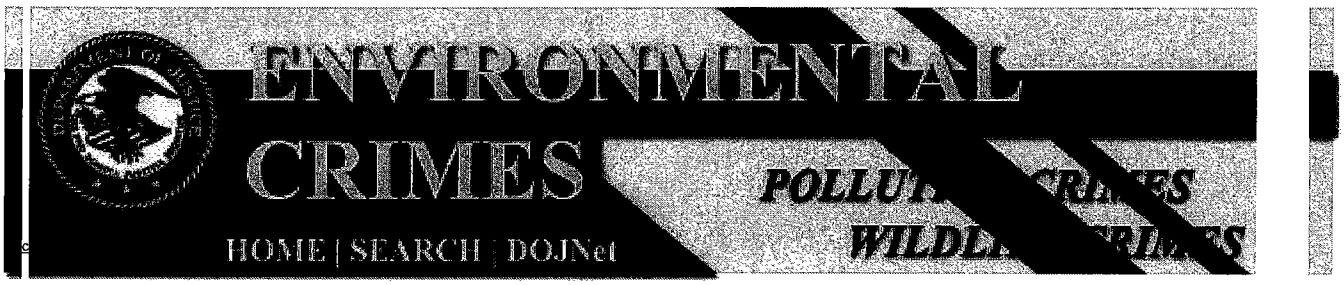

Environmental Crimes Manual
Environmental Crimes Bulletin
Contacts
Document Bank
Policies
Useful Guidance Material
Links

Updated: November 21, 2003
doj/jmd/ls/shi

July 1, 1991

FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR

I. Introduction

It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating f actors in the Department's exercise of criminal environmental enforcement discretion. This document is intended to describe the factors that the Department of Justice considers in deciding whether to bring a criminal prosecution for a violation of an environmental statute, so that such prosecutions do not create a disincentive to, or undermine the goal of, encouraging critical self-auditing, self-policing, and voluntary disclosure. It is designed to give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and to ensure that such discretion is exercised consistently nationwide. It is also intended to give the regulated community a sense of how the federal government exercises its criminal prosecutorial discretion with respect to such factors as the defendant's voluntary disclosure of violations, cooperation with the government in investigating the violations, use of environmental audits and other procedures to ensure compliance with all applicable environmental laws and regulations, and use of measures to remedy expeditiously and completely any violations and the harms caused thereby.

This guidance and the examples contained herein provide a framework for the determination of whether a particular case presents the type of circumstances in which lenience would be appropriate.

II. Factors to be Considered

Where the law and evidence would otherwise be sufficient for prosecution, the attorney for the Department should consider the factors contained herein, to the extent they are applicable, along with any other relevant factors, in determining whether and how to prosecute. It must be

emphasized that these are examples of the types of factors which could be relevant. They do not constitute a definitive recipe or checklist of requirements. They merely illustrate some of the types of information which is relevant to our exercise of prosecutorial discretion.

It is unlikely that any one factor will be dispositive in any given case. All relevant factors are considered and given the weight deemed appropriate in the particu1ar case. See Federal Principles of Prosecution (U.S. Dept. of Justice, 1980), Comment to Part A.2; Part B.3.

A. Voluntary Disclosure

The attorney for the Department should consider whether the person[1] made a voluntary, timely and complete disclosure of the matter under investigation. Consideration should be given to whether the person came forward promptly after discovering the noncompliance, and to the quantity and quality of information provided. Particular consideration should be given to whether the disclosure substantially aided the government's investigatory process, and whether it occurred before a law enforcement or regulatory authority (federal, state or local authority) had already obtained knowledge regarding noncompliance. A disclosure is not considered to be "voluntary" if that disclosure is already specifically required by law, regulation, or permit.[2]

B. Cooperation

The attorney for the Department should consider the degree and timeliness of cooperation by the person. Full and prompt cooperation is essential, whether in the context of a voluntary disclosure or after the government has independently learned of a violation. Consideration should be given to the violator's willingness to make all relevant information (including the complete results of any internal or external investigation and the names of all potential witnesses) available to government investigators and prosecutors. Consideration should also be given to the extent and quality of the violator's assistance to the government's investigation.

C. Preventive Measures and Compliance Programs

The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.

Compliance programs may vary but the following questions should be asked in evaluating any program: Was there a strong institutional policy to comply with all environmental requirements? Had safeguards beyond

those required by existing law been developed and implemented to prevent noncompliance from occurring? Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance? Were there procedures and safeguards to ensure the integrity of any audit conducted? Did the audit evaluate all sources of pollution (i.e., all media) , including the possibility of cross-media transfers of pollutants? Were the auditor's recommendations implemented in a timely fashion? Were adequate resources committed to the auditing program and to implementing its recommendations? Was environmental compliance a standard by which employee and corporate departmental performance was judged?

D. Additional Factors Which May Be Relevant

1. Pervasiveness of Noncompliance

Pervasive noncompliance may indicate systemic or repeated participation in or condonation of criminal behavior. It may also indicate the lack of a meaningful compliance program. In evaluating this factor, the attorney for the Department should consider, among other things, the number and level of employees participating in the unlawful activities and the obviousness, seriousness, duration, history, and frequency of noncompliance.

2. Internal Disciplinary Action

Effective internal disciplinary action is crucial to any compliance program. The attorney for the Department should consider whether there was an effective system of discipline for employees who violated company environmental compliance policies. Did the disciplinary system establish an awareness in other employees that unlawful conduct would not be condoned?

3. Subsequent Compliance Efforts

The attorney for the Department should consider the extent of any efforts to remedy any ongoing noncompliance. The promptness and completeness of any action taken to remove the source of the noncompliance and to lessen the environmental harm resulting from the noncompliance should be considered. Considerable weight should be given to prompt, good-faith efforts to reach environmental compliance agreements with federal or state authorities, or both. Full compliance with such agreements should be a factor in any decision whether to prosecute.

III. Application of These Factors to Hypothetical Examples[3]

These examples are intended to assist federal prosecutors in their exercise of discretion in evaluating environmental cases. The situations

facing prosecutors, of course, present a wide variety of fact patterns. Therefore, in a given case, some of the criteria may be satisfied while others may not. Moreover, satisfaction of various criteria may be a matter of degree. Consequently, the effect of a given mix of factors also is a matter of degree. In the ideal situation, if a company fully meets all of the criteria, the result may be a decision not to prosecute that company criminally. Even if satisfaction of the criteria is not complete, still the company may benefit in terms of degree of enforcement response by the government. The following hypothetical examples are intended to illustrate the operation of these guidelines.

Example 1:

This is the ideal case in terms of criteria satisfaction and consequent prosecution leniency.

1. Company A regularly conducts a comprehensive audit of its compliance with environmental requirements.
2. The audit uncovers information about employees, disposing of hazardous wastes by dumping them in an unpermitted location.
3. An internal company investigation confirms the audit information. (Depending upon the nature of the audit, this follow-up investigation may be unnecessary.)
4. Prior to the violations the company had a sound compliance program, which included clear policies, employee training, and a hotline for suspected violations.
5. As soon as the company confirms the violations, it discloses all pertinent information to the appropriate government agency; it undertakes compliance planning with that agency; and it carries out satisfactory remediation measures.
6. The company also undertakes to correct any false information previously submitted to the government in relation to the violations.
7. Internally the company disciplines the employees actually involved in the violations, including any supervisor who was lax in preventing or detecting the activity. Also, the company reviews its compliance program to determine how the violations slipped by and corrects the weaknesses found by that review.
8. The company discloses to the government the names of the employees actually responsible for the violations, and it cooperates with the government by providing documentation necessary to the investigation of those persons. Under these circumstances Company A would stand a good chance of being favorably considered for prosecutorial leniency, to the extent of not being criminally prosecuted at all. The degree of any leniency, however, may turn upon other relevant factors not specifically dealt with in these guidelines.[4]

Example 2:

At the opposite end of the scale is Company Z, which meets few of the criteria. The likelihood of prosecutorial leniency, therefore, is remote. Company Z's circumstances may include any of the following:

1. Because an employee has threatened to report a violation to federal authorities, the company is afraid that investigators may begin looking at it. An audit is

undertaken, but it focuses only upon the particular violation, ignoring the possibility that the violation may be indicative of widespread activities in the organization.

2. After completing the audit, Company Z reports the violations discovered to the government.
3. The company had a compliance program, but it was effectively no more than a collection of paper. No effort is made to disseminate its content, impress upon employees its significance, train employees in its application, or oversee its implementation.
4. Even after "discovery" of the violation the company makes no effort to strengthen its compliance procedures.
5. The company makes no effort to come to terms with regulators regarding-its, violations. It resists any remedial work and refuses to pay any monetary sanctions.
6. Because of the non-compliance, information submitted to regulators over the years has been materially inaccurate, painting a substantially false picture of the company's true compliance situation. The company fails to take any steps to correct that inaccuracy.
7. The company does not cooperate with prosecutors in identifying those employees (including managers) who actually were involved in the violation, and it resists disclosure of any documents relating either to the violations or to the responsible employees.

In these circumstances leniency is unlikely. The only positive action is the so-called audit, but that was so narrowly focused as to be of questionable value, and it was undertaken only to head off a possible criminal investigation. Otherwise, the company demonstrated no good faith either in terms of compliance efforts or in assisting the government in obtaining a full understanding of the violation and discovering its sources.

Nonetheless, these factors do not assure a criminal prosecution of Company Z. As with Company A, above, other circumstances may be present which affect the balance struck by prosecutors. For example, the effect of the violation (because of substance, duration, or amount) may be such that prosecutors would not consider it to be an appropriate criminal case. Administrative or civil proceedings may be considered a more appropriate response.

Other examples:

Between these extremes there is a range of possibilities. The presence, absence, or degree of any criterion may affect the prosecution's exercise of discretion. Below are some examples of such effects:

1. In a situation otherwise similar to that of Company A, above, Company B performs an audit that is very limited in scope and probably reflects no more than an effort to avoid prosecution. Despite that background, Company B is cooperative in terms of both bringing itself into compliance and providing information regarding the crime and its perpetrators. The result could be any of a number of outcomes, including prosecution of a lesser charge or a decision to

prosecute the individuals rather than the company.

2. Again the situation is similar to Company A's, but Company C refuses to reveal any information regarding the individual violators. The likelihood of the government's prosecuting the company are substantially increased.
3. In another situation similar to Company A's, Company D chooses to "sit on" the audit and take corrective action without telling the government. The government learns of the situation months or years after the fact.

   A complicating fact here is that environmental regulatory programs are self policing: they include a substantial number of reporting requirements. If reports which in fact presented false information are allowed to stand uncorrected, the reliability of this system is undermined. They also may lead to adverse and unfair impacts upon other members of the regulated community. For example, Company D failed to report discharges of X contaminant into a municipal sewer system, discharges that were terminated as a result of an audit. The sewer authority, though, knowing only that there have been excessive loadings of X, but not knowing that Company D was a source, tightens limitations upon all known sources of X. Thus, all of those sources incur additional treatment expenses, but Company D is unaffected. Had Company D revealed its audit results, the other companies would not have suffered unnecessary expenses.

   In some situations, moreover, failure to report is a crime. See, e.g., 33 U.S.C. § 1321(b) (5) and 42 U.S.C. §9603(b). To illustrate the effect of this factor, consider Company E, which conducts a thorough audit and finds that hazardous wastes have been disposed of by dumping them on the ground. The company cleans up the area and tightens up its compliance program, but does not reveal the situation to regulators. Assuming that a reportable quantity of a hazardous substance was released, the company was under a legal obligation under 42 U.S. C. § 9603 (b) to report that release as soon as it had knowledge of it, thereby allowing regulators the opportunity to assure proper clean up. Company E's knowing failure to report the release upon learning of it is itself a felony.

   In the cases of both Company D and Company E, consideration would be given by prosecutors for remedial efforts; hence prosecution of fewer or lesser charges might result. However, because Company D's silence adversely affected others who are entitled to fair regulatory treatment and because Company E deprived those legally responsible for evaluating cleanup needs of the ability to carry out their functions, the likelihood of their totally escaping criminal prosecution is significantly reduced.
4. Company F's situation is similar to that of Company B. However, with regard to the various violations shown by the audit, it concentrates upon correcting only the easier, less expensive, less significant among them. Its lackadaisical approach to correction does not make it a strong candidate for leniency.
5. Company G is similar to Company D in that it performs an audit and finds violations, but does not bring them to the government's attention. Those violations do not involve failures to comply with reporting requirements. The company undertakes a program of gradually correcting its violations. When the government learns of the situation, Company G still has not remedied its most significant violations, but claims that it certainly planned to get to them. Company G could receive some consideration for its efforts, but its failure to

disclose and the slowness of its remedial work probably mean that it cannot expect a substantial degree of leniency.

6. Comprehensive audits are considered positive efforts toward good faith compliance. However, such audits are not indispensable to enforcement leniency. Company H's situation is essentially identical to that of Company A, except for the fact that it does not undertake a comprehensive audit. It does not have a formal audit program, but, as a part of its efforts to ensure compliance, does realize that it is committing an environmental violation. It thereafter takes steps otherwise identical to those of Company A in terms of compliance efforts and cooperation. Company H is also a likely candidate for leniency, including possibly no criminal prosecution.

In sum, mitigating efforts made by the regulated community will be recognized and evaluated. The greater the showing of good faith, the more likely it will be met with leniency. Conversely, the less good faith shown, the less likely that prosecutorial discretion will tend toward leniency.

IV. Nature of this Guidance

This guidance explains the current general practice of the Department in making criminal prosecutive and other decisions after giving consideration to the criteria described above, as well as any other criteria that are relevant to the exercise of criminal prosecutorial discretion in a particular case. This discussion is an expression of, and in no way departs from, the long tradition of exercising prosecutorial discretion. The decision to prosecute "generally rests entirely in [the prosecutor's] discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).[5] This discretion is especially firmly held by the criminal prosecutor.[6] The criteria set forth above are intended only as internal guidance to Department of Justice attorneys. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable, at law by a party to litigation with the United States, nor do they in any way limit the lawful mitigative prerogatives, including civil enforcement actions, of the Department of Justice or the Environmental Protection Agency. They are provided to guide the effective use of limited enforcement resources, and do not derive from, find their basis in, nor constitute any legal requirement, whether constitutional, statutory, or otherwise, to forego or modify any enforcement action or the use of any evidentiary material. See Principles of Federal Prosecution (United States Department of Justice, 1980) p. 4; United States Attorneys' Manual (United States Department of Justice, 1986) 1-1.000.

---

1. *As used in this document, the terms "person" and "violator" are intended to refer to business and nonprofit entities as well as individuals*
2. *For example, any person in charge of a vessel or of an onshore facility or an offshore facility is required to notify the appropriate agency of the United*

States Government of any discharge of oil or a hazardous substance into or upon inter alia the navigable waters of the United States. Section 311 (b) (5) of the Clean Water Act, 33 U.S.C. 1321 (b) (5), as amended by the Oil Pollution Act of 1990, Pub. L. 101-380, § 4301(a), 104 Stat. 485, 533 (1990).

3. *While this policy applies to both individuals and organizational violators, these examples focus particularly upon situations involving organizations.*
4. *For example, if the company had a long history of noncompliance, the compliance audit was done only under pressure from regulators, and a timely audit would have ended the violations much sooner, those circumstances would be considered.*
5. *Although some statutes have occasionally been held to require civil enforcement actions, see, e.g., Dunlop v. Bachowski, 421 U.S. 560 (1975), those are unusual cases, and the general rule is that both civil and criminal enforcement is at the enforcement agency's discretion where not prescribed by law. Heckler v. Chaney, 470 U.S. 821, 830-35 (1985); Cutler v. Hayes, 818 F.2d 879, 893 (D.C.. Cir. 1987) (decisions not to enforce are not reviewable unless the statute provides an "inflexible mandate").*
6. *Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).*