March, 2002

The Current State of Environmental Criminal Enforcement in Louisiana, An Insider’s View

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The costs of committing environmental crimes are going up in Louisiana. This year the largest environmental criminal fine in the federal Middle District was levied in United States v. Discovery Aluminas, et al., and the state parallel criminal case of State of Louisiana v. Discovery Aluminas, totaling 1.1 million dollars. In 2000, in United States v. Johnson Properties, et al., in New Orleans, the defendant companies paid a total of 4.5 million in environmental criminal fines.

Environmental crimes have been aggressively prosecuted since the original enactment of statutes authorizing such enforcement by the Department of Justice (DOJ) and the United States Environmental Protection Agency Criminal Investigation Division (EPA-CID). The bar, and specifically those in the criminal defense bar, have predicted for almost a decade that this area of law would be a growth industry for the 1990’s, and they were right. In fiscal year 1991, the Federal government indicted 125 corporations and individuals, while in fiscal year 1998, 350 indictments were lodged. However, contrary to those who claim that “numerous Louisiana corporations and facilities have been targeted for criminal investigation,” EPA-CID does not predetermine who it will investigate, and responds to complaints of wrongdoing without an agenda. Yes, EPA-CID is an organization manned by federal Special Agents who carry guns and badges and have full federal investigative authority, but their specialized training in environmental investigations enables them to effectively discern crimes from mere insinuations.

An environmental violation or incident is an unplanned or unforeseen exceedance of a permit, or involves a discharge that occurred without the knowledge of the employees of the vessel or facility. An environmental crime is one in which employees knowingly or negligently violate the law or permit. These crimes are fundamentally not environmental crimes but instead can be classified as economic crimes that, at times, have an environmental impact. This is because people do not discharge pollutants into the river because they hate the environment. No, “Dr. Evil” does not reside in Louisiana. They pollute to save money. Dollars go to managers and executives who reduce the costs of environmental compliance, in the form of bonuses, and that serves to replace the much more costly alternative of proper disposal. People choose to falsify reporting requirements of air emissions and water discharges because they do not want to have to pay for more frequent monitoring, and they do not want to raise the ire of environmental watchdogs. People choose to transport hazardous waste while manifesting it as non-hazardous waste for disposal because, as some former managers have put it, “the costs were prohibitive to the economic viability of the plant.”

The criminal prosecution of environmental crimes in Louisiana began with the concept that had recently begun in the rest of the country. This idea, which had its genesis here in 1990-91, was that criminal enforcement was solely for the most egregious offenders. This meant that violators who made efforts to return to compliance would continue to be regulated by the civil branch, and those parties who remained incorrigible would be turned over to criminal investigators. A person who repeatedly failed to come into compliance was “knowingly” in violation of environmental statutes. It was during this time that the original task force ideas were brought into place by leaders primarily working as public servants in Baton Rouge. The Louisiana Department of Environmental Quality (LDEQ), the Louisiana State Police (LSP), and the East Baton Rouge District Attorney’s office during this initial phase worked to complement one another’s enforcement goals.

Currently, EPA-CID maintains an office in Baton Rouge and has had agents permanently stationed in Louisiana since 1992. There are 15 EPA-CID “area” offices located around the country, and the Baton Rouge field office answers to its area office in Houston, Texas. This office then, in turn, answers directly to Washington, D.C. The criminal enforcement program is streamlined and independently organized from the civil EPA Regional offices located throughout the country. This grants them the freedom to fully investigate any leads that come into local offices without wading through levels of bureaucratic review which might unduly delay effective enforcement. Area offices and some field offices have stationed a sort of in-house counsel called a Regional Criminal Enforcement Counsel (RCEC)” to assist the agents in their investigations.

The statutory elements of environmental crimes are
found in the United States Code.11 This is only the beginning, though, as the EPA has rulemaking authority granted to it by Congress, and thus the nerve center of environmental prosecutions lies in the Code of Federal Regulations (CFR). It is in the CFR that the terms contained in these statutes are defined. For example, the CFR references as to what is “hazardous waste,” and the proper conditions for storing, treating or disposing of such hazardous waste can appear daunting to the uninitiated. However, just as any seasoned attorney in a particular field has reservations about venturing into the uncharted waters of another area of law new to him, the environmental criminal area of practice can be mined professionally, and certainly prosperously, by most attorneys. In Baton Rouge, this has been and continues to be particularly true of those whose chief talents lie in the area of litigation. This is an important practitioner’s note, and the increasing need for competent counsel in this area was emphasized recently in an article in the Louisiana Bar Journal which stated: “Companies should identify competent criminal and environmental counsel in advance of trouble and engage them as soon as they become aware that they have become the target of a criminal investigation.... Additionally, the company should consider making criminal counsel available to all employees reasonably likely to be the targets of the investigation.”12

The federal criminal investigation does not follow the pattern of a civil inspection, nor does it provide the benefit of the predictability of its procedures. It is totally accurate to say that if the EPA-CID shows up at your client’s business with a warrant, they have already done an enormous amount of case work and investigation.13 This has shocked civil environmental attorneys, and even today, attorneys lecture and write articles bemoaning traditional law enforcement techniques utilized in investigating environmental crimes.14 It should be understood that all of governmental civil enforcement of environmental regulations is based on one fundamental principle. This idea is called “self-reporting.” Self-reporting basically means that industry monitors itself. It is obligated to inform the LDEQ, the Coast Guard, LSP or EPA what, how, and when it is releasing chemicals into the environment. It is supposed to be truthful in these communications. Civil regulators rely upon the veracity of this reporting and use it to determine where its limited resources for enforcement need to be directed. People in industry are aware of the limitations of civil enforcement, and of the reality that civil enforcement efforts are chiefly reactive in nature. In fact, industry officials are regularly notified prior to inspections and the nature of those inspections to be completed at the facility in question. The goal of these civil regulators is not primarily to “detect” anything askew, but to assist that company’s plant in returning to levels of compliance.15 Thus, when criminal investigators begin an investigation, and utilize techniques foreign to their previous contacts with regulators, company personnel, particularly those who have been misleading the civil folks, are surprised and taken aback. This should not surprise criminal attorneys, though, as the use of operational activities such as confidential informants and body wires have been used to obtain information that might confirm nefarious activities occurring at a facility. Investigations will continue to be opened by EPA-CID in Louisiana, and both federal and state prosecutors have shown increasing willingness to cooperate in the prosecution of these cases.16 In Baton Rouge, former U.S. Attorney L.J. Hymel and current U.S. Attorney Brian Jackson have assigned M. Patricia Jones and Richard B. Lonney as prosecutors to focus on the prosecution of environmental crimes.17 Information is developed through leads from civil branches of enforcement, from attorneys whose clients were dangerously exposed, from environmental groups, and, of course, from other diverse sources such as disgruntled employees. In Louisiana, EPA-CID will always have a role as long as certain bad actors in industry actively

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December 2001