Environmental Liability:

Quick Response Critical to Avoiding Criminal Charges

By Steven Andersen

The BP oil spill in the Gulf of Mexico is the worst environmental disaster in U.S. history, so it came as little surprise when the Department of Justice launched a criminal investigation in June. But while few companies will ever face environmental liability of that magnitude, that doesn't mean they are in the clear.

"Sometimes folks think, 'that can't happen to me in my little corner of the world,' but in fact it happens all the time," says Timothy D. Hoffman, who chairs the Environmental Practice Group at Dinsmore & Shohl LLP. "There are criminal environmental investigations going on all across the country."

Criminal environmental liability is on the rise. Whether as a consequence of high-profile energy extraction activities—such as offshore drilling in the Gulf or oil shale exploration in Appalachia—or events as routine as municipal waste-water treatment, investigators are more inclined than ever to bring criminal charges in environmental cases.

"Almost $100 million in criminal penalties were assessed by the Environmental Protection Agency in 2009," says Christopher B. "Kip" Power, a Dinsmore & Shohl litigation partner who frequently handles environmental cases. "That's a huge number, some $30 or $40 million more than the previous year."

In 2009, the EPA alone opened 387 new criminal cases and brought criminal charges against 200 defendants. Eighty-six percent of those cases involved charges against at least one individual."Clearly, the EPA believes prosecuting individuals is important," says Power, "and that it has a much greater deterrent effect on others than fines alone."

The Justice Department's environmental crimes section and state prosecutors have been more active as well. With ecological and climate concerns on the rise, corporate counsel must be more vigilant than ever about environmental liability, and the ways in which even isolated incidents can morph into criminal charges.

What Is Knowing?

Environmental charges can be brought under any number of state or federal laws, but the Clean Air Act and Clean Water Act are two of the most common.

"Each of the various statutes has its own criminal component," Hoffman says. "Take, for instance, the Clean Water Act. CWA has a misdemeanor provision for negligent violations, but there is also a felony provision for knowing violations."

Hoffman says clients are often aghast to learn that a single negligent act could result in a criminal misdemeanor charge.

"Well, that's the truth," he says. "There's really no heightened negligent standard of criminal negligence; it's intended to be simple negligence and the prosecutors, in their exercise of discretion, can in fact prosecute for a pretty simple foul-up, although that's still pretty rare."

Less rare, and much more damaging, is the escalation of charges to the felony level when a pattern of violations is established. The threshold for a knowing violation is somewhat vague, and can be alarmingly low.

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"What constitutes knowing is hotly debated," says Power. Depending upon what court and jurisdiction you find yourself in, you may find it takes very little to prove a knowing violation."

Power cites the case of a mine operator that took a belligerent stance with regulators, and responded to repeated requests to obtain permit coverage essentially with a shrug—maintaining that the company was not required to obtain a permit because it did not "cause" the pollution. .

"The district court and the Fourth Circuit Court of Appeals resoundingly rejected that type of defense and essentially said, 'The only thing you need to know is that pollutants were released from your property without a permit,'" Power explains. "That's what knowing means—knowing that you're releasing pollutants."

Making Matters Worse

That case illustrates two key aspects of environmental criminal liability. First, the predicate acts are extremely easy to prove. Evidence that pollution took place is often blatantly obvious and can be long-lasting. Second, and perhaps more importantly, the way a company responds to regulatory or prosecutorial scrutiny to a great extent shapes the investigation's outcome.

"Prosecutors are generally looking for more than a case where something went wrong on a particular day and then it was corrected—that's rarely prosecuted," Hoffman says. "It's usually a pattern of issues at a client's facility that results in a criminal investigation. Once that happens, I always caution my clients that it may not necessarily be the underlying violation that gets you in trouble, but it's how you handle yourself during the investigation that could lead to other problems."

False statements or obstruction of justice charges not only add new layers of liability, they reinforce and intensify investigators' suspicions. Things like concealment of evidence and tampering with control equipment or records do not paint a picture of a good corporate citizen whose environmental compliance was fouled by a lone employee taking a shortcut.

"Most of these cases are won or lost at the investigative stage on how investigators perceive the company's attitude toward what happened," Hoffman says. "This is not a situation where you want to put your head in the sand and hope it goes away. You want to be very active in the investigation and almost lead it for the government to show why they shouldn't exercise their discretion, because if they do, they may not have a very difficult time proving the violations."

Hopefully, there's a good history of compliance and a story that you want to tell.

Track Record

Telling that story means getting the most accurate information possible, and getting it fast. When accidents happen, in-house counsel must act without hesitation to uncover the full extent of the problem, work in good faith with investigators, and try to contain the situation.

Counsel should anticipate and respond to all the twists and curves of an investigation to prevent escalation to criminal charges. That means keeping lines of communication open, not only with the board and management but with lower-level employees as well.

"It's the speed with which you act," Hoffman says, "that determines whether you'll have successful damage control in one of these cases."

To be fast, in-house counsel have to be prepared. In many ways environmental practice is as much preventive as it is defensive, and the best way for a company to respond to environmental charges, of course, is never to face them at all.

"Prevention starts long before investigators show up at the doorstep—it entails having a good environmental system and using it," Power says. "You don't see too many companies that are ISO 14000 certified that are criminal environmental defendants."

A company's history of violations is the principal trigger for criminal charges. Mistakes can happen to anyone, but when a pattern of behavior emerges, it's usually a signal of lax compliance. Much of the responsibility for creating a solid track record—from training employees to regulatory affairs—falls in the purview of general counsel and chief compliance officers.

"Whoever's on the front line needs to be very familiar with what can be highly detailed and comprehensive regulations," Power says. "Also, they need to build relationships with their regulators, so they'll never be in a position where someone shows up and indicates that they are investigating possible criminal activity."

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With more than 450 attorneys in 10 offices across Ohio, Pennsylvania, Kentucky and West Virginia, Dinsmore & Shohl LLP is among the largest full-service law firms in the region. The firm's Environmental Practice Group provides clients with full-spectrum counseling, from compliance with the latest environmental laws and regulations to litigating toxic torts and other environmental liability cases.