

Crimina



al Enforcement of Environmental LAW

By Charles R. Toy and A. Michael Leffler

Stepping
up crime
prosecutions
is crucial
in the fight
against
environmental
law violators.

State and federal regulatory agencies are expanding efforts to combat environmental contamination by focusing on criminal enforcement. Although criminal provisions always have been a part of most environmental laws, criminal prosecution was rare. Enforcement of environmental statutes traditionally has been achieved through voluntary compliance programs, administrative penalties, and civil judicial remedies.

Each year, the United States Environmental Protection Agency (EPA) Office of Enforcement and Compliance Assurance (OECA) reports indicia of EPA criminal enforcement actions. Table 1 shows historical data for EPA criminal enforcement actions for fiscal years 1983 through 2000.

Michigan exhibits the same increase in indicia of criminal enforcement actions. Shortly after taking office in 1999, Attorney General Jennifer M. Granholm assigned an assistant attorney general specifically to prosecute environmental crimes. More environmental criminal cases have been brought in the last two and a half years than in all previous years combined. During the same period, the Michigan Department of Environmental Quality (MDEQ) Of-

fice of Criminal Investigations has initiated over 350 investigations.

The MDEQ has assembled 21 investigators in the Office of Criminal Investigation. This is the fastest growing enforcement area. The EPA Criminal Investigation Section has four full-time investigators in Detroit; three years ago it had none. Additionally, Michigan's Commission on Law Enforcement Standards now requires all Michigan police academies to provide a two-hour block of environmental training to recruits. The EPA's Office of Criminal Enforcement, Forensics, and Training directs the EPA's criminal program, provides a broad range of technical and forensic services for criminal investigative support, and oversees the agency's enforcement and compliance assurance training programs for federal, state, and local environmental professionals.

State and federal agency cooperation in the pursuit of environmental criminals is a priority. In April 2000, Attorney General Granholm announced a joint federal-state task force to prosecute environmental crimes in the counties composing the United States District Court for the Eastern District of Michigan. The task force is made up of representatives from the



United States Attorney's Office for the Eastern District of Michigan, the Michigan Department of Attorney General, EPA, FBI, Coast Guard, and Customs. A similar organization, the Western District Environmental Crimes Coordinating Committee, has been established to investigate and prosecute criminal activity in west Michigan.

Trends in the enforcement of environmental statutes also are reflected in measures of outcomes and impacts. Of the qualitative and quantitative impacts reported for criminal investigations for cases concluded in fiscal year 1999, the most frequently reported compliance activity was storage/disposal change (16 percent), followed by emissions/discharge change (15 percent). The EPA's fiscal year 1999 enforcement actions reduced nitrogen oxides, a major smog ingredient, by over 5.8 billion pounds; asbestos, a carcinogen, by over 19 million pounds; sulfur dioxide, which produces acid rain, by over 19 million pounds; volatile organic compounds, another major ingredient in smog, by over 6 million pounds; carbon dioxide, the chief global warming gas, by over 4 million pounds; and PCB-contaminated wastes, another carcinogen, by over 129 million pounds.

In the National Environmental Policy Act of 1969 (NEPA), Congress stated that it shall be the continuing responsibility of the federal government to assure all Americans "safe, healthful, productive, and aesthetically and culturally pleasing surroundings." The EPA's mission is to protect human health and the environment. Consequently, the primary goals of criminal enforcement of environmental laws are to maximize compliance and reduce threats to public health and the environment. An important means of deterring those who violate environmental laws

knowingly is a strong enforcement presence with incarceration as a key component.

Obviously, incarceration excludes business entities. Targets of environmental enforcement agencies are corporate officers, directors, shareholders, and employees who commit a proscribed act or who direct, aid, or counsel another individual to act in a manner contrary to environmental laws. The responsible corporate officer can be liable criminally for negligent violation of criminal laws, for negligent operation of the corporate facility, and for failure to exercise reasonable

misconduct; a pattern of hiding and concealment, such as through falsification of reports; tampering with monitoring or control equipment; and operating a business without proper permits, licenses, manifests, or other documentation.

In the past, special enforcement attention was directed at the following industry sectors: agricultural practices/concentrated animal feeding operations, automotive service and repair shops, coal-fired power plants, dry cleaning, industrial organics, chemical preparations, iron and steel, municipalities,

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care that results in a violation of an environmental statute. Individuals convicted and sentenced to incarceration cannot pass the sentence on to shareholders or the public as another "cost of doing business."

The EPA targets cases for criminal enforcement that include culpable conduct and the potential for significant environmental harm, such as a) identification of an actual harm, such as through a documented release; b) evidence of threat of significant harm; c) failure to report discharges, especially where it is coupled with an actual or threatened environmental harm; and d) illegal conduct that appears to represent an attitude within a recalcitrant industry sector that the EPA would like to correct.

The EPA identifies the following as indicia of culpable conduct: a history of repeated violations; intentional or deliberate

petroleum refining, primary nonferrous metals, and pulp mills.

Starting with fiscal year 2000, only petroleum refining continues as a priority industry sector because of the magnitude of its air pollution problems and its high record of non-compliance. The OECA reduced the number of sectors that it focused on in fiscal year 2000 in order to concentrate national resources on a few key areas and to allow the regions and states greater flexibility in addressing their priority areas. President Bush's FY 2002 budget includes \$25 million in grants for media specific (land, air, water) and multimedia funding to states and tribes for compliance assurance, including inspections and enforcement activities.

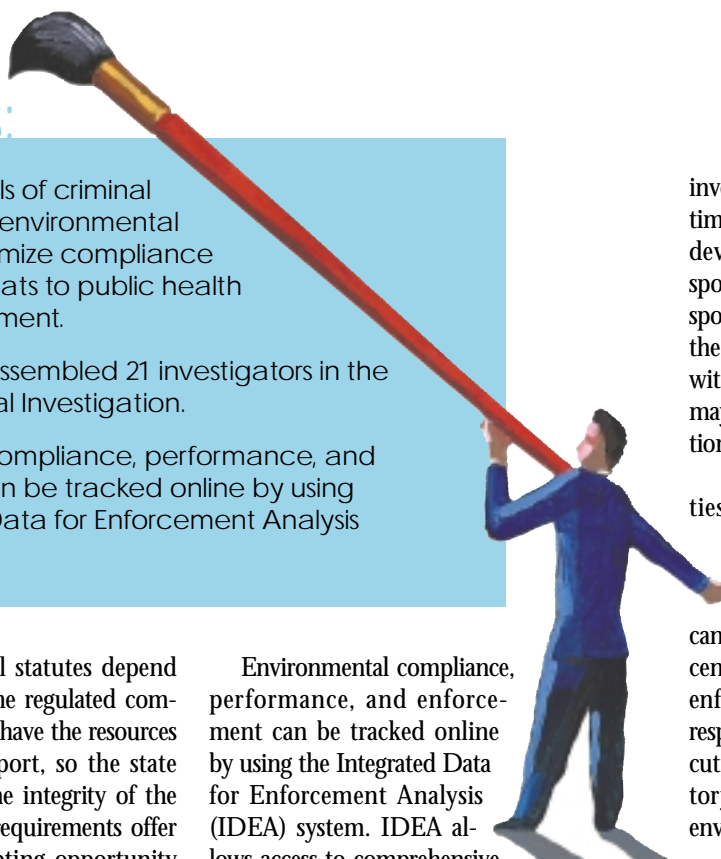
The Michigan Department of Attorney General specifically investigates and is particularly motivated to prosecute data integrity

Table 1: EPA Criminal Enforcement Actions, Fiscal Years 1983–2000

Action	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
Referrals to DOJ	26	31	40	41	41	59	60	65	83	107	140	220	256	272	228	266	241	236
Defendants Charged	34	36	40	98	66	97	95	100	104	150	161	250	245	221	322	350	320	360
Years Sentenced	0.0	0.5	6.5	23.3	38.0	23.2	27.1	62.1	80.3	94.6	74.3	99.0	74.0	93.0	195.9	172.9	208.0	146.0
Fines (\$ Million)				28	56								23.2	76.7	169.3	92.8	61.6	122
Criminal Investigators				46										151	199			

Fast Facts:

- The primary goals of criminal enforcement of environmental laws are to maximize compliance and reduce threats to public health and the environment.
- The MDEQ has assembled 21 investigators in the Office of Criminal Investigation.
- Environmental compliance, performance, and enforcement can be tracked online by using the Integrated Data for Enforcement Analysis (IDEA) system.



cases. Most environmental statutes depend on reports submitted by the regulated community. The state does not have the resources to verify data in every report, so the state must be able to rely on the integrity of the data provided. Reporting requirements offer potential offenders a tempting opportunity for deception. The safe harbor from state investigation of data integrity environmental crimes is truthful reporting from properly calibrated monitoring or control equipment.

The MDEQ Office of Criminal Investigation receives referrals from three primary sources: informants, which include anonymous tips, ex-employees, business competitors, local citizens, and environmentalists that scrutinize regulated activities; MDEQ and Michigan Department of Natural Resources (MDNR) field staff; and other governmental units, especially county and municipal health departments.

Various stakeholders are encouraged to self-audit, self-police, and voluntarily disclose environmental violations. Significant voluntary compliance or disclosure by a potential violator may avert criminal prosecution. The United States Department of Justice considers all of the following factors in deciding whether to exercise prosecutorial discretion: voluntary, timely, and complete disclosure of the matter under investigation; the degree and timeliness of cooperation; existence and scope of any regularized, intensive, and comprehensive environmental compliance program; pervasiveness of non-compliance; effective internal disciplinary action; and efforts to remedy any ongoing non-compliance promptly and completely.

Environmental compliance, performance, and enforcement can be tracked online by using the Integrated Data for Enforcement Analysis (IDEA) system. IDEA allows access to comprehensive historical profiles of inspections, enforcement actions, penalties assessed, toxic chemicals released, and emergency hazardous spills for any EPA-regulated facility. IDEA can be used to produce the compliance history of a specified facility, retrieve data for performing multimedia analysis of regulated facilities, identify a group of facilities that meets a user's specific criteria, and produce aggregated data on selected industries. The URL for IDEA is <http://es.epa.gov/oeca/idea/>.

Both the EPA and the Michigan Department of Attorney General also review environmental criminal enforcement cases for conventional criminal offenses. Often, conventional criminal offenses are easier to try and rates of conviction are higher, and sentences stiffer. For example, if a violator obtains an environmental license or permit using a knowingly false statement or if a required report contains falsified information, a prosecuting agency can charge false pretenses, uttering and publishing, forgery, and, possibly, conspiracy.

Practitioners must monitor carefully and be alert to enforcement initiatives and strategic goals of environmental agencies. EPA publishes monthly enforcement alerts and reports enforcement activities at <http://es.epa.gov/oeca/enforcement>. When an environmental enforcement agency commences an

investigation of a client, it is critical at that time to assemble a multi-disciplinary team to develop a response or an approach for responding to the regulatory agency. One response that should not be taken is to contact the regulatory official to lobby to reduce or withdraw a criminal charge. Such conduct may involve an additional charge of obstruction of justice.

Ignorance of environmental responsibilities does not excuse criminal culpability. Criminal exposure is no longer atypical. With the correct response, environmental enforcement agencies can offer compliance assurance through incentives and other innovative non-criminal enforcement programs. With an improper response, the agency will seek criminal prosecution. Either way, state and federal regulatory agencies will ensure compliance with environmental laws. ◆



Charles R. Toy, a partner in the East Lansing firm of Farhat & Story, P.C., concentrates primarily in the areas of environmental, commercial, and criminal law. He is the immediate past president of the State Bar of Michigan Environmental Law Section and a former Ingham County

assistant prosecuting attorney.



A. Michael Leffler is the assistant attorney general in charge of the Natural Resources and Environmental Quality Division. He is an active member, and on the council, of the State Bar of Michigan Environmental Law Section.

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- Research access to Westlaw,® including Dow Jones Interactive,® courtesy of West Group and Factiva.*