



BNA Technical Roundtable Abstract

EPA Has New Criminal Investigators on the Beat—How Will That Change the Regulatory Landscape?

In 2011, EPA will have more than 205 criminal investigators on the beat nationwide, the largest number of agents in the history of the enforcement program. Increasing manpower is the most proven method for increasing output, and EPA hopes the 25 new agents will make a difference in 2011. During the early 2000s, the number of agents fell to well below 200 in violation of the 1990 Pollution Prosecution Act. Thereafter the Agency embarked upon a three-year hiring strategy to restore EPA's Criminal Investigation Division (EPA CID) to present numbers.

The Obama administration has placed an increasing emphasis on both its civil and criminal enforcement programs. This enhanced criminal enforcement program is premised on the following tiered system for prioritizing criminal cases:

- Tier 1 cases involve an “environmental crime that involves a death or serious injury in addition to a severe environmental harm;”
- Tier 2 cases are ones where “no one was harmed but there was serious damage to the environment;”
- Tier 3 cases are “your bread-and-butter, supporting-the-program case,” for example “large-scale hazardous waste dumping and statutory violations that don't (sic) rise to the higher levels;” and

- Tier 4 cases “may or may not have an environmental impact or an impact on human health but there is some type of tie to environmental crimes,” for instance “a midnight dumper of five drums of hazardous waste off the back off a truck.”

While EPA has refined its case selection process, most environmental professionals are at a loss as how to evaluate criminal law risks accurately. When a company faces the possible threat of criminal prosecution, environmental managers and in-house counsel may be caught off guard. Instead of the normal give-and-take of a regulatory inspection, the company now may find that it is the subject of a search warrant executed by criminal investigators with guns and badges. Or, perhaps, the U.S. Attorney's Office has requested the presence of corporate employees or documents before a federal grand jury. For many, these events are met with disbelief. Surely there must be some mistake? The state and local environmental inspector we've been dealing with for years never uttered a word about a criminal investigation, so why is this happening now?

The above scenario is likely to become more prevalent as EPA implements its tiered case selection process. In any given year, there are only a handful of

investigations in the first tier—those involving death or serious bodily injury as a result of an environmental violation. While the agency certainly will apply its greatest resources to those more serious cases, the new criminal investigators being added to EPA CID likely will be focused on the less glamorous “bread-and-butter” variety of environmental crimes in the second and third tier—those involving false reporting or illegal storage or disposal of waste that may not cause measurable environmental harm. Environmental managers and in-house counsel will almost certainly know when they are dealing with a tier one matter, but the second and third tier criminal investigations are more subtle and may be harder to identify, especially in the early stages.

So how is one to distinguish between a serious threat of criminal prosecution and a more routine civil investigation? The answer is as murky as the question, and there may not be a way to know very early on. Yet there are some proactive steps that environmental managers and in-house counsel can take that will greatly benefit the company regardless of the nature of the investigation. The technical round table will discuss these and other issues that arise when EPA's criminal investigation division comes a-knocking.



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