

1994

An Interview with Edward L. Dowd, Jr., and Patrick M. Flachs, United States Attorneys Office, Eastern District of Missouri

Theodore A. Kardis

Follow this and additional works at: <http://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Theodore A. Kardis, *An Interview with Edward L. Dowd, Jr., and Patrick M. Flachs, United States Attorneys Office, Eastern District of Missouri*, 2 Mo. Env'tl. L. & Pol'y Rev. 75 (1994)

Available at: <http://scholarship.law.missouri.edu/jesl/vol2/iss2/3>

This Missouri Attorney General Enforcement Action is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized administrator of University of Missouri School of Law Scholarship Repository.

AN INTERVIEW WITH EDWARD L. DOWD, JR., AND PATRICK M. FLACHS, UNITED STATES ATTORNEYS OFFICE, EASTERN DISTRICT OF MISSOURI

by Theodore A. Kardis

What is the scope of your responsibilities, as well as those of your department?

Dowd: The scope is broad and the way I look at it, whenever we learn of any environmental violation, we will look at it to see if there is any criminal conduct whether it is the Clean Water Act or the Clean Air Act, no matter what the statute is, we are looking to make criminal prosecutions out of environmental violations. We think that has the greatest deterrent effect.

Flachs: I guess I would characterize our attitude in the Eastern District of being one of aggressive but fair prosecution of environmental laws. Actually, that term came from a defense counsel. We were involved in some negotiations before an indictment and he made the comment that it was his opinion that we were aggressive, but fair. We look at every case and every instance with a view toward criminal prosecution, but we take an evenhanded, well thought-out approach in every case.

What directions or goals do you bring to your positions?

Dowd: Environmental prosecution is one of our top priorities in this office and we've really done it through Pat Flachs, who has been a total leader in that area in terms of setting up our Environmental Crimes Task Force, working with state and local agencies, with the EPA and the FBI. I set the priorities and try to provide support — like providing two more Assistant U.S. Attorneys to work with Pat on our environmental crime cases.

We've also worked with Jay Nixon, of course, the state attorney general, who's given us two of his Assistant Attorney Generals to work as Special Assistant U.S. Attorneys to handle these cases because they are very time consuming, very paper intensive, very scientifically intensive and they take a lot of manpower, and a tremendous amount of time and effort to coordinate. Basically my priority is lending as much support as I can to Pat and the other lawyers and members of the Environmental Crimes Task Force.

Flachs: We've had the luxury in the Eastern District of having two very supportive U.S. Attorneys, first Stephen Higgins and now Mr. Dowd to allow us to establish a very comprehensive and I think farsighted approach to environmental enforcement. We established the Environmental Crimes Task Force for the Eastern District of Missouri, which is a joint cooperative effort between the U.S. Attorney's office, the Missouri Department of Natural Resources, the Attorney General's office, the Environmental Protection Agency's Criminal Investigation Division, and the FBI St. Louis office. Now the Task Force has several other members and I want to get into all of them because we're ever expanding. We've got a number of applications pending. The Task Force is a joint cooperative effort to identify, investigate, and in the appropriate circumstances prosecute environmental violations. I think that is the wave of the future as I see it, a collegial, cooperative effort between federal, state and local entities to take and bring a strong enforcement to this area.

What is your enforcement philosophy?

Dowd: Well, I think what Pat said about being aggressive but fair is a good description of our general philosophy, but another very important aspect of that is that making environmental crimes cases and proving them and getting convictions has a deterrent effect. We want these cases to have a deterrent effect on other violators. Consequently, we don't want it just to be the cost of doing business, that "oh, you were caught violating environmental laws, so now your company is going to pay a fine." We indict and prosecute individuals and we've had individuals be sentenced to prison for environmental crimes and we think that it's important that it not just be a cost of doing business. We want businessmen and individuals to know that if they knowingly violate environmental laws and endanger children and all of us really, they're looking to go to prison. We want them to know that so that maybe they'll stop now before they have to say goodbye to their families.

Flachs: I think that the enforcement effort we have in the Eastern District lends credence and strength to the overall enforcement effort — whether it be civil, criminal, or administrative. I think that's the deterrent effect that we have and I think that we've achieved that in a number of instances. I know Mr. Dowd has received a lot of inquiries about the Hoeffell case we just did in the Eastern District which was the first case under the Clean Air Act Stratospheric Ozone Protection Provisions. I just had a conversation with Ron Hunt from Region VII and he said that what we did in that one case had more far-reaching results than three years of efforts on his part to try to bring the CFC issue to the forefront.

What is a criminal violation, i.e., what are your criteria for choosing among the cases that you eventually do prosecute?

Flachs: I guess it's difficult to articulate because no one factor or combination of factors make one case more criminal than the other. I think though that we have general areas that we look at on a continuing basis. First of all, is there nefarious conduct of some sort? Is there a bribe, is there some sort of fraud or false swearing involved in a case? The second area is a major environ-

mental event. That is a tough area in that some environmental events are basically an act of nature or God. I think that we want to take a look at that because of the many negligence provisions in the environmental arena and the higher standard, if you will, that people in the business are held to, a higher standard than in other criminal areas. I think that's something that the general public ought to be happy about because that's part of the deterrent effect and part of looking at each and every instance for potential criminal violations. I'll give you an example. I don't know if you saw the Post Dispatch article about two and a half weeks ago. There was a spill out at one of the facilities in the suburbs here and I got a kick out of reading the environmental manager's response: "Well, it turned out just to be a solvent-based material," but they weren't sure what the spill was. When he was asked why he evacuated everyone and people went in under self-contained breathing apparatuses, he said "We're going to do this right and by the book." So that's the kind of thing that I think that an aggressive program like we have here does for the general public. The third area that we take a look at generally is what I'll call the environmental scofflaw, better yet the regulatory scofflaw — people that just will not follow the rules. That's a tough area because there's a fine line between criminal conduct and being a counter-aggressive advocate for your position from an regulatory standpoint. So we're very very careful in that area.

What kind of people or companies would you consider to be environmental criminals, and how do you get past the corporate veil to individuals?

Dowd: Well, in terms of who do we consider, that's based on individual investigations and what's uncovered in them. But the way you get past the corporate veil is really what Pat alluded to before, that the laws are very strict. There is a doctrine called the responsible corporate officer doctrine that basically says that if you're responsible for the activities that this company is engag-

ing in and the company engages in violations of environmental laws, you are criminally responsible for those violations even if you didn't order it done, or if you weren't in charge of it being done. The reason for that is so that corporate officials can't say "oh, I didn't know about it," so they can't close their eyes and stick their head in the sand and say "oh, I didn't know that we were doing this kind of dumping, or burial of waste." That's a very good law and I think that is something else that's important for people to understand, that you can't just say that it was a lower guy on the totem pole. You are legally responsible.

Flachs: We approach every case with a view towards establishing criminal responsibility at the highest level we can within the corporate structure. We do that in a number of different ways. We do it by working bottom up, sometimes top down. Sometimes we start in the middle. But we go as far as we can to establish the kind of responsibility that is appropriate in every investigation.

Do you feel that your department has been sufficiently funded and staffed to fulfill its mission, and more specifically, has the Pollution Prosecution Act of 1990 been an effective impetus for uncovering criminal violations?

Dowd: I think with the addition of the two new assistant attorney generals from Jay Nixon's office and with two more lawyers working here, we are more sufficiently funded than we were in the past when it was basically just Pat doing everything, although we could still use more help. Like I said before, the cases are extremely time-consuming and you can only handle so many at a time and I think that Pat handles as many as any one person can handle.

Flachs: The Pollution Prosecution Act of 1990 was a bellwether, because Congress mandated a re-apportionment of the resources within the EPA, ordering EPA to find resources from its existing budget for a more aggressive criminal enforcement program. We have been the direct beneficiaries of the Pollution Prosecution Act of 1990 in this

district because as a result EPA has hired a number of criminal investigation agents in response to it and, although some areas may dispute it, in my opinion we were the first city to receive a resident agent in charge. For a while we had one agent here, but we now have four agents in St. Louis to do criminal cases and I think that is a result of (1) our program and (2) the fact that we have shown results in this district. In the same vein, it takes a while to develop both the expertise and the infrastructure to do cases, so I think that we're now about to enter into a more active phase so you'll see some even more direct results in more cases from those agents. In my own opinion, it takes at least a year to a year and a half to get an agent sufficiently trained and familiar with this area of the law, to be an effective, productive agent. These cases are not what they appear sometimes and it takes a lot of effort and resources to ferret out what the true criminality might be and how to prosecute it.

Could you describe the criminal referral process and how the U.S. Attorney's office fits into that process?

Flachs: The criminal referral process is, it will be fair to say, in a state of flux at this time. I think the U.S. attorneys will become much more directly responsible for and may in the future be preeminently responsible for the prosecution in the criminal referral process. The process is like any other criminal case, in that the EPA CID agent brings the case or brings an allegation to the U.S. Attorney's office, and either requests a search warrant or whatever support they might need. We decide whether there is potential for a case there and then we open a case on it and begin to work it as a criminal matter.

How do your department and the EPA work together?

Dowd: Well, since I've been the U.S. Attorney, we've worked very closely with Steve Herman who's the assistant administrator for enforcement in Washington and Earl Devaney, who's basically the director of the enforcement effort and they've been, as

far I'm concerned, very supportive. As Pat said, they've given us four agents here to work in St. Louis which we really desperately needed. Before that we had pretty much relied on the Missouri Department of Natural Resources and local police at the St. Louis Police Department to provide us manpower and the FBI of course. We have a good working relationship with them and they're very supportive. I think that sometimes the EPA has an internal question as to whether they should be focusing on civil or criminal matters and I think that in the recent past they've come around more to the view of being more aggressive in terms of criminal prosecutions. That's what Congress wants, I think that's what the American people demand and truly what the environment needs.

Flachs: I'm interested, intrigued by your question, because I think it presupposes something that is perhaps no longer the reality and that is that EPA is the preeminent organization from an enforcement standpoint and that is why I alluded earlier to my view that the task force concept is the wave of the future. Primarily because when you take a look at environmental statutes, they are probably the purest form of federalism in America today. You've got a program that's mandated by the Congress, but then given to the states to enforce. So you have to take and bring all of those different disparate organizations and concepts into one collegial grouping. That's what we try to do in the task force. So, I would say that the EPA is an important part of our enforcement process and we hope a good partner in that process.

How does your department divide or share responsibility with the Missouri DNR and the AG's office?

Dowd: I think Pat's really talked about that already in that we work very closely with them. They support us in every way with manpower, with laboratory support. It's a cooperative effort and they are a very important part of the enforcement effort just like the FBI, EPA, the Missouri attorney general, local police and our office.

So do you think that the current balance of responsibility between those departments and your department is an appropriate balance?

Dowd: Very much so. I think it's a perfect setup to get the most out of the manpower and resources available. I think, I don't know this for a fact, but I would guess that we have as many or more environmental cases under investigation and that have been indicted in the last few years as any district in the country and most of that credit should go to the Task Force which Pat set up and has really ramrodded.

Flachs: As I view it, the relationship is one of partnership and collegiality.

Dowd: Right.

Flachs: That's how we view it and hopefully they feel the same, along with the other partners.

Dowd: They do.

If a person or a company has violated both federal and state law, and the state has already pursued administrative penalties, are you inclined to prosecute as well?

Flachs: Under the task force concept I would hope that wouldn't happen because when you think about it, it actually inures to the benefit of the regulated community because they won't be whipsawed between the federal and state systems. In the past that could have happened. Now, the way the task force is set up, if we have a violator who everyone agrees ought to be looked at from a criminal perspective, that alleged misconduct will come to our attention in the task force much earlier than it would have under the old system where you would have different groups going on sometimes parallel, sometimes divergent paths. Now, early on in the process the decision is made who is the appropriate entity to handle the different portions of the investigation and what level is appropriate for the enforcement action. That is not to say that you cannot have parallel civil and criminal enforcement actions. I hate to say it, but oftentimes if the law is clear, be careful of it. Legally we can basically overfile over the state. But with the task force con-

cept hopefully that would not happen.

So you're saying that the problem that's occurred in the past where a party would settle with the state and then wonder whether it would continue to have an obligation at the federal level would no longer be a problem with the task force?

Flachs: We would hope not and that's one of the evils we try to address in the task force. Just to give you an idea of the functioning of the task force, we meet religiously every eight weeks and we discuss cases at every meeting. We meet in St. Louis and Jefferson City because some of the partners are in Jefferson City. However, we don't necessarily save everything for the big meeting. For instance, next week we are going to convene a meeting of the appropriate agencies, not the whole task force, about two cases that we have under discussion and whether we're going to just allow those cases to be handled administratively or whether we're going to open a parallel criminal investigation. We have a specific memorandum that was done about parallel proceedings and we are not adverse to allowing the civil portion of the case to go forward as long as the appropriate safeguards are put in place. I think that again inures to the benefit of the regulated community because again, there won't be any question about where both the different enforcement authorities are going.

How does your department handle settlements?

Dowd: Generally you handle them like any other case, in the sense that you look at all of the conduct and what you can prove in terms of what types of violations and what the potential penalties are. Basically Pat and I will usually discuss the settlements and decide what we think is fair. Of course, we discuss it with the other people involved on the task force: What do we think a fair result would be in terms of who should be charged? Who's criminally responsible? Who had knowledge? What should they be charged with? What should they be allowed to plead guilty to? How much exposure should they

have criminally? Should they be exposed to up to five years in prison, 10 years in prison, a \$500,000 fine? I mean in some cases, like the Norfolk & Western case, we determined that two people should be charged criminally and the company should pay over \$6 million in fines and restitution and that's what happened. But that was after looking at all the facts and all the involvement of every employee there and you just come to a conclusion as to what you think is fair under the circumstances and start negotiating and you have your bottom line as to what you will take and that's what we did in that case.

What are some of the major pieces of legislation that you found have provided a springboard for your enforcement efforts?

Flachs: Just about every environmental statute currently in effect has provided us with some cases that are under consideration or have been prosecuted. However, for reasons that aren't exactly clear to me, most of our cases have been in the hazardous waste area and my experience has always been if you have a RCRA violation then you want to take a look to see if there was also a CERCLA hazardous substance violation, failure to report a release of a hazardous substance. That generally proves to be accurate because whenever someone discharges a reportable quantity of a substance, CERCLA is usually violated when the hazardous waste is disposed of. For reasons that are not clear to me we haven't had a whole lot of Clean Water Act cases and Mr. Dowd and Mr. Grace, the U.S. Attorney for the Southern District of Illinois, have sort of addressed that issue with the Mississippi River Counsel and hopefully we're going to make a stronger effort to assess just what needs to be done along the rivers. The Clean Air Act is sort of an interesting statute to enforce from a criminal perspective. We just did the first Stratospheric Ozone Protection prosecution here in the Eastern District several weeks ago. But I guess I'd have to say there is no one statute that has been a springboard. We've done

TSCA cases and we were looking at a FIFRA case. TSCA and FIFRA cases are misdemeanor violations, so the question you then have is do you wish to expend the kind of resources that are necessary in these kinds of cases when your ultimate result is just a misdemeanor violation.

Are there any areas of federal legislation that you have found to have frustrated your department's enforcement efforts?

Flachs: I guess the one area that's difficult from a criminal perspective is the Clean Air Act. It is a very difficult statute and the more recent amendments tried to address that issue, but I haven't seen the concomitant increase in the number of cases that have been brought to us for consideration. So I'd say the Clean Air Act probably is the one area I'd like to see a little bit more straightforward enforcement ability.

What place does education have in a comprehensive program with the goal of environmental compliance? In other words, do you think government has a responsibility to educate industry?

Flachs: I think that the EPA has recognized that to be a responsibility and it is certainly within their purview to make that value judgment. What we do is to try to educate industry by conducting outreach programs. Mr. Dowd makes me available on a regular basis to different organizations to come and discuss what the task force is, what it does, how we approach cases and to a large extent answer their questions like "what makes a case criminal?" They also ask what they should do in the case of (for instance) environmental audits, and I guess my general exhortation to the regulated community is the old saw, "Bad news does not improve with age." So if you've got a problem, come talk to us about it. So I guess to some degree we accept that responsibility to go out and not necessarily educate, but at least communicate with the regulated community.

Dowd: Yes, I think that's true in a lot of ways. I make a lot of speeches to business groups and schools and invariably talk about our environmental policy and how aggressive we intend to be in prosecuting environmental crime. We've written newspaper editorials for the Post Dispatch and of course every time we indict a case, that educates a lot of people also that this is something you want to avoid doing, like the release of the freon into the atmosphere. I was interviewed on radio talk shows in New York and Detroit, and I was interviewed by television and radio from Australia. That really had a lot of impact around the world, that hey, this is something that not only is bad for the environment, but you can get hurt for doing.

How do you feel about a federal environmental audit privilege?

Flachs: When the environmental audit guidelines came out in July of 1990 from the Land and Natural Resources Division, now the Environmental Enforcement Division, we took an aggressive stand. We had several problems with those guidelines when they were issued by Mr. Stewart, then the Assistant Attorney General. Part of my problem was there was not any consultation with the U.S. Attorneys about those guidelines. I think that as a general rule I don't understand why there should be any difference for environmental audits than there would be for any other kind of audit. If there's criminal conduct, then that criminal conduct ought to be aggressively prosecuted. Therefore, there shouldn't be any plenary indulgences given.

Are there any environmental problems which you think have mostly escaped regulation, and if so how would you change the situation?

Dowd: Well, one area that Pat mentioned before is the rivers and that's why we, along with Chuck Grace, the U.S. Attorney in Southern Illinois, formed the Mississippi River Environmental Council. We had U.S. Attorneys come to our first meeting here in St. Louis from every state that borders the

Missouri or Mississippi Rivers. We had people from EPA in Washington, the FBI, Coast Guard, Army Corps of Engineers, conservation groups, environmental groups, and consumer groups. What we were trying to get at was what are the problems on the river and what can we do about it because we have a gut feeling that the rivers are being used as sewers and I think that's generally true among all the U.S. Attorneys and we want it to stop. I think that was a good first step and I think you're going to see that that's an area where there are going to be increased prosecutions.

What interesting cases have you taken to trial lately?

Flachs: Well, as I mentioned, we just took the guilty plea in the Hoeffell case which was the first prosecution of the Stratospheric Ozone Protection measures of the Clean Air Act. We have under indictment a fellow who basically abandoned some property in downtown St. Louis. He left the EPA with nearly a \$1 million dollar cleanup at the last time I saw the figures. Unfortunately he chose to seek asylum in Canada, so we're currently working on an extradition, and I believe that will be the first environmental extradition in the country. I think that as Mr. Dowd said we want to give greater emphasis to the Clean Water Act issues.

Is there anything else you'd like to say to our readers?

Dowd: I would like to say two things. One is when you were asking before about EPA, I read in one of your earlier issues of the MELPR, Martha Steincamp talking about the Environmental Crimes Task Force and she said she thought it was good in terms of focusing attention on environmental crimes and marshalling resources to do those cases, but she also said she saw that the problem with it is "the task force must proceed "full bore" with little attention to targeting priority cases which present the greatest deterrence." That was what I was talking about before: a different view in some parts of EPA than we have here or that I think the U.S. Attorneys

have in general. My view is that we shouldn't be picking one case out of 10 and saying we're going to make a big splash with this. I think if you have ten criminal cases, ten criminals should be prosecuted. When ten banks are robbed we don't say "let's pick one where they got the most money and had the most flair and prosecute that and let the other nine go." I think environmental crimes should be prosecuted just like we really prosecute bank robberies. There is no reason to make nine of those civil cases where we say "oh, give us our money back." They should all be prosecuted. Lastly, I would just say that we really are totally committed to protecting the environment in every way we can and the best way that we can do that in this office is to work with the task force that Pat has set up and identify as many violators as we can, investigate the cases thoroughly and if the evidence is there, indict and prosecute to the full extent of the law.

Flachs: I guess I would like to amplify a little bit on the environmental audit situation and perhaps my plenary indulgence comment was a little bit too strong. My point there is this. I guess it goes back to two things. I advocate to Mr. Dowd, but certainly the policy decisions are his in that area. Nonetheless, I do not accept the immediate incantation, if you will, of an environmental audit privilege. I don't see why those kinds of audits are any different than an audit for any other kind of fraud, like bank fraud for example. In the same vein, if there is a company that has conducted an appropriate audit and did not have pre-knowledge of a problem, again with our aggressive but fair approach, if they are faced with that problem we certainly encourage them to come forward with that information. We will be reasonable and we will be fair in the assessment of that information. We would encourage them again to remember that bad news does not improve with age and that they ought to come forward and let us know about it and then we will work with the companies. I know that we do that in the bank area. If there is a problem with bank fraud, the bank

is not necessarily the defendant. We'll work with them to ferret out who the appropriate responsible individuals are and seek the criminal sanctions against them.

Dowd: We always will treat a company more leniently if they've disclosed the violations to us rather than have us discover it ourselves.

Flachs: Mr. Dowd addressed frontally the issue of Ms. Steincamp's comment that the problem she sees with the task force is we "must proceed "full bore" with little attention to targeting priority cases" and I guess I'm a little bit surprised by that comment in that if the EPA brings us an area that is of major concern to them we make every effort within the task force to pay particular attention to those instances or those companies, or those individuals that they bring forward. The problem we've had is there hasn't been a whole lot of that kind of conduct brought to our attention in the Eastern District. I will also say that we do make every effort to find out what EPA's priorities are. For instance, one of the current issues is environmental equity. Some feel that poor people or poor areas generally receive less attention for enforcement action than the more well-to-do areas and as a result of that there is a disparity in enforcement effort. We had a number of investigations that were ongoing that had, if you will, environmental equity implications and we paid particularly close attention to see whether those cases warranted criminal sanctions. So I guess I'm a little surprised by that being raised as an issue or a problem when (a) it's never been brought to our attention and (b) we never seem to receive any information from Region VII about those kinds of cases. I won't say I'm astounded by that as a criticism, but I'm a bit surprised by it mainly because they've never raised that as an issue with us, and secondly, we make every effort to handle that kind of a situation and I guess we have a specific example of how we are, if you will, on the cutting edge of issues, attuned to deterrent effects and that's the Hoeffell case, with the Stratospheric Ozone Protection portions.

WHERE CAN YOU GET BACK
VOLUMES AND ISSUES?



ORDER THROUGH HEIN!

We have obtained the entire back stock,
reprint and microform rights to

**MISSOURI ENVIRONMENTAL
LAW AND POLICY REVIEW**

Complete sets to date are now available.
We can also furnish single volumes
and issues.

WILLIAM S. HEIN & CO., INC.
1285 Main Street
Buffalo, NY 14209
(800) 828-7571 or (716) 882-2600