

Based upon twenty years of experience in the federal environmental crimes arena (both as a prosecutor at the Environmental Crimes Section of the U.S. Department of Justice, a defense attorney, and a certified compliance counselor), I have observed certain common characteristics in the types of environmental enforcement cases that are referred for criminal prosecution. After leaving governmental service, I have spent the past decade representing clients by offering both reactive/defense legal services, as well as proactive/compliance counseling. In addition to helping clients to fully appreciate the factors and policies that federal prosecutors rely upon in exercising their broad charging discretion, I regularly highlight the following facts or mistakes that other clients have made, which have influenced the decision to indict.

While each item below deserves careful evaluation and discussion, this list is meant to provide a practical overview as part of a broader compliance assessment process. As noted below, the mistakes are divided into two general categories, based upon the timing of when they take place relative to an environmental investigation.

A. Pre-Enforcement Shortcomings.

- i. Earning a poor environmental compliance record.
- ii. Creating an overly-adversarial relationship with regulators.
- iii. Absence of an open reporting system (anonymous hotline) and/or ignoring credible whistleblower allegations.
- iv. Lacking an "effective" compliance program and Environmental Management System (EMS).
- v. Failing to adequately document environmental protection or compliance "investments."
- vi. Failing to perform risk assessment on potential environmental impacts of operations.
- vii. Failing to perform EMS audits.
- viii. Prevalence of "smoking gun" emails/documents reflecting "sound bites" of poor corporate culture.
- ix. Ignorance of the low threshold of liability; the broad enforcement discretion; and the government's playbook.

B. Post-Enforcement Shortcomings

- i. Overly combative or defensive attitude with regulators/prosecutors.
- ii. "Casual" or deficient responses to grand jury subpoenas.
- iii. Engaging in any conduct that could be viewed as obstructing justice (e.g. — involving documents; witnesses; statements to investigators).
- iv. Meeting with investigators without legal counsel, without advance preparation, and without understanding context of investigation.
- v. Delayed or deficient remediation of significant environmental incidents/catastrophes (including "root cause" Analysis & Improvements to Compliance Program).

Beveridge & Diamond routinely defends clients in administrative, civil and criminal enforcement actions brought by federal and state agencies. Our team includes, among others, a former federal environmental crimes prosecutor (who worked both as an Assistant U.S. Attorney and as a Trial Attorney in the U.S. Department of Justice's Environmental Crimes Section); a former Internal Revenue Service Criminal Investigator; a former Chief Counsel of the Federal Highway Administration; a former Deputy Associate Solicitor of the U.S. Department of the Interior; numerous former state agency officials; and a "cavalry" of lawyers with vast experience and regulatory depth.

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