



What Makes an Environmental Violation Turn “Criminal:” A Peek Inside the Prosecutors’ Playbook.

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Topics (Limited Time):

- Background
- General Overview & Observations
- Relevant Factors In Environmental Crimes
“Lifecycle:”
 - Front-End / Investigative Criteria → EPA
 - Charging Decisions → DOJ
 - Individuals
 - Corporations
 - Punishment/Sentencing → 18 USC 3553
USSG (2Q)

Background

- Former Federal Prosecutor
 - DOJ's Environmental Crimes Section
 - AUSA – Charlotte, NC
- Environmental & White Collar Defense
 - Reactive
 - Proactive/Compliance
- Key Factors Apply at Each Phase

Objectives

- Share the Government’s “playbook” or policies about the factors that increase the likelihood of a criminal referral.
- Help share lessons that other clients have had to learn the hard way
- “Demystify” and give a new perspective on environmental crimes

General Observations:

- Regulatory Crimes are Different
- Intent-Based vs. Conduct Based
- Various Enforcement Options?
 - Admin / Civil / Criminal
- Blurred Lines Between Civil & Criminal
- Broad Prosecutorial Discretion
- What Makes Certain Violations Worthy of the “CRIMINAL” stamp/label?

What is an Environmental Crime?

- Any environmental violation that is committed “knowingly”
 - That is: Non--accidentally
- Basic Initial Inquiry:
 - Violation?
 - Underlying Cause?
 - “Knowingly?”

Elements of Liability: Low Legal Threshold

- “Knowingly” =
 - General Intent
 - Merely Aware of Acts or General Nature of Substances

Elements of Liability: Low Legal Threshold

Why? -- Public Welfare Offenses

- Individuals:

 - “Responsible Corporate Officer”

 - “Willful Blindness”

- Corporations:

 - Vicarious Liability / Respondeat Superior

 - “Collective Knowledge” Doctrine

Wide Range of Criminal Statutes

- Clean Water Act
- RCRA
- Clean Air Act
- FIFRA
- CERCLA
- Oil Pollution Act
- Act to Prevent Pollution from Ships (APPS)
- Endangered Species Act
- Wildlife Crimes
- Others

Wide Range of Criminal Statutes

Process Crimes:

- False Statements
 - Written / Oral
- Obstruction of Justice
 - Tampering with Monitoring Devices
- Witness Intimidation
- Perjury

Two Critical Questions:

- Were violations "knowingly" committed by the defendant?
- If so, are these violations "**serious enough**" to warrant prosecution?
 - » Acute Events
 - » Chronic Non-Compliance

Initial Hypothetical

- Your company gets a call or receives a subpoena alleging environmental violations at your facility.
- Follow up confirms some violations.
- Now what?

Initial Hypothetical

- EPA & Prosecutor Claims:
 - “Prosecution is Warranted”
- Your Company Responds:
 - “No Prosecution is Necessary.”
- Who is Correct? Why?

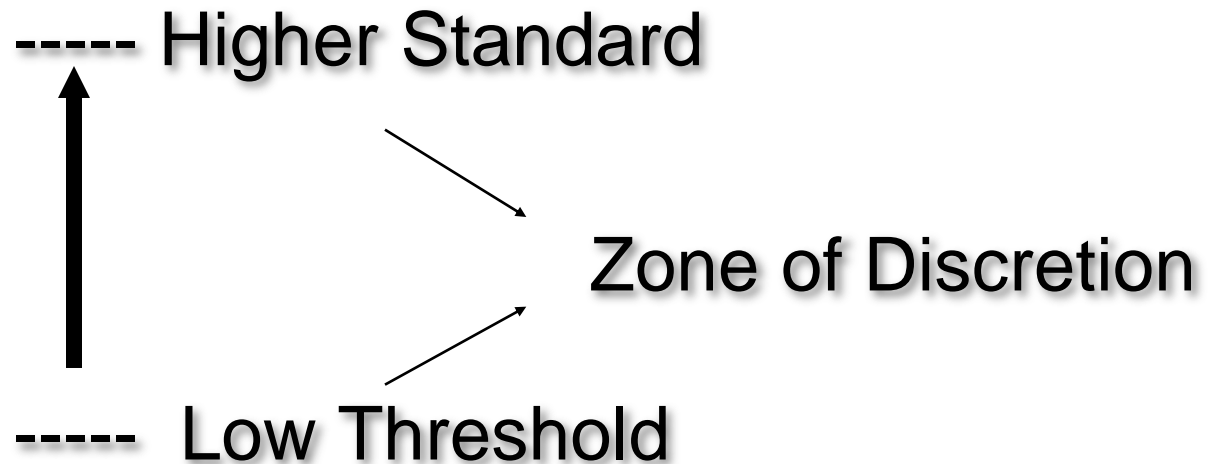
Environmental Prosecutions DO NOT require:

- Death or Serious Bodily Injury
- Threats to Public Health
- Actual Environmental Harm
- “Evil” Intent of Defendants
- Large Economic Motives

But . . . these factors can enhance
penalties & influence investigators,
prosecutors, jurors & judges

Broad Prosecutorial Discretion

What conduct should be prosecuted?



What conduct can be prosecuted?

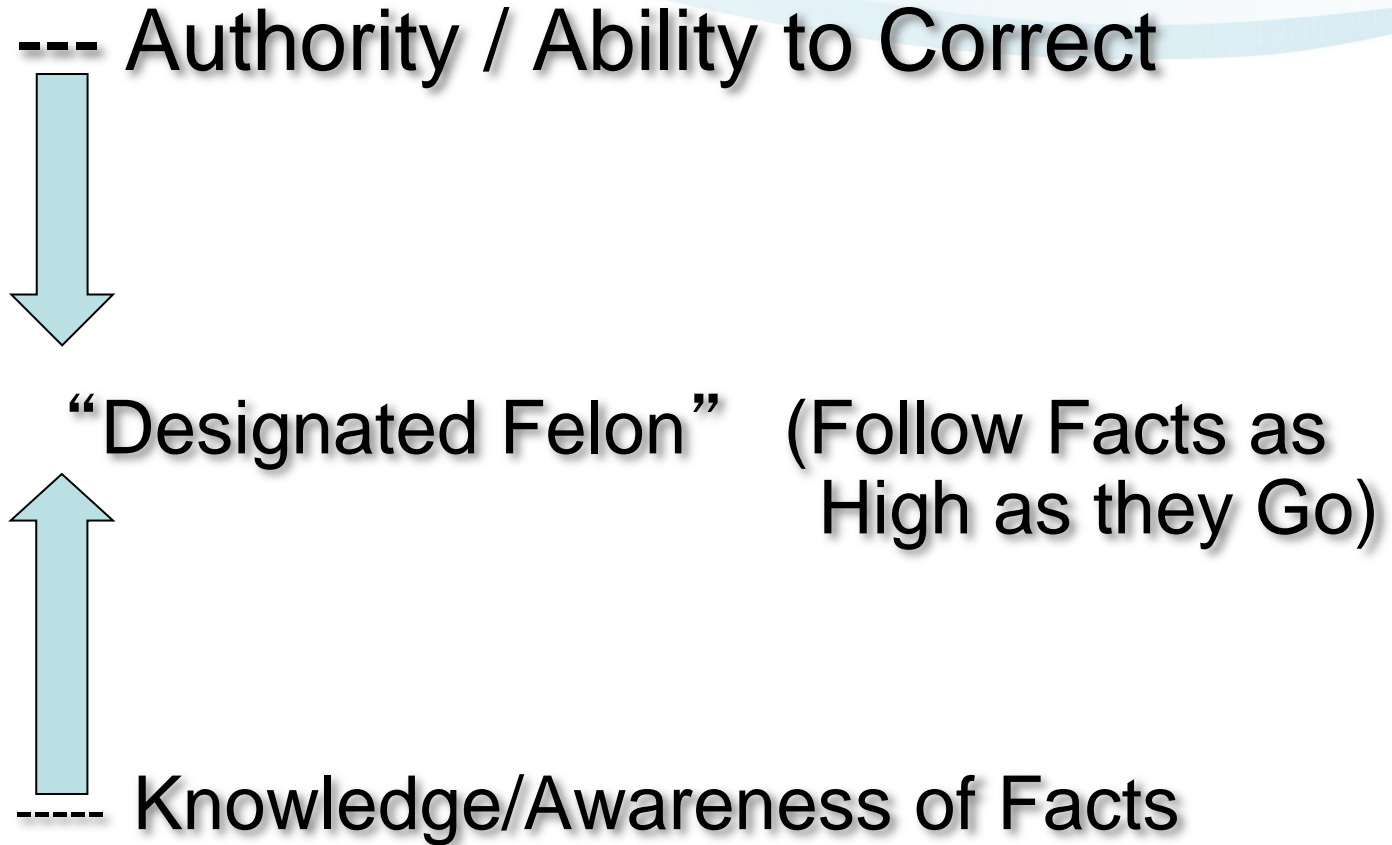
Broad Prosecutorial Discretion: Options?

- Who “can” or “should” be charged?
 - Individual(s)?
 - Company?
- What charges ?
 - Substantive / Process?
 - Felony / Misdemeanor
 - Deferred Prosecution
 - Or . . . None = Declination

Broad Prosecutorial Discretion

- How to influence that discretion?
 - “The Devil Is in the Details” – Facts Matter
 - “Timing is Everything”
 - With “Investments”
 - Opportunity to Influence with White Paper
 - “But We’ re A Good Company Who Cares About Compliance” ----- “Prove It”

Broad Discretion: Who To Charge?



Broad Prosecutorial Discretion: So What Are Our Options?

First . . .

Understand the Prosecutor's
Perspective / Policies

Then. . . Adjust Accordingly

- 1) Risk Management / Triage
- 2) Internal Investigation Lens
- 3) Negotiations / Declination

Factors Influencing Investigative Discretion: Civil vs. Criminal ?

EPA

- “Devaney Memo” (1/12/94)
- Audit Policy (Rev. 4/11/00)

DOJ

- U.S. Attorney Manual (Gen/Indiv. & Corp.)
- Env. Crimes Factors (7/1/91)

Factors Influencing Investigative Discretion: Civil vs. Criminal ?

Sentencing Guidelines - 2Q Factors

Statutory Sentencing Factors – 18 USC 3553

Look for Overlapping & Repeat Themes from Prosecutors Playbook

Some Factors “**Hurt**” =

Prosecution More Likely
Increase Punishment

Other Factors “**Help**” =

Declination
Mitigation of Punishment

General Observations about Prosecutors' Playbook

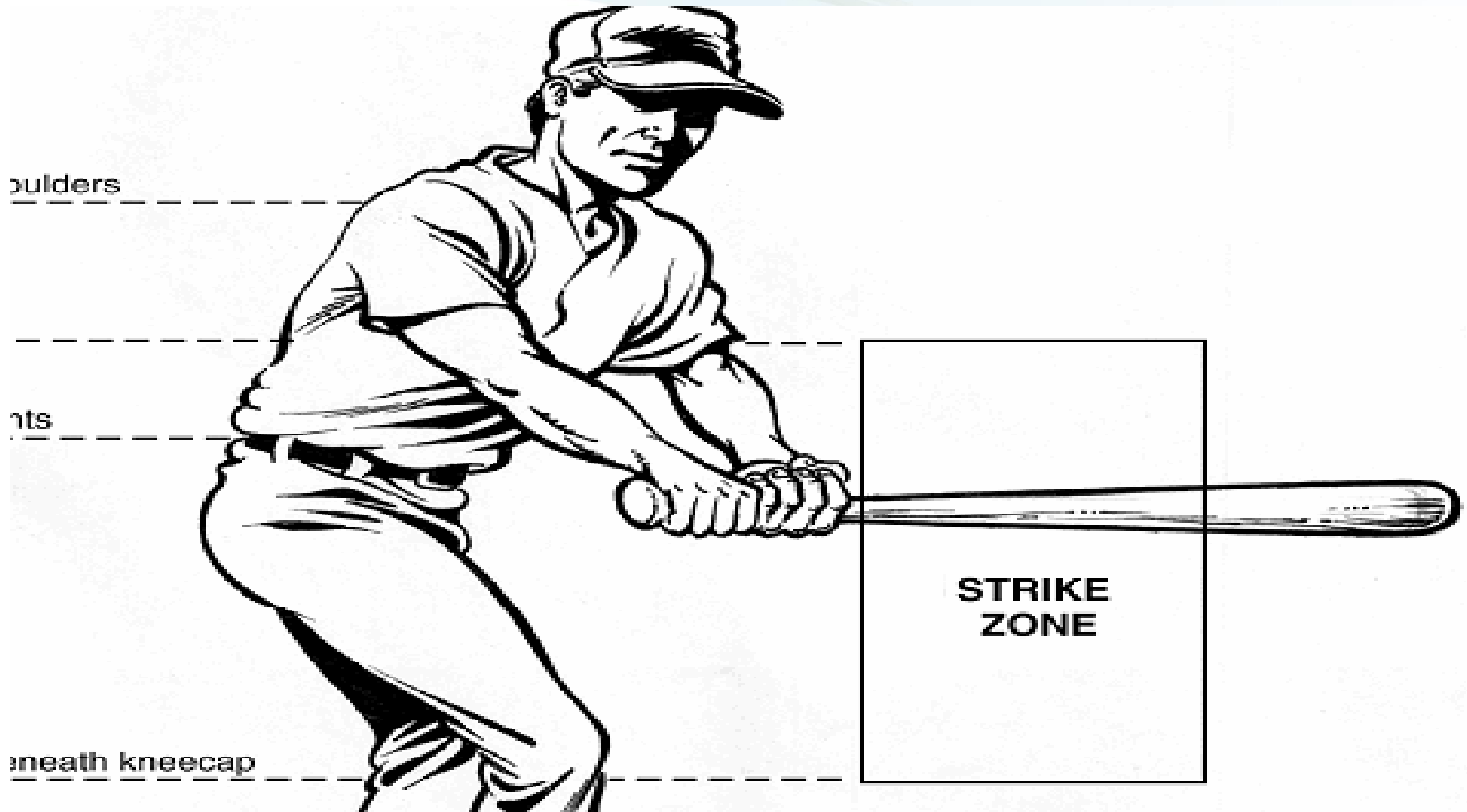
Cumulative Weighing of All Factors

Rarely Does One Factor Control

No Factor Offers Absolute Defense

Individual Prosecutor's Have Different
"Strike Zones" -- Just Like Umpires

Calling Balls & Strikes



“The Spears”

Factors That Increase Likelihood of Prosecution

Harm/Potential Harm/Consequences:

- “Knowing Endangerment”
 - Actual Harm / Death / Serious Bodily Injury
 - Threat of Significant Harm
- Hazardous Wastes / Toxic Materials Involved
- Substantial Clean-up From Violations

“The Spears”

Factors That Increase Likelihood of Prosecution

Violation Related:

- Extreme Degree (50-100x Permit Limits)
- Long Duration of Violations
- History of Repeated Violations
- Clarity of Standards/Regs/Law
- Economic Benefits from Violations
(Cost Savings)

“The Spears”

Factors That Increase Likelihood of Prosecution

“Lying & Cheating” Facts:

- Concealment
- Failure to Report
- Tampering with Monitoring Equipment
- False Statements
 - During inspections; or on permit applications
- Diluting Samples

“The Spears”

Factors That Increase Likelihood of Prosecution

Miscellaneous Facts:

- Overly Adversarial or Delayed Response to Government Investigation
- Lack of Remediation / Corrective Action
- Pervasive Involvement of Many EE’s & Mgmt
- Clear Evidence of Intent / Knowledge
 - Repeated NOV’s
 - “Smoking Gun” emails
 - Insider testimony

“The Shield”

Factors That Decrease Likelihood of Prosecution

Compliance/Good Corporate Citizenship:

- Strong Record of Documented & Effective Compliance
- Minimal History of Non-Compliance
- Past Record of Auditing
- Self-Reporting of Violations

“The Shield”

Factors That Decrease Likelihood of Prosecution

Compliance/Good Corporate Citizenship:

- Strong Support from Local Regulators
 - Good Corporate Reputation
- Complete & Early Cooperation During Government Investigation
- Remediation / Corrective Measures

“The Shield”

Factors That Decrease Likelihood of Prosecution

Violation-Related Facts:

- Accidental Nature of Violations
 - Not Readily Foreseeable
- Violations Caused by Rogue EE’s
- Lack of Proof of Knowledge
 - No Credible Insiders with Corroboration

“The Shield”

Factors That Decrease Likelihood of Prosecution

Violation-Related Facts:

- Ambiguous, Vague or Overly Complex Regs/Standards/Law
- Limited Economic Motive @ Violations
- Absence of “Lying Cheating” Factors
- Agency “Condonation” or Awareness of Prior Violations

Concluding Thoughts

- **Broad Discretion – But Not Unbridled**
- **The Best Defense is a Good Offense**
- **Focus on & Apply the Playbook:**
 - **Front-End = Risk Management/Compliance**
 - **Internal Investigation = Fact-Gathering**
 - **Negotiations – Goal = Declination**

Questions ?

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