

# Environmental Enforcement Overview



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# Outline

- I. Why Do You Care?
- II. Trump Administration Environmental Enforcement Outlook
- III. Civil or Criminal?
- IV. Parallel Proceedings
- V. Types of Environmental Violations & Examples of Recent Cases
- VI. Responding to Civil Inspections
- VII. Internal Investigations / Search Warrants / Grand Jury Subpoenas
- VIII. Suspension & Debarment
- IX. Effective Corporate Compliance Programs



# I. Why Do You Care?



# I. Why Do You Care?

- This is an Enormous Risk
- Environmental laws touch nearly every business in ways that you might not anticipate.

# I. Why Do You Care?

1. **Low “Knowledge” standard for environmental criminal offenses**
2. **Respondeat Superior Doctrine**
  - Imputes criminal liability to the company for actions of employees that are within the scope of employment and for the benefit of the company.
3. **“Responsible Corporate Officer” Doctrine**
  - Imputes criminal liability to senior managers who were in a position to prevent a violation but failed to do so.
4. **DOJ Policy encouraging prosecution of individuals where possible**
  - Memorandum by Deputy Attorney General Sally Yates on 09/09/2015.
  - U.S. Attorney’s Manual § 9-28.000 *et seq.* - Principles of Prosecution of Business Organizations.
5. **“Alternative Fines”**
  - Twice the gain or loss caused by the unlawful conduct.
6. **“Worker Endangerment Initiative” between DOJ and Dept. of Labor**
  - Pursuing criminal environmental cases for OSHA violations.

# **I. Why Do You Care?**

**7. Suspension & Debarment**

**8. Whistleblower Incentives**

**9. State and Federal Civil Enforcement and Large Penalties – ranging in the millions**

**10. Statutorily authorized citizen lawsuits**

**11. Environmental violations cut across many different industry sectors**

- Mining
- Oil & Gas
- Maritime and Recreational Water Craft
- Consumer Products
- Manufacturing
- Transportation
- Construction and operation of construction equipment
- Public utilities & water treatment facilities
- Pharmaceutical, academic, private R&D and government labs
- Seafood suppliers
- Lumber suppliers
- Repair shops, antique dealers, automotive dealers

## II. Trump Administration Outlook

### Administration Statements & Policy

“[W]e are going to continue with a strong program of environmental law enforcement, on both the civil and criminal sides”

*- DOJ Environment & Natural Resources Division Acting Assistant Attorney General Jeffrey Wood on 11/16/2017*

“As a former attorney general ... I know what it means to prosecute people, and I can tell you that it’s a point of emphasis.”

*- EPA Administrator Scott Pruitt to The Washington Post on 11/17/2017*

**In practice, we have seen no reduction in environmental civil or criminal enforcement.**

### **See Also ...**

- June 2017 – DOJ Directive ending “community service” payments in connection with criminal guilty pleas.
- October 2017 EPA Directive limiting “sue & settle” consent decrees with private parties that impose obligations on EPA.

## II. Trump Administration Outlook

### The Numbers

- EPA's FY 2018 Budget Request
  - \$5.65 billion, which is \$2.6 billion lower than FY 2017 funding.
  - Civil enforcement: \$143.3 million (approx. \$30 million and 220 FTE below FY 2017)
  - Criminal enforcement: \$44.5 million (approx. 6 million and 59 FTE below FY 2017)
    - "In FY 2018, the Criminal Enforcement program will focus its resources on the most egregious cases (e.g., significant human health, environmental, and deterrent impacts), while balancing its overall case load across all environmental statutes."
- DOJ ENRD FY 2018 Budget Request
  - \$115.5 million / 385 attorneys. Approx \$5 million over FY 2017 funding.
  - FY 2016: 39% of ENRD's work was affirmative civil enforcement, 3% criminal enforcement. Over \$14 billion in civil & criminal fines (700% increase over FY 2015 – notably VW & BP Horizon).
  - Anticipating same number of civil and criminal investigations and cases as FY 2017, which were slightly under FY 2016 numbers.



# III. Civil or Criminal?

## 1994 Devaney Memorandum

- Case selection guidance from EPA Criminal Enforcement Office Director Earl Devaney.
- Criminal enforcement should target the most significant and egregious violators.
- Criminal case selection criteria:
  - **Significant environmental harm**
    - Actual harm to human health or the environment
    - Threat of significant harm
    - Failure to report discharges that result in actual or threatened harm
    - Trend or common attitude within the regulated community
  - **Culpable conduct**
    - History of repeated violations
    - Deliberate misconduct resulting in violation
    - Concealment of misconduct or falsification of records
    - Tampering with monitoring equipment
    - Business operation without required permits
  - **Additional factors for corporations**
    - Performing audits and failing to remedy non-compliance, correct harm, disclose.
    - “[A] violation that is voluntarily revealed and fully and promptly remedied as part of a corporation’s systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal investigative resources.”

### III. Civil or Criminal?

#### Other Policies & Sources of Factors to Consider:

- DOJ – Federal Principles of Prosecution – Individuals (USAM §§ 9-27.000, 9-28.210).
- DOJ – Federal Principles of Prosecution – Business Organizations (USAM § 9-28.000).
- ENRD Environmental Crime Prosecution Factors in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1991).
  - Voluntary disclosure, cooperation, preventative measures and compliance programs, pervasiveness on non-compliance, internal disciplinary action, subsequent compliance efforts.
- EPA Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (“Audit Policy”) (65 Fed. Reg. 70 (April 11, 2000)).

## IV. Parallel Civil & Criminal Proceedings

- Risk to the government of abuse of civil process and unauthorized release of secret criminal grand jury information.
  - Using civil process to conduct a criminal investigation
  - Disclosing grand jury material to civil investigators
- Policy of communication/coordination/cooperation between criminal and civil enforcement.
  - U.S. Attorney's Manual § 1-12.000.
  - Attorney General Memorandum 01/30/2012. See Organization & Function Manual at § 27.
    - Civil Resource Manual § 228.
    - Criminal Resource Manual § 2464.
  - ENRD Parallel Proceedings Policy – December 20, 2016 (Directive 2016-12).
  - In practice, civil enforcement staff will refer cases to criminal investigators when they believe the conduct was intentional or reckless. When criminal enforcement is proceeding, civil proceedings are effectively stayed.

## V. Types of Environmental Violations & Examples of Recent Cases

- A. Clean Water Act (CWA)
- B. Clean Air Act (CAA)
- C. Resource Conservation & Recovery Act (RCRA)
- D. Toxic Substances Control Act (TSCA)
- E. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA/Superfund)
- F. Endangered Species Act / Lacey Act
- G. “Traditional” Title 18 Offenses
- H. Federal Insecticide, Rodenticide and Fungicide Act (FIFRA)
- I. Oil Pollution Act
- J. Safe Drinking Water Act



## V. Types of Environmental Violations & Examples of Recent Cases

### A. Clean Water Act (CWA) (33 U.S.C. § 1251 et seq.)

#### 1. Criminal Penalties:

Felony: “Knowingly” discharging a pollutant without a permit or in violation of a permit into U.S. Waters or public sewer systems, or filling without a permit (33 U.S.C. § 1319(c)(2)).

- Individuals: Up to **3 years in prison** and/or fine up to \$250,000 or \$50,000 per day of violation (whichever is greater), restitution.
- Companies: 1-5 years of probation, **Fine up to \$500,000** or \$50,000 per day of violation (whichever is greater), restitution.

Misdemeanor: “Negligently” doing the same thing. (33 U.S.C. § 1319(c)(1)).

- Individuals: Up to 1 year in prison and/or fine up to \$100,000 or \$25,000 per day of violation (whichever is greater), restitution.
- Companies: Up to 5 years of probation, fine up to \$200,000 or \$25,000 per day of violation (whichever is greater), restitution.

## V. Types of Environmental Violations & Examples of Recent Cases

**Felony:** Knowingly making false statements in applications, records, reports, etc., or tampers with monitoring devices (33 U.S.C. § 1319(c)(4)).

- Individuals: Up to 2 years in prison and/or fine up to \$250,000 or \$50,000 per day of violation (whichever is greater), restitution.
- Companies: 1-5 years of probation, fine up to \$500,000 or \$50,000 per day of violation (whichever is greater), restitution.

# Quick Note on Criminal Penalties

## **What category is the offense?**

- 18 U.S.C. § 3559.
- Example: CWA “Knowing Discharge” is a 3 year felony. Therefore a Class E felony.

## **Fines – 18 U.S.C. § 3571**

- Individuals
  - Felony – up to \$250,000
  - Misdemeanor – Up to \$100,000
- Companies
  - Felony – Up to \$500,000
  - Misdemeanor – Up to \$200,000
- Alternative Fine – Twice gain or Loss – 18 U.S.C. § 3571(d)

## **Corporate Probation**

- Probation is authorized under 18 U.S.C. § 3551(c).
- Term of probation for a felony is not less than one year nor more than five years under 18 U.S.C. § 3561(c).

## **Restitution – 18 U.S.C. § 3664**

# V. Types of Environmental Violations & Examples of Recent Cases

## 2. Notes:

- “Knowingly”
- “Waters of the United States”
- “Pollutant”
- “Responsible Corporate Officer”
- Other water statutes: Safe Drinking Water Act (42 U.S.C. § 300f, *et seq.*), Act to Prevent Pollution from Ships (33 U.S.C. § 1902, *et seq.*), Rivers & Harbors Act (33 U.S.C. § 401, *et seq.*)

## 3. Recent Criminal Case Examples:

- ***U.S. v. Lance Charen* (D. Del. Case No. 17-cr-00013).**
  - Oil recycling facility manager who slowed the plant’s water treatment process on days when samples were taken to make the samples comply with permit limits before discharging to the sewer.
  - Sentenced to 1 year and 1 day in prison.
  - Company also pled guilty and paid a \$3.5 million in fines and restitution. (*U.S. v. Internat’l Petroleum Co.*, Case No. 16-cr-00097)



## V. Types of Environmental Violations & Examples of Recent Cases

- ***U.S. v. John Brewer (S.D.W.V. Case No. 16-cr-00086).***
  - Lab manager who falsified water sampling data for a coal mine.
  - Sentenced to two years in prison.
  - Colleague at the lab, John Shelton, received a year and nine months for conspiring to violate the CWA.
- ***U.S. v. Omega Protein, Inc. (W.D.L.A. Case No. 16-cr-00292).***
  - Manager directed employees to use a hose to drain a treatment pond into a canal.
  - Three years probation, a \$1 million fine, and a \$200,000 “community service fee”.
- ***U.S. v. Adam Boylen (N.D. Ohio Case No. 17-cr-00050).***
  - Trucking company driver who collected industrial waste and dumped it into a wetland and streams instead of taking it to a proper disposal facility.
  - Sentenced to 42 months in prison and over \$85,000 in restitution.
- ***U.S. v. Panthera Painting, Inc. and Andrew Manganas (M.D. Pa. Case No. 16-cr-00209).***
  - Very recent guilty plea by company and owner.
  - Highway bridge repair contract – waste allowed to enter the Susquehanna River.
  - Additional charges of theft from employee benefit plan and wire fraud.

## V. Types of Environmental Violations & Examples of Recent Cases

**4. Civil Penalties:** Up to \$51,570 per day of violation (33 U.S.C. § 1319(d), 82 Fed. Reg. 3633 (Jan. 12, 2017)) and EPA administrative penalties of up to \$20,965 per day of violation up to \$262,066 (33 U.S.C. § 1319(g)(2)).

### 5. Recent Civil Case Examples:

- ***U.S. v. Starkist Co.*** (*W.D. Pa. Case No. 17-cv-01190*).
  - Tuna processing facility in American Samoa
  - Unpermitted discharges of inadequately treated wastewater and stormwater into harbor.
  - \$6.5 million civil penalty plus facility upgrades and donation of \$88,000 in equipment to local responders.
- ***U.S. v. NVR, Inc.*** (*D.N.J. Case No. 17-cv-04346*).
  - Residential construction company in 14 states.
  - Failure to obtain [stormwater] permits prior to starting construction / failure to comply with permits.
  - Sediment & erosion control.
  - \$425,000 civil penalty.

# V. Types of Environmental Violations & Examples of Recent Cases

## B. Clean Air Act (CAA) (42 U.S.C. § 7401 et seq.)

### 1. Criminal Penalties:

- A. Knowingly violating one of the many monitoring, recordkeeping, or reporting requirements for performance standards, solid waste combustion, preconstruction, acid rain, and ozone depleting gasses. (42 U.S.C. § 7413(c)(1)).
  - Individuals: Up to 5 years in prison and/or \$250,000 fine.
  - Companies: 1-5 years of probation, \$500,000 fine.
- B. Knowingly making false statements or material omissions on applications, records, reports, etc. (42 U.S.C. § 7413(c)(2)(A)).
  - Individuals: Up to 2 years in prison and/or \$250,000 fine.
  - Companies: 1-5 years of probation, \$500,000 fine.
- C. Knowingly failing to notify or report as required by the Act (42 U.S.C. § 7413(c)(2)(B)).
  - Individuals: Up to 2 years in prison and/or \$250,000 fine.
  - Companies: 1-5 years of probation, \$500,000 fine.

## V. Types of Environmental Violations & Examples of Recent Cases

- D. Knowingly **falsifying or tampering** with monitoring devices (42 U.S.C. § 7413(c)(2)(C)).
  - Individuals: Up to 2 years in prison and/or \$250,000 fine.
  - Companies: 1-5 years of probation, \$500,000 fine.
- E. Knowingly failing to **pay required fees** (42 U.S.C. § 7413(c)(3)).
  - Individuals: Up to 1 year in prison and/or \$100,000 fine.
  - Companies: Up to 1 year of probation, \$200,000 fine.
- F. Knowingly **releasing** listed **pollutants** placing another person in imminent danger of death or serious bodily injury (42 U.S.C. § 7413(c)(5)).
  - Individuals: Up to **15 years** in prison and/or \$250,000 fine.
  - Companies: 1-5 years of probation, **\$1 million fine**.
- G. Negligently **releasing** listed **pollutants** placing another person in imminent danger of death or serious bodily injury (42 U.S.C. § 7413(c)(4)).
  - Individuals: Up to 1 year in prison and/or \$100,000 fine.
  - Companies: Up to 1 year of probation, \$200,000 fine.



# V. Types of Environmental Violations & Examples of Recent Cases

## 2. Recent Criminal Case Examples:

- ***U.S. v. Guido Cortes-Rodriguez*** (D. Conn. Case No. 16-cr-00234).
  - Training manager falsely certified that an undercover FBI agent completed asbestos and lead paint training courses.
  - Sentenced to 2 years probation and six months home confinement.
- ***U.S. v. AIREKO Construction Company*** (D.P.R. Case No. 15-cr-00448).
  - Improper removal of asbestos and exposing workers to asbestos.
  - Sentenced to three years probation, \$1.5 million fine, and \$172,000 for workers' medical costs.
- ***U.S. v. Berkshire Power Co. and Power Plant Mngt. Services, Inc.*** (D. Mass. Case No. 16-cr-30021).
  - Tampering with air pollution emissions equipment, submitting false information to regulators.
  - Sentenced to \$3.25 million in fines, \$1 million in community service payment, and over \$3 million in civil penalties and disgorgement.

## V. Types of Environmental Violations & Examples of Recent Cases

**3. Civil Penalties:** \$95,284 per day of violation (42 U.S.C. § 7413(b), 82 Fed. Reg. 3633 (Jan. 12, 2017)), and EPA administrative penalties of \$45,268 per day of violation up to \$362,141 (42 U.S.C. § 7413(d)).

### 4. Recent Civil Case Examples:

- ***U.S. v. Harcross Chemicals, Inc.*** (*D. Kan. Case No. 17-cv-02432*).
  - Chemical manufacturer and distributor with 31 facilities in 19 states.
  - Inadequate risk management program, “general duty clause” deficiencies.
  - \$950,000 civil penalty.
- ***U.S. v. Rocky Mountain Bottle Company LLC*** (*D. Col. Case No. 17-cv-01554*).
  - Unpermitted furnace expansion and failing to install pollution control equipment.
  - 475,000 civil penalty.

## V. Types of Environmental Violations & Examples of Recent Cases

### C. Resource Conservation & Recovery Act (RCRA)(42 U.S.C. § 6901 et seq.)

#### 1. Criminal Provisions:

- Knowingly causing hazardous waste to be transported to an unpermitted facility (42 U.S.C. § 6928(d)(1)).
- Knowingly causing hazardous waste to be treated/stored/disposed of without a permit or in violation of a permit (42 U.S.C. § 6928(d)(2)).
- Knowingly making false statements or material omissions on applications, records, reports, etc. (42 U.S.C. § 6928(d)(3)).
- Knowingly treating/storing/disposing of hazardous waste or used oil and destroying or failing to file records (42 U.S.C. § 6928(d)(4)).
- Knowingly causing hazardous waste to be transported without a manifest (42 U.S.C. § 6928(d)(5)).
- Knowingly exports hazardous waste (42 U.S.C. § 6928(d)(6)) or treats/stores/disposes of used oil unlawfully (42 U.S.C. § 6928(d)(7)).

# V. Types of Environmental Violations & Examples of Recent Cases

## 2. Criminal Penalties:

- Individuals: Up to 2 years in prison and/or \$250,000 fine, restitution.
- Companies: Up to 5 years probation, \$500,000 fine, restitution.

## 3. Recent Criminal Cases:

- ***U.S. v. Leading Edge Aviation Services, Inc.*** (N.D. Miss. Case No. 14-cr-00121).
  - Storage of waste in an open pit
  - Sentenced to 1 year probation, \$2 million in fines, restitution, and community service
  - Required to hire EHS Manager, Adopt Corporate Code of Ethics Policy.
- ***U.S. v. Integrated Plastic Solutions LLC*** (D. Kan. Case No. 13-cr-10185)
  - Recycling facility “storage” of ignitable hazardous waste.
    - Buried under a rock pile after an inspection.
  - Three years probation, over \$100,000 in fines and restitution.
  - Required to develop a court-approved compliance and ethics program.



## V. Types of Environmental Violations & Examples of Recent Cases

- ***U.S. v. Harcros Chemicals, Inc.*** (D. Kan. Case No. 14-cr-20070)
  - Storage of old chemicals at labs.
  - Two years probation and a \$1.5 million fine.
- ***U.S. v. General Super Plating Co.*** (N.D.N.Y. Case No. 15-cr-00287)
  - Disposal of water filters in the trash.
  - \$25,000 fine.

## V. Types of Environmental Violations & Examples of Recent Cases

4. **Civil Penalties:** Civil fines up to \$71,264 per violation (42 U.S.C. § 6928(g), 82 Fed. Reg. 3633 (Jan. 12, 2017)).

### 5. Recent Civil Case Examples:

- ***U.S. v. Whole Foods*** (*EPA Consent Agreement and Final Order – RCRA-HQ-2017-0001*).
  - Voluntary disclosure that company might not have made sufficient hazardous waste determinations on all solid waste streams (e.g. cleaning products, paints, pesticides, fluorescent light bulbs).
  - \$500,000 civil penalty.
- ***U.S. v. Innophos*** (*M.D.L.A. Case No. 17-cv-00026*).
  - Acid manufacturer.
  - Toxic waste sent to unpermitted facility for disposal.
  - \$1.398 million civil penalty.



## V. Types of Environmental Violations & Examples of Recent Cases

### D. Toxic Substances Control Act (TSCA) (15 U.S.C. § 2601 *et seq.*)

- EPA regulated (tests, controls manufacture of, and bans) certain substances – e.g. PCBs, asbestos, metal working fluids.
- Pesticides are excluded (see the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) at 7 U.S.C. § 136 *et seq.*)

#### 1. **Criminal Penalties:** Knowingly or willfully failing to comply with the Act's requirements pertaining to control of (a) toxic substances (including refusing to permit entry or inspection), or (b) lead based paint (15 U.S.C. § 2615(b)).

- Individuals: Up to 1 year in prison and/or fine up to \$100,000 or \$50,000 per day of violation (whichever is greater), restitution.
- Companies: Up to 5 years of probation, fine up to \$1 million or \$50,000 per day of violation (whichever is greater), restitution.



# V. Types of Environmental Violations & Examples of Recent Cases

## 2. Recent Criminal Cases:

- ***U.S. v. William Jackson*** (N.D. Ohio Case No. 14-cr-00353)
  - Demolition contractor failed to remove asbestos from an old factory prior to demolition.
  - 33 months in prison and \$7.8 million in restitution.
  - Owner of the factory was sentenced to 57 months in prison.
  - Clean Air Act / TSCA prosecution.
- ***U.S. v. Maureen Walck*** (W.D.N.Y. Case No. 17-cr-01103)
  - Real estate agent failed to make lead-based paint disclosures. Buyer's child diagnosed with lead poisoning.
  - Guilty plea in September 2017.

## V. Types of Environmental Violations & Examples of Recent Cases

**3. Civil Penalties:** Civil fines up to \$38,114 per day of violation (15 U.S.C. § 2615(a), 82 Fed. Reg. 3633 (Jan. 12, 2017)).

### 4. Recent Civil Case Examples:

- 123 civil lead-based paint administrative actions filed by EPA between October 2016 and September 2017.
- KGN Asset Management (Colorado) - \$30,000 penalty for failure to use lead-safe work practices (including in the television series “Raise the Roof”).

## V. Types of Environmental Violations & Examples of Recent Cases

### F. Endangered Species Act (ESA) (16 U.S.C. § 1531 *et seq.*) / Lacey Act (16 U.S.C. § 3317 *et seq.*)

#### 1. ESA Criminal Penalties: Knowingly importing, selling, “taking”, possessing, etc., a listed animal or plant.

- **Prohibited Acts:** 16 U.S.C. § 1538
- **Misdemeanor criminal provision:** 16 U.S.C. § 1540(b)(1)
  - **Individuals:** Up to one year in prison and/or \$100,000 fine.
  - **Companies:** Up to one year probation and/or \$200,000 fine.
- **Endangered Species List:** 16 U.S.C. § 1533; 50 CFR § 17.11 (animals); 50 CFR § 17.12 (plants).

#### 2. Lacey Act – Felony for knowingly importing/exporting/selling/purchasing any animal or plant taken/possessed/transported in violation of U.S. law (16 U.S.C. § 3373(d)).

- **Individuals:** Up to five years in prison or \$250,000 fine.
- **Companies:** Up to five years probation or \$500,000 fine.



## V. Types of Environmental Violations & Examples of Recent Cases

### 3. Recent Criminal Cases:

- ***U.S. v. Lumber Liquidators, Inc.*** (E.D.V.A. Case No. 15-cr-00126)
  - Illegal importation of hardwood flooring that had been illegally logged in Eastern Russian tiger habitat.
  - Over \$13 million in criminal fines, forfeiture, and community service payments. Over \$3.1 million in civil forfeiture.
- ***U.S. v. Joseph Williams*** (E.D.N.C. Case No. 15-cr-00002)
  - Illegal harvesting of striped bass.
  - Probation, over \$69,000 in restitution.
- **“Operation Crash”** – International rhinoceros horn & elephant ivory smuggling. Search warrants in 13 states. Over 36 years of prison sentences, \$2 million in fines, and \$5.7 million in forfeiture and restitution.

## V. Types of Environmental Violations & Examples of Recent Cases

### 4. Civil Fines:

- ESA: Up to \$50,276 per violation (16 U.S.C. § 1540(a), 82 Fed. Reg. 6307 (Jan. 19, 2017)).
- Lacey Act: Civil fines up to \$25,409 per violation (16 U.S.C. § 3373(a), 82 Fed. Reg. 6307 (Jan. 19, 2017)). “Should know” standard.

### Also ...

- Civil asset forfeiture
- Citizen lawsuits authorized

## V. Types of Environmental Violations & Examples of Recent Cases

### G. “Traditional” Title 18 Criminal Offenses

- False Statements (18 U.S.C. § 1001) – Up to five years in prison and/or \$250,000 / \$500,000 fine.
- Conspiracy (18 U.S.C. § 371) – Up to five years in prison for felonies/one year for misdemeanors and/or appropriate fine.
- Mail/Wire Fraud (18 U.S.C. §§ 1341, 1343) – Up to 20 years in prison and/or \$250,000 / \$500,000 fine.
- Obstruction of Justice
  - Witness tampering/evidence destruction in agency proceedings (18 U.S.C. § 1505) – Up to five years in prison and/or \$250,000 / \$500,000 fine.
  - Witness tampering/evidence destruction in official proceedings (18 U.S.C. § 1512(b) or (c)) – Up to 20 years in prison and/or \$250,000 / \$500,000 fine.
  - Destruction/alteration/falsification of records in a federal investigation (18 U.S.C. § 1519) – Up to 20 years in prison and/or \$250,000 / \$500,000 fine.

## VI. Responding to Civil Inspections

- EPA and state agencies have broad civil authority to inspect premises, operations, and records.
- Contact internal or outside counsel immediately.
- Do not insist on a search warrant absent very unusual circumstances.
- Always accompany the inspector.
- Always have a second person take notes & photos.
- Never agree to allow inspector to take original records off site.
  - You may agree to send copies.
  - Note – not applicable to criminal search warrants.
- Answer questions that are asked.
  - Truthfully.
  - Don't volunteer.
  - Potential for Obstruction of Justice/False Statements.
- Make required notifications.
- If sampling is requested, take split samples.



## VII. Internal Investigations / Search Warrants / Grand Jury Subpoenas

- **Document & Electronic Data Acquisition**
- **Employee Interviews**
- **Litigation hold**
- **Search warrant protocols**
  - Communicate representation
  - Present for employee interviews
  - Obtain the warrant
  - No obstruction
  - Instruction to employees
  - Accompany agents, observe, document
  - Identify any privileged information
  - Collect current compliance policies & procedures
  - Request split samples / recreate samples
  - Engage environmental expert
  - Joint defense agreements
- **Grand Jury Subpoenas**



# VIII.Suspension & Debarment

- Pertains to federal procurement (contracts, subcontracts) and non-procurement “Covered transactions” (grants, loans, use of federal lands, insurance, etc.)
- Issue is whether a party is “presently responsible” to do business with the government.
- Government has broad discretion.
- Excluded Parties List
- Government-wide
- Statutory Debarment
  - Criminal convictions under the Clean Water Act & Clean Air Act
  - Continues until debarring official certifies that the condition giving rise to the conviction has been corrected.
- Discretionary Debarment
  - Far less than criminal standard of proof.
- Resources:
  - Executive Order 12549
  - 13 CFR 400.109 (Government-wide Debarment and Suspension (non-procurement)).
  - FAR § 9.400 *et seq.*, § 9.406 (Debarment), § 9.407 (Suspension) (Also 48 CFR § 9.400 *et seq.*)
  - DFAR § 209.406 (Debarment), § 209.407 (Suspension) (Also 48 CFR § 209.1 *et seq.*)
  - EPA Suspension and Debarment Website (<https://www.epa.gov/grants/suspension-and-debarment-program>).

## IX. “Effective” Corporate Compliance Programs (USSG § 8B2.1)

1. Exercise due diligence to **prevent and detect** criminal conduct.
2. Promote an **organizational culture** that encourages ethical conduct and a commitment to compliance with the law.
3. Program shall be **reasonably designed, implemented, and enforced**.
4. **Established standards and procedures** to prevent and detect criminal conduct.
5. **Governing authority** knowledgeable about the content and operation of the compliance and ethics program.
  - Exercise reasonable oversight.
6. **Specific individuals within high-level personnel** assigned overall responsibility.
7. Specific individuals within the organization **delegated day-to-day** operational responsibility.
  - **Report** periodically to high-level personnel / governing authority.
  - Given **adequate resources**, appropriate authority, and direct access to the governing authority.

## IX. “Effective” Corporate Compliance Programs (USSG § 8B2.1)

8. Keep **bad actors** out of management.
9. **Communicate** standards and procedures / effective **training** programs for management, employees, agents.
10. **Monitoring** and **auditing**.
11. Periodically **re-evaluate** the effectiveness of the program.
12. Have and publicize a **confidential reporting system / no retaliation**.
13. **Incentives** for compliance / **discipline** for failures.
14. **Respond** appropriately to / **prevent** further similar criminal conduct.
15. Periodically **re-assess risks** and **modify** compliance & ethics program.

## QUESTIONS?



### **Bonni Kaufman (Washington, D.C.)**

- » National practice focused on defense and prevention of environmental enforcement, compliance counseling and transactions/development. Clients include industrial, transportation, real estate, consumer product and manufacturing sector companies.
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