel who seek to understand why and how particular cases have been singled out for criminal treatment.

At the same time, there are some institutional gaps in the new policy that may impede the desired civil-criminal collaboration. While information sharing is identified as a priority, there is a notable lack of clear direction on the processes for transferring enforcement to and from civil and criminal. The policy also does not address how to break down the silos the two sections have long maintained to maximize their respective annual enforcement results.

Time will tell whether this new direction accomplishes the express objective of ensuring that the EPA exercises its enforcement discretion fairly and consistently and the implicit goal of promoting justice for regulated entities.

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