

White-Collar Crime

COMMENTARY

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Defense of Environmental Criminal Cases By the Numbers of Science and the Law

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Your client faces fines of up to \$25,000 per day per violation and decades of jail if convicted of most kinds of environmental crimes. The consequences of “bet the company” litigation raise the stakes even further. Add to that mix the presence of multiple defendants likely charged by the district or U.S. attorney, including plant managers, line managers and perhaps even equipment operators, and you’ve got not only a potentially toxic case but one that’s difficult at best to defend successfully.

This article explores successful defense strategies based not only on procedure and substantive law but also on challenges to the investigation and the science of sample collection and testing. The law and science must be executed by cooperative defense lawyers and at least one top-notch environmental consultant. One of those lawyers should also be very knowledgeable about the Environmental Protection Agency’s publication SW-846, the “bible” of how to collect and test samples in order to enter the test results into evidence.

First, let’s look at some background to give context to the defense analysis from these two main perspectives: law and science.

Government attorneys, their investigators and the environmental agencies have unlimited resources and time to build their case against your client. Frequently, the defendants do not know they are under investigation, which can go on in many instances for years. If at all possible, when you as the company’s attorney get a whiff of an investigation, suss it out as quickly as possible and determine whether it is an administrative investigation, civil or criminal.

If criminal, head to the prosecutor’s office and attempt to divert it to either the civil or administrative path. You may end up paying more in fines, but the overall outcome

will cost much less considering time and attorney fees. Just as important, you avoid the possible outcome of jail and convictions that don’t sit well with corporations. Administrative proceedings are the preferred forum, with civil as a close second and criminal a distant third.

To make matters more difficult for lawyers to defend, operations permits issued to the defendant client by government regulatory agencies stipulate consent for their entry onto the client’s premises at any time, for any reason, without advance notice and for as long as the agencies want to stay to look around. Fourth Amendment challenges to the investigation therefore are immediately met with skepticism by the court. There are ways, however, to protect your client, although mostly prophylactic.

Proactive Defense Techniques for the Alert Client and Consultant

First and foremost, a lawyer should retain the company’s environmental consultant under the terms of the attorney work product privilege well before there is any hint of trouble. While prosecutors may later argue the applicability of that privilege in the apparent absence of pending litigation, the terms of the operations permits should provide sufficient basis to invoke the privilege. If not, the mere presence of hazardous materials and potential liability under innumerable state and federal environmental statutes and regulations should meet that requirement, especially if documented by cleanup allegations from neighboring property owners, residents or any of a number of environmental groups.

By applying the work product privilege to the environmental consultant’s work, the lawyer can prevent discovery of the consultant’s analysis of potential violations of civil

and criminal statutes and regulations. All the environmental consultant's reports should be routed first through the attorney and then by the attorney to the client. The summary terms of the privilege should be prominently labeled on the front cover and every page of reports and other communications from the consultant. The client should consolidate and store these materials and reports in one place or a limited number of places and likewise prominently display labels reciting the application of the privilege to the stored materials.

In this fashion, the defense lawyer can (and must) immediately demand the return of all such privileged material if seized by government investigators during the exercise of a search warrant or otherwise. If necessary, the defense lawyer can file a motion before the court to obtain the return of this privileged material, suppress it or exclude it from evidence, but most importantly to keep it out of the prosecutor's and government investigators' hands. In one instance investigators seized a consultant's reports detailing the client's innumerable potential violations of multiple environmental statutes and regulations, providing the prosecutor with a complete roadmap for the prosecution.

Second, the client must be educated on how to respond to a search warrant and have in place established standard operating procedures to respond to the swarms of investigators who arrive to search the client's premises and interview the client's employees. Calls should immediately be placed to company attorneys. Investigators and prosecutors arrive with the stated intent to segregate management and line workers from one another and get the line workers to "turn in" allegedly bad management practices.

It is acceptable for the investigators to obtain the identification of the client's employees but not to interview them at length about management practices or otherwise. Employees should be trained to provide only "name-rank-serial number" responses to questions and then invoke their Miranda rights and demand to speak to a lawyer before responding to any further questions if detained. If not detained or placed under arrest, the employees must be trained to leave the premises without responding to further questions. Several training sessions and perhaps simulated examples demonstrated to drive the point home likely will be required to obtain the desired responses from employees.

Management also must immediately inform investigators and prosecutors that company attorneys represent each of the employees and management and invoke Miranda rights for everyone. Management initially may want to appear cooperative, but prior training is necessary to explain the severe adversarial nature between the government and the

company when serving a search warrant. Likewise, if not detained or otherwise arrested, management should seek out the lead investigator and offer to oversee the shut-down of ongoing chemical processes in the plant or premises and, if refused, leave the premises in the hands of the investigators and prosecutors.

Clients should be encouraged to understand that a party admission, either from management or an employee, is practically impossible to keep out of evidence. Horror stories abound, and if necessary they can be communicated to the client during training to drive the point home.

In a situation where chemical processes are continuing to run during the execution of the search warrant, it is likely the investigators will seek to either operate or test tanks with running processes and commit the very felony or misdemeanor violations they seek to charge against the company. That eventuality provides the defense attorneys with a valuable weapon to raise with judge or jury. (Prosecutors most frequently seek to try criminal corporate environmental cases before juries, which demonstrates the benefit of filing procedural limiting motions prior to pretrial and mounting a highly focused defense during the pretrial hearing.)

Once the search warrant seizure process is over, the defense attorney should demand the return of any unused corporate materials, computers and, if present, privileged materials. The defense attorneys also must monitor the court files to obtain the return of the search warrant that identifies the seized items. Well-placed conversations between the defense attorney and prosecutor also should occur at this stage, followed by documentation informing the prosecutors that the defense attorneys represent not only the company but also its management staff and all employees. The documentation also should instruct the prosecutor to contact defense counsel prior to contacting a represented party.

If possible, defense counsel should provide investigators with a list of employee names to confirm representation by counsel. Management and counsel should likewise inform employees not to speak to investigators without counsel present. Invariably, the investigators discover documents or materials they wish to follow up on and will seek to interview current and former employees of the company to gain a further understanding of the evidence.

Management and the environmental consultant also should attempt to identify the government's inside contact or former employee who may have shared information with the criminal investigators before the exercise of the search warrant. If a former employee, the company

should retain separate counsel for that employee and so advise the government prosecutors. Counsel must use every avenue to cut off further government investigation into the company. It is time to circle the wagons and hunker down. If terminating the informant employee, consult with a labor law attorney or put the employee on administrative leave with pay, but keep the informant off-premises.

Compliance, Remorse, Retribution And Punishment

The goal of most criminal prosecutions revolves around one or more of the four main purposes of the criminal justice system:

- Compliance, which is designed to force the client to comply with environmental regulations;
- Remorse, which seeks to confirm the client's understanding that her conduct is wrong and will not be repeated;
- Retribution, which is designed to obtain repayment of not only the cost of the prosecution but also the cost of damage to the environment; and
- Punishment, which is society's response to a recalcitrant client who fails to comply, express remorse or address the consequences of her actions; most often, failing to address the first three elements results in jail time.

Government prosecutors hold these four elements central to their case, and the company must apply all four in early attempts to cut short a full-scale prosecution. To avoid jail, good defense counsel propose an alternative punishment, such as larger fines or longer probation periods.

Typically, if an investigation has reached the level of executing a search warrant, little can be done to forestall formal prosecution. In the prosecutor's eyes it is simply too little too late. Prosecutors argue instead that the company should have complied with the applicable environmental statutes and regulations much earlier and avoided the criminal prosecution altogether.

In any event, it is never too late to start on the path of compliance. Whether convicted or not, the company still will be required to come into compliance with the perceived violations, so it is best to start as quickly as possible.

The environmental consultant plays a dual role here. On one hand, the consultant should identify the areas in the plant where deficiencies may exist, allowing the

defense attorney to anticipate the charges and prepare preemptive strikes. Second, the consultant should advise the client how to bring those apparent deficiencies into compliance.

As part of ongoing settlement discussions between defense counsel and prosecutors, disclosing compliance efforts may soften some of the eventual charges against the client. However, settlement protections must be invoked when discussing compliance efforts with the prosecutor to preclude those conversations from entering into evidence.

As part of those settlement discussions, an early meeting (if offered and available) proves worthwhile by allowing the prosecutors and investigators to meet the target defendants face to face. Some attorneys may disagree, but in my experience humanizing the defendants goes a long way to eliminate prosecutors' and investigators' inbred distrust of "criminal" defendants. The presence of a corporate defendant, which provides a significant number of jobs and tax base to the community and its government, should not be overlooked and should be regularly pointed out to the prosecutor and the investigators. If appropriate, a sincere but well-couched expression of remorse can work wonders. Again, invoke settlement discussion protection.

At some point in the settlement (*née* plea bargain) discussions, talk of fines and punishment will arise. A candid discussion reveals the scope of the charges against the client. At this point, defense attorneys should have in hand a client spreadsheet identifying all the client's expenditures on environmental compliance, consultant and attorney fees, and costs incurred on an ongoing basis.

Defense attorneys should introduce to the prosecutor when appropriate the concept of a supplemental environmental project, which can be credited against or toward any agreed-upon fine. According to the EPA, an SEP is an "environmentally beneficial project that a violator voluntarily agrees to perform, in addition to actions required to correct the violation(s), as part of an enforcement settlement." "Volunteer" is the key word in that definition, and the project itself can be practically anything that benefits the environment, but it is best received when the SEP seeks to remedy one or more of the alleged violations.

An SEP can be used two ways: to provide a tax benefit to the client since it is not characterized as a fine and to accommodate the increased compliance costs as identified by the environmental consultant. Large fines typically militate against the number of counts offered in the plea bargain.

Applying Science to Discovery

Ultimately, and sometimes more than a year after service of the search warrant, defense counsel will receive the indictment or complaint charging the corporate client, president, plant manager, line manager and ultimately other employees with felony and/or misdemeanor violations. Alert and conscientious counsel will have made arrangements with the prosecutors to surrender and arraign the clients. At the arraignment, waive your client's constitutional right to a speedy trial and get consent from the client, prosecutor and judge that the client does not have to appear again until the trial if your state's criminal procedure allows that waiver.

At this point multiple counsel will be in place for each individual defendant. One other piece of advice: You're presumably the expert in environmental law, the one lawyer in your state who knows the area better than anyone else. The company will owe an obligation to provide counsel to the other individual defendants, so choose wisely. Pick criminal lawyers with some environmental experience but much more experience in your county's criminal system.

You want to hire the most well-known and highly respected criminal attorneys in your jurisdiction, and you can certainly ask criminal judges for some recommendations. You would be wise not to hire a civil environmental lawyer other than yourself if that's your practice area. Otherwise, look through the papers and see if any judges or lawyers have faced criminal charges and see whom they hired.

Now with multiple counsel, it's time to bring back the environmental consultant to review the discovery materials. Page by page, fact by fact, it's time to dig. It's time to analyze the manner in which the samples were taken and whether there was full compliance with EPA publication SW-846.

There are two main components of SW-846 to consider: sample collection, which can be found in chapters one, nine and 10, and lab testing, which can be found in the various methods that relate to the type of material being tested. You'll need the guidance of a highly qualified environmental consultant or a savvy lab tech with a doctorate to walk you through the methods. Oh yes: Don't forget to send a subpoena to the lab for everything, including the chain of custody from start to finish, as well as the lab's protocols, its records and the other documents recommended by your consultants. Hint: You likely will find slip-ups and mistakes in the chains of custody. Look for them. Hard.

The scope and breadth of SW-846 is far beyond the scope of this article. I can't even begin to summarize a 13-chapter, 9,000-page document. You just have to read it and understand it. It helps to have a science background.

Setting Up the Plea Bargain Negotiations

Set your boundaries early with the prosecutor and remember the four purposes of the criminal court system. Emphasize what the prosecutor and the prosecutor's client want to hear first: compliance, compliance and compliance. It's just like the laws of real estate.

Then, after you've given, you can take. Tell the prosecutor that no one's doing jail time, that you need the individual defendants dismissed, and that the corporation may be willing to take a hit and perhaps pay an appropriate fine. At this point, it's difficult to give you much more advice. The outcome of the case can turn on this phase and likewise is directly related to your personality and ability to deal effectively with the prosecutor on a one-on-one basis.

Don't forget to set your client's expectations in the right framework, too. You don't need to talk about going to jail unless asked. They watch TV. They know criminal charges might mean jail time. When they ask about the outcome, they're usually asking about fines and number of felonies in the plea bargain.

Pretrial Hearing Motions

These motions are all dependent on circumstances, so you'll have to evaluate the evidence and make a determination case by case. Some options you can choose from are demurrer to the complaint, motion to strike and motion to dismiss (be prepared to get more counts charged in return), motions to compel discovery (from the prosecutor's client and the lab that tested the samples), motion to traverse the warrant, motion to suppress, motion to exclude evidence, and motion to return improperly seized documents (no, there's no formal criminal procedure to allow such a motion, but now you're getting the idea). The best motions are the ones that the evidence suggest and that you create. They're tough for the prosecutor to defend against, and the judge will read the entire motion because it's so unusual.

Each motion you file should pass what I call the 10-pound test: If the motion papers, declarations/affidavits and accompanying evidence weigh more than 10 pounds, the motion's ready to file. If not, you haven't done your work. When the prosecutor brings in the writs and appeals department (the smarter prosecutors who know how to write) to help handle your motion practice, you're making progress. Most typical criminal case motions don't surpass two pages, three if really important. Set a goal here. Don't file a motion with points and authorities under 50 pages.

Don't expect to win these motions. If you do, you're a hero. Otherwise, be smart and expect to lose. You will have accomplished your goal, which is to educate the judge and the prosecutor about the defects in the prosecution's case. If you've handled the negotiating phase correctly, you've got the prosecutor on the run and the judge thinking you just might win. If so, keep your client and your ego in check.

Handling the Pretrial Hearing

Judges are an important part of the overall strategy to win a case. An environmental case is likely the last thing most criminal judges want to hear about, given the complex nature of the statutes, regulations, evidence and facts. Lots of facts. More importantly, the judge likely has not heard one of these cases before, and if so, then certainly not like you're going to present it. Chambers conferences are a must to educate the judge on the law and also the facts of the case and, if you've handled the negotiations correctly, to work the twists and turns out of the presentation of the case itself.

In this phase you need to attack, and attack hard. Challenge everyone who gets on the stand and the evidence they submit. Prove the holes in the case. Scare the prosecutor into believing her case isn't made of gold. Your client most likely will get bound over, so don't expect to win. You should, however, charge forward to establish your negotiating points as the case winds toward trial.

Trying the Case

Avoid this step at all costs, especially if you'll have to fight in front of a jury. Just think about it. You've got a corporate defendant charged with a heinous environmental crime. If you can't imagine it, look up how much Exxon paid in the Valdez spill, divide by 1,000 and you'll get a glimpse of what you may be up against.

On the other hand, never show fear to the prosecutor, or you and your client are done for. I can't tell you how to walk this tightrope; it comes with experience and after trying cases. It's best to win early and decisively, but if you must go to trial, be prepared to show your client's

innocence. Forget the criminal burden of proof in the Constitution; you must prove beyond a shadow of a doubt that your client is not guilty.

If you've followed my compliance advice so far, your client will not fear a jury site visit, and you might want to consider asking for one in the presence of the jury. By now, you should already have made that offer to the judge and prosecutor in the pretrial proceedings, and your client must not flinch when you suggest it. If you detect a flinch, don't make the offer.

It's simply not enough to prove the existence of reasonable doubt in the prosecutor's case; you must prove the SODDI defense (Some Other Dude Did It), that the investigators and lab techs are nothing more than Keystone Kops on an unjustified witch hunt and your client is the paragon of environmental compliance. You will win if you prove all three. Miss an element here, and you're likely to lose. Sure, none of these "defenses" exists in the law, they just exist in the jury deliberation room, despite what the judge may have instructed.

Conclusion

Much of what happens in environmental criminal cases is dependent on how the case is litigated, negotiated and handled in motions and how you deal with the prosecutor, the judge and the jury. Almost everything else is dependent on your judgment and your demeanor. But don't worry. The worst that could happen is a huge fine and jail time for your client. You'll go home to a steak dinner. Yes, I'm exaggerating, and yes, some of the advice in this article is also exaggeration. Good attorneys will know the difference. Judges will sanction those who don't.

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