UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Coordinated Settlement of Parallel Proceedings: Interim Policy and Procedures

FROM: Steven A. Herman, Assistant Administrator
Office of Enforcement and Compliance Assurance

TO: Regional Enforcement Division Directors
Regional Counsels

DATE: JUN 9 1997

EPA policy encourages the coordinated investigation of suspected violations of environmental laws for criminal and civil liability, as well as a comprehensive approach to determining appropriate case resolutions that will effectively deter future violations and remedy any harm caused by the violations.[1] This memorandum establishes substantive and procedural requirements pertaining to the settlement of civil liability when such liability is related to an environmental criminal case, including so-called "global settlements." This interim policy is effective immediately.

Policy

1. EPA will not approve the waiver or discharge of criminal liability in a civil settlement.

2. EPA will not approve the waiver or discharge of civil liability in a criminal plea agreement.

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[1] See, Memorandum, Parallel Proceedings Policy, from Steven A. Herman, Assistant Administrator, June 22, 1994; Memorandum, Procedures to Implement the Guidelines of the U.S. Sentencing Commission for Remedial and Compliance-Related Conditions of Probation, from Herbert Tate, Assistant Administrator, July 24, 1992; Memorandum, Regional Enforcement Management: Enhanced Regional Case Screening, from James Strock, Assistant Administrator, December 3, 1990.

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3. EPA will settle civil liability that is related to an environmental criminal case only when the civil aspects of the settlement[2] are memorialized in a civil settlement document (administrative or judicial, as appropriate), and when there is a parallel proceeding approved pursuant to Agency policy.[3] The civil settlement must in all respects conform to applicable Agency policy, to the same extent as if the civil settlement were not parallel to a related criminal case.

Procedures

1. As contemplated in existing Agency policies, Regional enforcement personnel should consider, early and on a continuing basis in the criminal investigative process, whether a parallel civil action, and/or an alternative sentence (as permitted by the Sentencing Guidelines applicable to corporate criminal defendants),[4] may be appropriate.

2. The Regional Criminal Enforcement Counsel (RCEC) is responsible for informing the prosecutor, at the time of the criminal referral, of Agency policy pertaining to parallel proceedings and global settlements, and for monitoring the progress of the criminal case. If it comes to the attention of the RCEC that a criminal prosecutor may advocate a global settlement in a matter which is not an approved parallel proceeding, the RCEC must promptly notify the Criminal Investigation Division's Special Agent in Charge and the Regional Counsel (or Enforcement Division Director, where applicable), so that they may re-examine whether a parallel civil action may be appropriate in that case. The RCEC is also responsible for notifying the Assistant Director for Legal Counsel and Resource Management, Office of Criminal Enforcement, Forensics and Training, as well as the OECA Division Director having responsibility for the type

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[2] "Civil aspects" include, for example, any waiver or resolution of civil liability for environmental violations, the imposition of civil penalties, and liability for suspension and debarment.

[3] Under Agency policy, a parallel civil action may be approved at any stage of the criminal investigation or prosecution, so long as the civil action will not unduly interfere with the criminal action.

[4] The Sentencing Guidelines permit judges in criminal cases to impose sentences that include orders of restitution, remedial orders, and community service orders that are related to the type of harm caused by the crime committed. Because these sentences can go beyond the scope of traditional criminal sentences (fines and imprisonment), they are sometimes referred to as "alternative sentences." Although the Guidelines do not contemplate that such sentences would effect a waiver or discharge of potential civil liability, in some cases they may obviate the need for injunctive relief in a parallel civil action. Note that, when given the opportunity to do so, EPA enforcement personnel should carefully examine proposed criminal plea agreements that include affirmative injunctive relief, or restitution to the United States for clean-up costs, in order to advise the Department as to whether the proposed remedial or restitutionary aspects are appropriate, even though related civil liability may not be affected.

of civil case involved, of the potential global settlement, so that OECA may consult with the Region as to whether a parallel proceeding and global settlement may be appropriate in that case and if so, whether the civil action should be administrative or judicial.

3. Where there is an approved parallel proceeding, EPA's civil and criminal attorneys must consult with the federal criminal prosecutor (and the DOJ civil attorney, if one is assigned) sufficiently to ensure that the civil action, and its settlement, will not unduly interfere with the criminal proceeding.[5] Assuming the settlement of the parallel civil action meets the criteria articulated in this policy, the approval process for the civil settlement is the same as it would be if it were not a parallel proceeding,[6] except that the Agency civil attorney must coordinate the timing of the settlement with the criminal prosecutor.[7]

Reservation of Rights

This policy provides internal guidelines for the Environmental Protection Agency. It is not intended to, and does not, create any rights, substantive or procedural, that are enforceable at law by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Environmental Protection Agency.

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[5] Among the other considerations that apply in parallel proceedings, such as the responsibility not to reveal matters occurring before a grand jury, it is particularly important for the attorneys to take steps to ensure that the cases are handled in such a way that the Constitutional prohibition against double jeopardy is not violated. See, United States v. Halper, 490 U.S. 435 (1989).

[6] E.g., if the parallel civil action is of a type for which settlement authority has not been delegated to the Regions, then approval of the settlement would be by the appropriate official at headquarters, in accordance with normal practices and procedures.

[7] Note also that, under Department of Justice policy, the Assistant Attorney General for the Environment and Natural Resources Division must review and approve global settlements. It is the responsibility of the criminal prosecutor to obtain this review.