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Tom Ray

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AN INTERVIEW WITH MARTHA STEINCAMP, REGIONAL COUNSEL, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION VII

by TOM RAY

How does EPA begin an enforcement action?

The administrative enforcement process begins with our receipt of a case file indicating violations. This report of violations may actually come from the state because the regulatory programs are often administered by the state. We try to limit our enforcement action to significant cases which the states report to us. Additionally, states are required to inform us about enforcement actions they are taking against these violators. In some instances, we may not agree with the state's enforcement response. We may overfile, but this is a rare event. Sometimes the state will ask us to take the case. The case may be too big and complex for the state's limited resources, or they just may not want to do that particular case.

Once we look at the case and decide there are violations meriting a penalty or other injunctive relief, we decide whether to pursue a formal administrative or civil judicial case. The first document we usually work on is the complaint. The complaint is filed with the Regional Hearing Clerk who operates just like a court clerk. She makes sure all our paperwork gets filed properly, docketed the cases, and keeps track of each particular matter.

Once a complaint is filed, it is mailed to the respondent and they usually need to file an answer within 30 days. Sometimes the respondent will ask for an informal conference. We strongly encourage this. Informal

conferences provide an opportunity to come in, talk, see where we are coming from, and try to work out a settlement. I would say well over 90% of our cases are settled, with very few of them actually going to hearing.

How does a hearing work?

If an answer is filed in response to a complaint, and a settlement has not yet been worked out, then a hearing is scheduled before an Administrative Law Judge (ALJ). All ALJs have their offices in Washington, D.C. The ALJs work similarly to district court judges; they set up schedules for reporting on the status of settlement negotiations. ALJs can require a Pre-Hearing Exchange to press for settlements. Pre-Hearing Exchanges involve each side sending to the other the basis of their case, a list of witnesses, and a summary of their testimony. If a settlement still has not been reached, then a hearing date is set. This is an administrative hearing which is similar to a judicial hearing but less formal. Respondents are entitled to request the location of the hearing and usually select their hometown rather than Kansas City. Direct and cross-examination of witnesses is allowed.

After all the evidence has been presented, the ALJ will request both sides to submit briefs with proposed findings of fact and conclusions of law. The ALJ will make an Initial Decision. After the Initial Decision has been sent out, it will become final forty-five days (45) after service unless one of the

parties objects.

Appeals of decisions are made to the EPA Administrator. We used to have appeal hearings before Judicial Officers appointed by the Administrator. Judicial Officers were appointed by the EPA Administrator but the caseload was overwhelming. Now we have an Environmental Appeals Board (EAB), originally appointed by the Administrator. The EAB consists of three ALJs: Nancy Firestone, Ed Reich, and Ronald McCallum who sit *en banc* in Washington, D.C. They are all very capable attorneys. Like an appellate circuit court, the EAB accepts briefs, hears oral arguments, and issues written opinions. Some of the appeals are "of right" and some are discretionary, depending on the subject matter. The EAB's decision is considered final agency action. Further appeals may be heard in either the Court of Appeals for the judicial circuit where the violations occurred or in the D.C. Circuit Court of Appeals for regulatory challenges. These are very rare, however.

Where does the U. S. Attorney's office fit in the enforcement process?

The process I just described for you was the administrative enforcement process. The U. S. Attorney's office plays a role in the civil enforcement process. The civil process begins when a compliance officer looks over a case file and says "This company is doing a very poor job of complying with environmental laws. They have violated before and obviously still didn't get the message. This should be a civil referral." The civil referral process is essentially the same as the administrative process, only there's a whole lot more paper including a litigation referral package. The referral package goes to the Department of Justice in Washington, D.C., which reviews the package and decides whether or not we have a case which is appropriate for filing. The Department of Justice (DOJ) makes the final decision as to whether to file the case.

If DOJ does decide to file a case, then the case will have gone from Region VII to DOJ in Washington, D.C. and then back to a U.S. Attorney in Region VII. Some of our U. S. Attorneys prefer to allow DOJ to handle the cases. This does not mean they do not do environmental cases, as they provide excellent support for the lead DOJ attorney. It is more a reflection of the expertise found in Washington, D.C. in the environmental law

area. Other U. S. Attorneys, especially in the Western District of Missouri, are very hands on — they want to do the environmental cases in the Western District.

The U. S. Attorney's Office in the Eastern District of Missouri has been very helpful with our dioxin cases as well as others. They generally provide support to DOJ in civil cases. On the criminal side, they actually prosecute the cases with varying degrees of assistance from DOJ. We work very well with both U. S. Attorney's Offices and have no complaints whatsoever.

What is your opinion of the environmental crimes task force that is currently operating in the Eastern District of Missouri and is proposed for the Western District of Missouri?

The concept of an Environmental Crimes Task Force is good because we think that's probably the best way to focus on environmental crimes, get attention, and marshal the resources necessary to do these cases. The problem as we see it is the task force must proceed "full bore" with little attention to targeting priority cases which present the greatest deterrence and result in the most environmental improvement.

Can you tell me about the substantial increase in criminal enforcement personnel in the EPA and the U.S. Attorney's Office?

Congress passed the Pollution Prosecution Act in 1990 and prescribed that we had to increase the number of criminal investigators to 200 by 1995 and civil investigators by 50. Obviously, when resources are being cut back, it isn't easy to do this. EPA has had to figure out ways to utilize open positions for more criminal and civil investigators. I think so far they have done a fairly aggressive job. For instance, our office now has seven full-time criminal investigators. For a long time we only had one criminal investigator in our office. We have a full-time Special Agent in Charge, Linda Algar, located in Kansas City. This increased staff has allowed us to give more attention to these cases and hopefully move a lot of them through. We receive many, many tips from the public as well as

other law enforcement agencies. Investigation of an environmental criminal case takes time and technical expertise and if you don't have people to do it, these cases are just "dead in the water".

You said earlier that Region VII doesn't go in with a stormtrooper attitude. Criminal investigations are an exception to this, right?

The characterization of a stormtrooper attitude may be a little harsh, but the criminal program is where you are most likely to see a stronger enforcement presence because of the potential danger. The first priority of the agents when conducting a criminal investiga-

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tion is to assure the safety of the public. Based on information they have received, it may be necessary to have a fairly large group of law enforcement personnel to secure a site prior to a search.

Sometimes this isn't always necessary. We just had a case where a company bought a lab. Through their internal audit processes they found that an assistant lab manager was falsifying data, so called "dry labbing." He was telling people he was performing tests and charging people for them but he really was not. The fellow was in charge of "fish tissue monitoring" but he wasn't buying any fish. Monitoring fish tissue is pretty hard without fish. The new management confronted him, he confessed, and they fired him. Then the company's lawyer came to EPA and the U. S. Attorney's Office and told us about their discovery. A criminal investigation verified the information and the assistant lab manager pled guilty. In this case, no search warrants were necessary. However, there have been other cases where executing an unannounced search pursuant to a search warrant was necessary. We try not to be "badge heavy" in Region VII, but our first priority is always to protect lives.

Are "internal audit processes" related to environmental auditing?

Yes. Environmental audits are something we encourage companies to do on an annual basis. While there is benefit in doing an environmental audit one time, we want everybody to make it part of their way of doing business. I would like to put in a "plug" for routine internal environmental auditing programs as part of a company's culture. When environmental problems are identified early, they often can be corrected more easily and cheaply. If possible criminal violations are identified, I strongly recommend that company officials report them immediately. A caveat to this recommendation is the government *may not* provide immunity from prosecution, but early reporting will certainly be taken into consideration during any future prosecution decisions.

Several years ago, I was flying back from Seattle and the man sitting next to me had some Resource Conservation and Recovery Act (RCRA) materials laid out in the seat between us. Well, you generally don't see people reading RCRA materials on a plane so I asked him what it was for. I found out he was with a major oil company which had instituted a policy where internal teams of employees go to different company facilities and do environmental audits on a regular basis. He said this was a very successful program.

I think environmental auditing is an excellent concept. A viable comprehensive audit program that's designed to find things and isn't a sham will probably carry some weight with EPA when we're negotiating on a penalty in an enforcement case settlement discussion. As complicated as the environmental statutes are, probably even the best environmental auditing program may not always be perfect in identifying all violations. We sometimes try to obtain an agreement from a violator to do an environmental audit, especially where the company's violative history indicates a need for a comprehensive environmental audit. We hope that environmental audits become part of their company culture.

The bigger companies are always first in line to do these types of things like environ-

mental audits because it is an important and cost effective way to identify and correct environmental problems. Small companies sometimes view environmental auditing as just another expense they can't afford to incur. We think they provide good value in the long run. The statutes are forcing environmental audits to some extent because you can't or shouldn't buy property nowadays without taking a look at what went on at that property before you became interested. Depending on what the physical aspects of the property are, these audits can be very expensive. The Superfund statute embraces "caveat emptor" which makes a good environmental audit imperative because Superfund cleanups are generally very expensive. (See pages 83-88 for a discussion of CERCLA and caveat emptor). It's just good business practice to know the status of environmental compliance of any business you are considering purchasing.

How do you feel about education as a compliance inducing tool?

Environmental education is very important. The thing I dislike most as an enforcement attorney is to get a case where the defendant can legitimately say, "I didn't know about this." The EPA is really stressing outreach and environmental education, not only in the regulated community but to the public also, through schools, public information announcements and seminars and workshops. We try to assure, probably more than other federal agencies, that we get the information out to the public so they know what they need to do.

We're trying to enhance environmental education in the school systems as well. We have a kindergarten through twelfth grade curriculum outline we provide to teachers who want it. I think starting to educate children at an early age to recognize the importance of environmental protection will be a big help in accomplishing and sustaining our mission in the future.

The Clean Air Act Amendments of 1990 have special provisions for small business assistance. Missouri has expanded this by

creating an office that handles technical assistance problems for all its programs. The office is designed to help the regulated community, not turn them over to the Missouri Attorney General for prosecution. I predict Congress will include similar assistance programs in all future statutes because we are asking more of the regulated community than ever before and the requirements are more complex.

What role does the long term play in environmental enforcement?

The long term is one of our main reasons for having an enforcement tool - not as an

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end in itself but as a deterrent. We can't sue everybody in violation of the laws and do not want to. Some of them may have violated just one month but ordinarily they are in compliance. We try to prosecute the significant cases which helps get out the message that we will sue if necessary. We are somewhat similar to the IRS in approach. I'm sure there are people that cheat on their taxes and don't get caught. Overall, I think people are probably a little bit nervous about being audited so they are pretty careful when they prepare their taxes. The threat of fines and punishment is a great deterrent.

EPA has only been in existence for a little over twenty years and I think we've done pretty well in achieving and maintaining a good compliance track record. This is particularly true in Region VII.

Is there anything else you would like to say about environmental enforcement?

We try very hard to make sure our attorneys get involved at the beginning of case

development. This allows for careful consideration of pollution prevention settlement opportunities and the most timely schedule for achieving compliance. We do our best to have our attorneys and technical staff work together on cases. This helps our attorneys understand the technical issues and contributes to a more productive teamwork effort and better enforcement results. The emphasis in enforcement used to be on just achieving compliance as soon as possible and an appropriate penalty for the violations. Now we try to consider pollution prevention opportunities, environmental audits and other environmental improvement measures which are beyond what the law requires in lieu of part of the penalty assessment. Although we will not reduce a penalty assessment below the amount of economic benefit gained by violating the law, we are strongly in favor of good environmental projects which can be in lieu of a part of the penalty.

EPA has a policy which provides guidance for what types of projects may be acceptable as part of a settlement. It is referred to as the Strock memo dated February 12, 1991. These projects are called Supplemental Environmental Projects (SEPs). Region VII is a leader among the Regions in number and value of SEPs in administrative case settlements. The state of Missouri is interested in SEPs also and has reached some settlements which include these types of projects.

The future course of enforcement will surely include even more emphasis on pollution prevention and SEPs as part of settlements. Our Region is developing expertise in these areas to assist us in obtaining good SEPs in our settlements.

You mentioned some cutbacks in resources. Are these the first budget cuts you have seen during your tenure at EPA?

Yes. I think the situation is such that resource impacts are inevitable. This makes us review our programs and focus our attention on those areas where environmental results are most apparent.