



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 24 2007

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of Final OECA Parallel Proceedings Policy

FROM: Granta Y. Nakayama

A handwritten signature in black ink that reads "Granta Y. Nakayama".

TO: Regional Administrators
Regional Counsel
Regional Enforcement Directors
OECA Office Directors

Attached is the final revised Parallel Proceedings Policy which supersedes both the Memorandum, *Parallel Proceedings Policy*, Steven A. Herman, Assistant Administrator, Office of Enforcement (June 21, 1994), and the Memorandum, *Coordinated Settlement of Parallel Proceedings: Interim Policy and Procedures*, Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance (June 9, 1997).

This Policy reaffirms and clarifies the earlier policies, while adding procedural mechanisms to enhance effective communications between the Agency's civil and criminal enforcement programs. The Policy was developed through extensive coordination between the Office of Enforcement and Compliance Assurance's civil and criminal programs, consulting with Regional Counsels and the Department of Justice, Environment and Natural Resources Division's Environmental Enforcement Section and Criminal Enforcement Section.

Should you have any questions, please contact me at (202) 564-2440, or your staff may contact Melissa Marshall at (202) 564-7971 in the Office of Civil Enforcement, or Bette Ojala at (202) 564-4226 in the Office of Criminal Enforcement, Forensics and Training.

Attachment



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SUBJECT: Parallel Proceedings Policy

FROM: Granta Y. Nakayama *Granta Y. Nakayama*

TO: Regional Administrators
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Introduction

Most statutes administered by EPA include both civil and criminal enforcement authorities; effective protection of human health and the environment requires appropriate use of the full range of these authorities to identify and resolve violations. This Parallel Proceedings Policy up-dates the Agency's earlier policies regarding coordinated use of EPA's civil and criminal authorities to achieve environmental compliance.¹

Although the great majority of EPA's enforcement actions are brought as either civil or criminal matters, there are instances in which both enforcement responses are appropriate. These include situations where the violations merit the deterrent and retributive effects of criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions make both criminal and civil enforcement appropriate.

¹ The following are hereby superseded: Memorandum, Parallel Proceedings Policy, Steven A. Herman, Assistant Administrator, Office of Enforcement, June 21, 1994; Memorandum, Coordinated Settlement of Parallel Proceedings: Interim Policy and Procedures, Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, June 9, 1997.

Definitions

EPA defines parallel proceedings very broadly to mean civil and criminal enforcement activities taken with respect to the same or related parties, dealing with the same or a related course of conduct.

- Proceedings include enforcement activities at both the investigative stage (including the use of entry and information-gathering authorities) and the litigation stage.
- Parallel proceedings are simultaneous or sequential enforcement actions taken with respect to the same or related parties and dealing with the same or a related course of conduct.
- Enforcement includes actions for criminal sanctions, civil penalties, injunctive relief, compliance orders and cost-recovery.

Consultation and Cooperation

Active consultation and cooperation between EPA's civil and criminal programs, consistent with all legal requirements, are critical to the success of EPA's overall enforcement program. The success of any parallel proceedings depends upon coordinated decisions by the civil and criminal programs as to the timing and scope of their activities. For example, it will often be important for the criminal program to notify civil enforcement managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the criminal program when there are significant developments in the civil matter that might change the scope of the outcome being sought. In every parallel proceeding, communication and coordination should be initiated at both the staff and manager levels and should continue through the resolution of all parallel matters.

In all parallel proceedings, the civil and criminal programs should initially meet to weigh the options and determine how to achieve the most complete and appropriate relief. In those instances where it is decided that only the criminal matter will go forward, the criminal enforcement program must ensure that the civil program is timely advised if the criminal matter will not be charged. That notification should occur no later than a year before the expiration of the statute of limitations in the civil matter.

Consistent with legal restrictions, emphasis should be placed on ensuring that the activities of each program complement – but do not interfere with – the other program and that information is gathered in such a way that it may be shared to the maximum extent appropriate. Communication and consultation with the Department of Justice (DOJ) should occur regarding all parallel proceedings. In matters where EPA's civil action is purely administrative, EPA's

criminal enforcement personnel should discuss the parallel proceeding with DOJ prosecutors. In matters involving a potential or filed civil judicial action, EPA civil and criminal enforcement personnel should each consult with their DOJ colleagues.

Each Region must establish a system for communication and coordinated decision-making that includes staff and managers from the Criminal Investigation Division (CID) and the Office of Regional Counsel and Regional enforcement office (RC). Similarly, the Headquarters Office of Enforcement and Compliance Assurance (OECA) must establish such a system between the Office of Criminal Enforcement and Forensics Training (OCEFT), the Office of Civil Enforcement (OCE) and/or the Offices of Site Remediation Enforcement (OSRE) and Federal Facilities Enforcement (FFEO), as appropriate, for proceedings where OCE, OSRE or FFEO has the lead or where a significant national interest has been identified. If there is disagreement between Regional civil and criminal enforcement managers as to whether parallel proceedings are appropriate or the order in which the actions will go forward, the applicable OCE, OSRE, FFEO and OCEFT Office Directors should be notified. The Directors will either resolve the issue or refer it to the Principal Deputy Assistant Administrator for OECA.

Types and Management of Parallel Proceedings

There are essentially two types of parallel proceedings. The more frequent parallel proceedings involve criminal actions where a parallel civil administrative compliance or cleanup order is also required for protection of human health or the environment. In these situations, a civil penalty action ordinarily should not be brought unless the criminal proceeding does not go forward.²

The other type of parallel proceedings is where the nature of the conduct is sufficiently egregious that both civil and criminal responses are appropriate. These parallel proceedings are infrequent. They tend to be significant and complex enforcement actions, requiring careful case-by-case management and on-going effective communication and coordination. There are a number of ways to approach management of this second type of parallel proceedings, including:

- Deciding that either the civil or criminal action will be sufficient to achieve the

² In exceptional instances where the respondent/defendant refuses to comply with an order, it may be necessary to impose civil penalties for that failure in order to achieve a timely cleanup. Such action must be jointly decided upon by the civil and criminal programs and subject to the considerations discussed in this section and should be managed pursuant to the procedures used in the more complex type of parallel proceedings.

- Agency's interests;³
- Deferring the civil proceeding until the criminal case is resolved;
- "Carving-out" civil or criminal claims where allegations in either proceeding do not overlap or where the defendants are not the same;
- Proceeding simultaneously while attempting to resolve the civil matter through negotiation, rather than filing the civil action;
- Filing a civil action where it is necessary to preserve a claim and moving to stay the action; or
- Proceeding with the civil and criminal matters simultaneously.

If a determination is made to file a civil complaint before resolution of the criminal matter, the civil and criminal programs should meet to decide whether to request a stay of any part of the civil case pending resolution of the criminal case. This meeting is not required where the civil matter has been resolved either administratively or through a judicial consent decree or other settlement agreement that will be lodged with the filing of a complaint.

Legal and Practical Implications of Parallel Proceedings

In deciding whether parallel proceedings are appropriate and how best to manage them, the enforcement team should be aware of the legal and practical issues affecting related proceedings, as well as the timing of enforcement activities. Factors that favor bringing the criminal proceeding to conclusion first include:

- The significant deterrent and punitive effects of criminal sanctions;
- The ability to use a criminal conviction as collateral estoppel in a subsequent civil case;
- The possibility that imposition of civil penalties might undermine a prosecution or the severity of a subsequent criminal sentence;
- Preservation of the secrecy of a criminal investigation, including completion of covert sampling;
- Prevention of a defendant's premature discovery of evidence in the criminal case, through a defendant's exploitation of the civil discovery process to obtain evidence regarding the criminal proceeding;
- Avoidance of unnecessary litigation issues, such as unfounded defense claims of misuse of process in the civil or criminal action;
- Avoidance of duplicative interviews of witnesses and subjects;

³ Generally, if a criminal proceeding can accomplish complete relief the matter should go forward criminally. However, where the civil proceeding has been significantly developed and the criminal proceeding is relatively undeveloped and speculative, then the civil matter should continue, maintaining coordination with the criminal program.

- The Speedy Trial Act requirements that trial be held within specified time frames after indictment.

Factors supporting the initiation or continuation of the civil judicial or administrative action prior to conclusion of the criminal action include:

- A threat to human health or the environment that should be expeditiously addressed through preliminary injunctive relief or response action;
- A threat of dissipation of the defendant's assets;
- An immediate statute of limitations or bankruptcy deadline;
- Where only a marginal relationship exists between the civil and criminal actions;
- The civil case is in an advanced stage of negotiation or litigation when the potential criminal liability is discovered;
- The civil case is integral to a national priority and a decision to postpone the case could substantially and adversely affect implementation of the national effort.

Memorialization

Once the civil and criminal programs decide to pursue parallel proceedings and agree upon their timing, they should promptly memorialize these decisions in a case-specific Parallel Proceedings Memorandum. The Memorandum should provide only essential information, including a description of the key factual allegations and potential statutory and regulatory violations. Most importantly, the Memorandum must contain a summary of the decision(s) regarding the timing and scope of the parallel proceedings.

The Memorandum must be signed by the appropriate CID Special Agent in Charge and the RC. In identified cases of national interest or those in which OCE, OSRE or FFEO has the lead for the civil matter, the Memorandum should be signed by the OCEFT and OCE, OSRE or FFEO Office Directors. It should be written as a memorandum to the case file and distributed to all members of the civil and criminal case teams. In cases of national interest, a copy of the Memorandum should also be provided to the Principal Deputy Assistant Administrator of OECA. As parallel proceedings are developed and moved toward resolution, it may be necessary to revisit the decisions recorded in the Memorandum; any new or modified changes should be documented and then distributed to the civil and criminal case teams. The Memorandum should be marked as Attorney/Client Privileged and Work Product and be maintained as an enforcement confidential record.

Legal Guidelines

Parallel proceedings present specific legal issues regarding investigations, discovery and litigation. In addition to complying with all legal and ethical requirements, enforcement personnel should follow practices that avoid even the appearance of overreaching or unfairness.

These guidelines apply to all parallel proceedings.

Grand Jury Materials

EPA criminal investigative personnel obtain access to grand jury materials only if permitted by a federal prosecutor. Agency personnel must comply with the prosecutor's directions in order to assure their compliance with the law and procedures of that judicial district.

Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of any matter occurring before a grand jury or information that is part of a grand jury's record except in very limited circumstances, usually involving an authorizing order from the court. EPA personnel must take utmost care not to violate this secrecy rule; violators may be subject to civil and/or criminal sanctions. The Rule prohibits using grand jury information for any purpose other than assisting the prosecutor in the criminal proceedings; for example, knowledge drawn from the grand jury record must not be used in civil enforcement activities, absent a court order authorizing the use. To avoid either the release of grand jury information or the appearance of misuse, EPA personnel to whom Rule 6(e) grand jury information has been disclosed should not be assigned to any parallel civil enforcement matter.

Criminal investigative information that is not subject to grand jury secrecy and use rules may be shared with the civil program without violating Rule 6(e). However, once grand jury proceedings are initiated, such information sharing should not occur unless the prosecutor agrees that the disclosure or use will not violate Rule 6(e). When this information sharing does occur, a record should be made in the criminal case file of DOJ's agreement that the information could be shared; what material was transmitted; the source of that information (*i.e.*, a description of its non-grand jury status), and who may receive it.

Information Requests and Inspections

The criminal program does not direct the civil program's investigative activities, nor does the civil program direct the criminal program's investigative activities. It is entirely appropriate for the civil enforcement personnel to bring information to the attention of the criminal program and for criminal enforcement personnel to bring information to the attention of the civil program, subject to the restrictions discussed in this Policy's section on grand jury materials, above.

EPA's regulatory inspections, including administrative searches with a warrant, must be objectively reasonable and properly limited within the scope of the authorizing statute and warrant. In every situation, the government has a duty to act in good faith and must ensure that its use of administrative entry authorities is properly within the mandate of the Fourth Amendment.

EPA's information-gathering authorities must be used in accordance with authorizing

statutory provisions. There is no general legal bar to using administrative mechanisms to investigate suspected criminal matters. However, the government must not intentionally mislead a person as to the possible use of any responsive information in the criminal context in such a way as to violate the Fifth Amendment Due Process Clause or the Self-Incrimination Privilege.⁴ Accordingly, although not a legal requirement, it is a common EPA practice to include a warning in EPA information requests that all information sought may be used in an administrative, civil judicial or criminal action. Furthermore, it is EPA policy that any information request issued by EPA's criminal enforcement program must clearly reflect that the information is being sought by that program.

Civil Discovery

Any information obtained as a result of a legitimate civil purpose, including discovery, may be shared with criminal enforcement personnel.⁵

In responding to civil discovery, government attorneys may assert a law enforcement privilege to protect responsive files in a parallel criminal case. If there is a motion to compel production of the criminal files, the law enforcement privilege must be asserted by a high EPA official (such as the Assistant Administrator or Deputy Assistant Administrator for OECA) explaining the harm that would be caused by disclosure of the records. This is a qualified privilege, however, and can be overcome if a litigant's need outweighs the government's interests in keeping the information confidential. Thus, the possibility that criminal investigation files might have to be produced is a factor to consider when determining whether civil litigation should go forward while the criminal proceeding is pending. Prior to informing a defendant of a decision by EPA not to assert this privilege, the civil attorney should coordinate closely with the EPA and Department of Justice criminal programs to ensure that the privacy interests of individuals mentioned in the criminal case records are fully protected.

Double Jeopardy

Parallel proceedings under the environmental laws do not give rise to double jeopardy

⁴ The Fifth Amendment privilege against self-incrimination may only be raised by individuals, not by business entities. A business must respond to an information request, even if individuals within that entity claim the privilege and refuse to respond in their individual capacities.

⁵ United States v. Kordel, 397 U.S. 1 (1970). Note that protected Confidential Business Information can only be disclosed to those authorized to receive it.

concerns.⁶ The Double Jeopardy Clause of the Fifth Amendment only protects against the imposition of multiple *criminal* punishments of the same person for the same offense. To raise even a question about possible double jeopardy arguments, a civil penalty would have to be so punitive in form and effect that it transforms an intended civil remedy into a criminal penalty.

Disproportionate Penalties

Civil penalties should not be imposed that, taken together with criminal sanctions, are so grossly disproportionate to the underlying violations that they violate the constitutional prohibition of excessive fines.⁷

Ethical Considerations

Attorneys and other persons representing EPA in enforcement actions must never use the threat of criminal prosecution to obtain a civil settlement, nor may they use the threat of civil enforcement to resolve a criminal matter. This ethical rule is important in every case, and is particularly important in the context of parallel proceedings to avoid even the appearance of impropriety.

Coordinated Resolutions

A coordinated resolution is the simultaneous resolution of both civil and criminal liability in a parallel proceeding.⁸ Although not required by law, it is EPA policy that only the defendant may make this proposal. In such an event, EPA, in conjunction with DOJ, should consider whether coordinated settlements of civil and criminal liability would be a timely, practical and appropriate resolution of the violations and in the best interests of the United States. A coordinated resolution would not be appropriate if, for example, the process of negotiating civil relief would unduly delay or interfere with the criminal proceeding. It would also be inappropriate if the negotiations regarding the criminal case limited EPA's ability to respond to an environmental or human health threat or limited the Agency's ability to obtain appropriate injunctive relief.

⁶ Hudson v. United States, 522 U.S. 93 (1997).

⁷ Id., 522 U.S. at 103.

⁸ Simultaneous resolutions of a defendant's civil and criminal liability were formerly known as "global" settlements. That term is now applied to civil settlements that resolve similar violations at most or all of a defendant's facilities. The term "coordinated" resolutions more accurately describes the simultaneous conclusion of parallel civil and criminal proceedings.

When EPA approves a coordinated resolution, the following limitations apply:

- The settlement documents must be negotiated separately;
- EPA will not agree to release criminal liability in a civil settlement;
- EPA will not approve the waiver or discharge of civil liability in a criminal plea agreement; and
- The civil and criminal resolutions must conform to all applicable policies; and must be memorialized in separate settlement documents.

Reservation of Rights

This Policy provides internal guidelines for the Environmental Protection Agency. It is not intended to, and does not, create any rights, substantive or procedural, that are enforceable at law by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Environmental Protection Agency.