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Environmental Prosecutions Increased in Pandemic Year

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It is worthwhile for plant managers and environmental managers to pay attention to the types of cases involving environmental violations which are selected by regulators and prosecutors for criminal enforcement. That is particularly true now that enforcement is on the upswing.

At the beginning of every Democratic administration, prognosticators project increases in federal enforcement. However, statistics recently released by the United States Environmental Protection Agency (EPA) show that criminal enforcement of environmental crimes were already on the upswing in 2020, hinderances from the pandemic notwithstanding. The number of criminal cases opened by EPA in fiscal year 2020 increased 45 percent from fiscal year 2019, for the highest number of new criminal environmental cases since fiscal year 2014, according to a recent press release. *EPA Touts Increase in Criminal Enforcement Despite Limits from Pandemic* (January 22, 2021).

EPA was particularly diligent in opening new criminal cases during the pandemic. According to statistics maintained by EPA's Office of Enforcement and Compliance Assurance (OECA), almost 60 percent of its new criminal cases for the fiscal year were opened from March to September 2020. But OECA claims that, with regard to both civil and criminal enforcement, in the first five months of fiscal year 2020, prior to the virus outbreak, EPA was already "on track to significantly exceed traditional numeric metrics in many categories with more compliance monitoring activities in the first five months than in any year since 2013, more in assessed penalties the first five months than in seven out of the previous ten years, more injunctive relief in the first five months than in FY 2019, and more concluded cases in the first five months than in either FY 2018 or FY 2019."

Businesses obligated by environmental regulation to manage wastewater, air emissions, hazardous and other types of regulated wastes should note the types of cases selected for criminal enforcement so that these types of enforcement actions may be avoided. A review of recent cases prosecuted criminally by USEPA identifies consistent characteristics of the types of cases that are referred to U.S. Attorney's offices for criminal enforcement:

- *Noncompliance followed by more noncompliance.* A consistent characteristic of criminal cases over the years has been and continues to be the offender's having received notice of non-compliance and yet continuing to cut corners instead of timely righting the ship. For example, EPA recently publicized a sentencing in August 2020 of a bottled water company that drew groundwater and used sand filters to reduce the concentration of naturally occurring arsenic. The company flushed the filters, generating arsenic-contaminated wastewater. The company discharged the wastewater into an artificial pond. Local regulators tested the pond and found that the arsenic concentration was several times in excess of the hazardous waste limit. The state tested the wastewater, confirmed the earlier findings of exceedances of the hazardous waste limit and ordered the company to remove the arsenic pond. In the removal, the company (1) failed to use proper manifesting; (2) failed to identify the wastewater as hazardous; and (3) transported the wastewater to a facility that was not permitted to receive hazardous waste. As a result, the wastewater was discharged into a sewer without appropriate treatment. *Crystal Geyser Bottler Ordered to Pay \$5 Million Criminal Fine for Illegal Storage &*

Transportation of Arsenic-Laced Waste, Environmental Crimes Bulletin (August-September 2020).

- *Noncompliance following notice of an environmental risk.* A dentist and the contractor who renovated the dental office were recently convicted and sentenced after proceeding to renovate a building without taking any steps to abate the risk of the release of asbestos into the air. Prior to the renovation, an inspection of the building revealed the presence of asbestos. *Wyoming Dentist and Office Renovation Contractor Sentenced for Illegal Asbestos Removal*, Environmental Crimes Bulletin (August-September 2020).
- *Compromises to pollution control devices.* Environmental violations are often regarded by regulators as deserving of criminal enforcement where there is some overt act of willfulness, an intentional violation of environmental law. Guilty pleas have recently been entered by employees of a waste management company involved in the installation of "defeat devices" on diesel trucks, disabling the trucks' emissions diagnostic systems. *Waste Management Companies Enter Resolutions to Pay \$4.3 million for Clean Air Act Violations*, Environmental Crimes Bulletin (August-September 2020). EPA investigated this case with the U.S. Department of Transportation. Douglas Shoemaker, a DOT investigator in the case, stated that, "Businessmen and companies that intentionally falsify records in order to circumvent federal laws and regulations will be held accountable for their actions."
- *Threats to human health, wildlife or the environment.* In situations where a case is under investigation and the final decision to seek an indictment has not yet been reached by prosecutors, a target of the investigation should explore whether a credible argument can be made that the environmental violation has not resulted in harm. Harm to human health, wildlife or the environment is often a common denominator with many of these cases that are prosecuted criminally. For example, in the Crystal Geyser case discussed above, regulators claimed that the arsenic pond's exceedances of the hazardous waste limit were such that it posed a risk to groundwater and wildlife. In the case involving the removal of asbestos during the renovation of a dental clinic, EPA's criminal investigators claimed, "The defendants in these cases caused asbestos to be released, which presented a serious health threat to workers."

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