



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

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ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Civil-Criminal Enforcement Coordination Policy

FROM: Susan Parker Bodine

A handwritten signature in blue ink, appearing to read "Susan Parker Bodine", is written over the printed name.

TO: Regional Counsels
Regional Enforcement Division Directors
OECA Office Directors
OCEFT Special Agents in Charge

EPA's criminal and civil enforcement programs have the same fundamental mission -- to protect human health and the environment from pollution and risk of harm by promoting compliance with federal environmental laws. Communication and coordination between the two programs helps ensure that the agency is undertaking the most appropriate, efficient, and effective enforcement response to environmental violations and making the best use of its enforcement resources. Accordingly, criminal and civil enforcement program managers need to communicate with one another about ongoing investigations and actions on a regular basis.

This Policy establishes best practices for communication to support strong and effective enforcement and provides flexibility in the approaches that the civil and criminal enforcement personnel in each Headquarters and Regional office can employ. It also updates and supersedes those portions of the December 3, 1990, guidance document entitled "Regional Enforcement Management: Enhanced Regional Case Screening" by James Strock, then-Assistant Administrator of the Office of Enforcement, that pertain to integration of civil and criminal enforcement activities. As described below, this Policy does not alter or amend EPA's September 24, 2007, Parallel Proceedings Policy.

A. Early Screening of Investigative Information for Civil and Criminal Violations

Early communication and coordination in enforcement matters promotes protection of human health and the environment, while allowing the civil and criminal enforcement programs to manage their case development resources more efficiently. Accordingly, civil and criminal enforcement staff should continue to evaluate circumstances as they develop, rather than conducting a one-time screening, because information regarding civil or criminal enforcement potential may arise at any time during an investigation. It is important for enforcement personnel to expeditiously share information on potential violations to ensure that any follow up civil or criminal enforcement is based on timely and appropriate information (i.e., to prevent the sharing of "stale" information regarding violations).

Presumption to share information on imminent and substantial endangerment situations: Criminal enforcement personnel should continue to evaluate information as they receive it to determine if there is the possibility of an imminent and substantial endangerment or ongoing discharge, emission, or release or other acts, such as continued sale of unregistered pesticide, that may cause harm. This policy is also intended to include cases where there may be no ongoing exposure but the risk or threat of harm is plain, such as improper storage of ignitable or reactive waste, an eroding lagoon, and falsification of drinking water data. If there is a risk or threat of harm, criminal enforcement personnel should promptly notify civil enforcement personnel, who can then determine whether remedial measures and/or injunctive relief is appropriate. In addition, other civil authorities should also be considered when immediate action may be required, such as a “stop work” order under Section 167 of the Clean Air Act, or a “stop sale, use or removal” order under Section 13 of the Federal Insecticide, Fungicide, and Rodenticide Act. The only exception to this sharing of information derived from a criminal investigation relates to grand jury materials subject to Rule 6(e) of the Federal Rules of Criminal Procedure (FRCrP) (which would require a court order authorizing release to civil enforcement personnel).

Sharing information relevant to a civil case investigation: Where criminal enforcement personnel have information that is relevant to violations in a pending civil case investigation, criminal investigative information not subject to FRCrP 6(e) should also be shared with the civil team, in coordination with the prosecutor in matters they are actively involved in, except where sharing the information is inconsistent with the requirements of the 2007 Parallel Proceedings Policy or might jeopardize the integrity of the criminal investigation (such as an undercover operation or impending search warrant in a covert investigation, or by revealing the identity of sensitive witnesses).

Sharing information on cases with criminal enforcement potential: Similarly, civil enforcement staff (including Superfund enforcement staff) should evaluate information regarding environmental violations as they receive it for criminal enforcement potential. In the Superfund context, enforcement staff should evaluate environmental violations or activities at all stages but particularly at the site discovery stage or at an early point in the response process (e.g., removal assessment or a remedial investigation).

Some factors that might indicate criminal investigation is warranted in any civil case include, but are not limited to:

- a history of repeated violations;
- potentially deliberate, knowing, or willful misconduct;
- concealment of misconduct or false statements to federal, state, or local regulators, including the falsification of required records;
- tampering with monitoring or control equipment; and
- actual harm to human health or the environment.

If criminal activity is suspected, civil enforcement staff should promptly share that information with the Special Agent in Charge (SAC), Assistant Special Agent in Charge (ASAC), Regional Criminal Enforcement Counsel (RCEC), or other criminal enforcement staff. The SAC or ASAC can then determine whether the facts warrant further criminal investigation and action. SACs and civil Enforcement Division Directors (EDs) and their staffs should work together to determine criteria for which civil matters to screen for potential criminal evaluation.

Enforcement managers and staff should not wait for the regular meetings described below to exchange information on any matters that might warrant immediate action by their counterparts, especially when an

emergency response action may be needed during a criminal investigation or there is new evidence of ongoing criminal activity that arises during a civil investigation.

B. Regular Coordination Meetings

While informal consultation between civil and criminal staff is important and encouraged, civil and criminal enforcement managers should meet at least quarterly (or more frequently if needed) to coordinate as appropriate regarding pending civil and criminal investigations or matters. The SAC, ED, and RCEC should generally participate in these meetings, and the Regional Counsels are encouraged to participate as well. These enforcement managers should also meet at least annually to discuss their respective enforcement priorities, including the OECA National Compliance Initiatives.

As discussed above, the underlying objective of this Policy is timely and effective “two-way” communication between the civil and criminal enforcement programs on pending matters. Accordingly, the principal purpose of the quarterly meetings is to: (1) determine if criminal program involvement may be appropriate in a civil matter and vice versa; (2) ensure that each program makes prompt decisions about possible involvement in an enforcement action that the other program is pursuing or may pursue; and (3) provide status reports, to the extent possible, on cases referred to the civil or criminal program. For example, criminal enforcement personnel should promptly refer all matters that are declined for criminal prosecution but that involve evidence of civil violations to the appropriate civil enforcement program well in advance of the applicable statute of limitations. Also, if a civil case is on hold (either in whole or in part) awaiting a decision on possible criminal action, and the criminal case is still open without charges filed after one year, the SAC and ED should discuss the matter then (and every three months thereafter) and consider having the civil case move forward. Both civil and criminal enforcement teams should pay particular attention to the federal statute of limitations and, if warranted, to relevant state statutes of limitations, for each case and regularly highlight this information in discussions.

In addition to periodic meetings at the upper management level, it may be useful to have at least one RCEC (and SAC or ASAC as they see fit) attend periodic meetings with technical unit managers to screen new cases. These meetings can provide an opportunity to foster better communication between the technical units and the criminal program. Staff can develop a better understanding of “what makes a case criminal” and may appreciate having a regular forum to raise issues and ask questions.

C. Tracking Investigative Leads and Cases

Offices that have a tracking program in place report that documenting screening decisions as they occur helps to save time, avoid misunderstandings, and keeps cases from “falling through the cracks.” For this reason, all Offices should employ some form of tracking system to capture the results of case screening between the civil and criminal programs. Updating the information regularly and making it available to enforcement staff from both programs has proven to be an effective and low-cost part of a coordination strategy. Effective systems generally should include information about: (1) the name and location of the companies or facilities; (2) the date the screening was done; (3) the identity of the lead(s) for each investigation; (4) whether parallel proceedings have been initiated; and (5) the ICIS Enforcement Action Identification Number, if there is one. Some Regions have found it useful to also track those investigations that have been screened but declined by the other program (e.g., a case that civil referred to criminal but criminal did not pursue).

To be most helpful, the system should be readily accessible to designated representatives in both programs. Offices are encouraged to use an electronic tracking mechanism, with security settings in place to ensure limited access. Regions might consider having the tracking system send an email notification to the SAC, ASAC, RCECs and the relevant civil enforcement managers each time a case is entered to keep everyone informed.

D. Parallel Proceedings

The success of any parallel proceeding depends upon coordinated decisions by the civil and criminal programs as to the timing and scope of their activities. For example, it will often be important for the criminal program to notify civil enforcement managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the criminal program when there are significant developments in the civil matter that might change the scope of the outcome being sought.

Civil and criminal enforcement personnel shall comply with the legal and ethical constraints regarding the concurrent use of the government's civil and criminal enforcement authorities, as described in the 2007 Parallel Proceedings Policy. In every parallel proceeding, communication and coordination should be initiated at both the staff and manager levels and should continue through the resolution of all parallel matters.

This Policy in no way supersedes or otherwise impacts the processes in place to manage parallel proceedings. The institution of parallel proceedings should not itself stop necessary response or injunctive relief work.

E. Training

Joint training in which civil and criminal enforcement personnel learn about their counterparts' program is another key component of effective coordination. In addition to benefitting civil-criminal relationships, joint training helps enforcement staff identify circumstances that warrant criminal versus civil responses and gain additional proficiency in managing parallel proceedings, including training on criminal discovery rules. Civil and criminal enforcement personnel substantially involved in casework (e.g., inspectors, investigators, enforcement specialists, PRP search specialists, attorneys, scientists and engineers, and supervisors) should receive such joint training on a periodic basis, particularly after new employees are hired.

To prevent duplication of effort and conserve scarce resources, OCE and OCEFT will produce a training module promptly after this Policy's issuance. After getting input from the Regional enforcement staff (including SACs, RCECs, Enforcement Coordinators and other enforcement personnel as needed), FFEO, and OSRE, OCE and OCEFT will finalize the training module. OCE and OCEFT will then work with the Regions to provide a joint civil-criminal training session to each Regional office, as well as OCE, OCEFT, FFEO and OSRE. Regional and Headquarters managers should provide future training on a regular basis.

F. Discovery and Disclosure Obligations

There are broad discovery and disclosure obligations that apply to enforcement proceedings, which may include any notes or documents exchanged in case screening consultations. Civil and criminal enforcement personnel should assume that emails, voicemails and written communications regarding pending investigations may be subject to disclosure in civil or criminal discovery. Civil and criminal

enforcement staff shall preserve all such records consistent with Agency record retention policies and litigation holds or preservation notices and be prepared to produce them to the Department of Justice for an evaluation of privilege, and (because privileges are significantly narrowed in the criminal as compared to the civil enforcement context) likely have them produced to defense counsel in a criminal case (possibly under a protective order).

G. Criminal Sentencing and Restitution to Superfund

If the Agency incurs Superfund response costs addressing violations that become the basis for a criminal enforcement action, criminal and civil enforcement personnel should consult at the earliest opportunity about recovering those costs as part of any criminal sentence in the form of restitution.¹ If seeking such restitution seems appropriate, the criminal enforcement personnel should consult with the criminal prosecutors, who may then work with the Superfund civil enforcement program to ensure that any restitution payments are included as part of the government's sentencing recommendation. If a court includes such restitution as part of the sentence, the criminal and civil enforcement personnel should continue to consult to ensure that criminal defendants fully cooperate with EPA personnel (e.g., by providing access).

cc: Deputy Regional Administrators

¹ There may be other situations where the criminal defendant could be asked to pay restitution, e.g., cleanup under RCRA corrective action.