

Chapter Eighteen

FIFRA CRIMINAL ENFORCEMENT

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FIFRA CRIMINAL ENFORCEMENT

INTRODUCTION

Over the past several years, EPA's criminal enforcement program has become a significant tool in enforcing environmental requirements. The success of the criminal enforcement program has increased incentives for voluntary compliance by the regulated community.

EPA's criminal investigations are handled by Special Agents of the Criminal Investigation Division (CID). Other key members of the criminal enforcement program include the Regional Criminal Enforcement Counsel (located in each Office of Regional Counsel) and the Office of Criminal Enforcement Counsel (located at EPA Headquarters in Washington, D.C.). In addition, many States have instituted their own environmental criminal enforcement programs.

FIFRA inspectors are among the pesticide enforcement personnel most likely to initially detect criminal environmental violations. Any such discoveries can be discussed with either EPA's Special Agents or Criminal Enforcement Counsel. A formal referral memorandum or "package" is not necessary to obtain an assessment of the potential criminal implications of a FIFRA violation. Many environmental criminal investigations and prosecutions can trace their beginnings to a single telephone call by an alert inspector.

The Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, can provide special training for interested FIFRA inspectors (and other environmental technical personnel) who are involved in criminal investigations. The purpose of this chapter is to heighten FIFRA inspectors' awareness of the environmental criminal enforcement program and the critical role they play in this program. In addition to the overview in this section, special considerations related to criminal investigations are noted, where appropriate, throughout this manual.

THE CRIMINAL PROVISIONS OF FIFRA

Section 14(b) of FIFRA (7 U.S.C. section 1361) makes the knowing violation of any provision of FIFRA punishable as a crime subject

to criminal penalties consisting of fines and/or a term of imprisonment. More severe criminal penalties are provided for convicted defendants who are pesticide registrants, applicants for registration, pesticide producers, and commercial applicators than for private pesticide applicators.

Section 12 of FIFRA (7 U.S.C. section 136j) specifically lists the unlawful acts that are subject, not only to civil and administrative enforcement, but also to criminal investigation and prosecution. A FIFRA inspector must be alert to the fact that the commission of any of these unlawful acts may potentially represent a criminal case.

THE STATE AND FEDERAL ROLES IN CRIMINAL ENFORCEMENT OF FIFRA

Sections 26 and 27 of FIFRA (7 U.S.C. sections 136w-1 and 136w-2) provide that a State shall have primary enforcement responsibility for pesticide use violations during any period for which the Administrator determines that such State: (1) has adopted adequate pesticide use laws and regulations, and (2) has adopted and is implementing adequate procedures for the enforcement of such State laws and regulations. The States are initially allowed 30 days to commence appropriate enforcement actions for such violations. Criminal FIFRA violations, though, that do not constitute pesticide use violations can be investigated and prosecuted on the federal level without waiting for State authorities to exercise their primary enforcement responsibility.

FIFRA'S RELATIONSHIP TO OTHER FEDERAL CRIMINAL LAWS

Any FIFRA inspector who uncovers what he or she believes to be any type of criminal environmental offense must bring this fact promptly to the attention of their EPA supervisor and in turn, notify the EPA criminal enforcement counsel or Special Agents or appropriate State authorities. This is true even if it does not appear to be a FIFRA violation. Criminal environmental conduct may also be prosecuted under one of the other environmental laws or one of the general criminal laws.

Submission of false information as part of registration may, for instance, not only constitute a violation of FIFRA, but also of the federal false statement statute and conspiracy laws. The unlawful disposal of pesticides may be a criminal violation of the Resource Conservation and Recovery Act (RCRA) or if the disposal was into a river, such conduct could amount to a criminal violation of the Clean Water Act (CWA). Which statute to proceed under may not be decided until the investigation is almost completed and may depend on factors such as the evidence available to establish an offense and the different penalty levels of the involved statutes.

OVERVIEW OF CRIMINAL ENFORCEMENT

Special Attention to Defendant's Rights

Investigations of alleged criminal activities place even greater responsibilities on the participants involved. Because more severe penalties may be imposed on individuals convicted of violating the criminal provisions of environmental laws or other statutes, there are greater constitutional safeguards to protect their rights. Thus, it is of critical importance that all participants in criminal investigations be fully aware of these safeguards and conduct themselves accordingly. Special Agents of the Criminal Investigation Division (CID) provide the necessary instructions and directions to the investigation team on these matters.

From the beginning of a criminal investigation until it is completed, the constitutional rights of defendants must be fully protected and established investigation procedures must be followed. The special emphasis given to these matters results from the potential defendant's desire to conceal his or her criminal activities and, when detected, their frequent challenges to the procedures used to apprehend them and to seize evidence of their criminal misconduct.

These challenges to the government's case principally stem from the "Exclusionary Rule," which prohibits the use of evidence during the prosecution of a defendant whose constitutional rights were violated by the procedures used to collect that evidence. Also excluded is any information subsequently derived from improperly collected evidence. The procedures used by EPA's CID are designed to ensure protection of the defendant's rights and leave a documentary record of the investigation that will support admission of the resulting evidence into a prosecution.

Another frequent procedural challenge occurs when a suspect provides statements to a law enforcement officer, after being taken into custody. The Special Agent must first issue a "Miranda Warning" and obtain a knowing waiver of such rights if the statements are to be admissible evidence. Defendants also have a right against self-incrimination. This means that a defendant can be silent and make the government prove its case.

Criminal Enforcement at EPA

The criminal investigative staff is a part of the Office of Criminal, Enforcement, Forensics, and Training (OCEFT) in Washington, D.C. with Special Agents operating out of field units at all Regional offices. In addition, EPA technical personnel, such as engineers and field inspectors, have received special training to assist the criminal investigative staff when needed. As environmental criminal enforcement has expanded, increasingly joint investigations are conducted involving the EPA and other federal enforcement agencies (such as the FBI, Fish and Wildlife Service, and U.S. Customs) and with State enforcement offices.

The Agency has a staff of attorneys experienced in both criminal and environmental law who work with the investigators and DOJ in the investigation and prosecution of criminal cases. Located at EPA Headquarters and within the Offices of Regional Counsel, they provide legal guidance and training in criminal enforcement matters. An inspector must not hesitate to contact any Special Agent or Criminal Enforcement Counsel to discuss any aspect (general or specific) of the criminal enforcement program.

RECOGNIZING POTENTIAL CRIMINAL VIOLATIONS

It is neither expected nor desired that FIFRA civil inspectors and investigators be able to define or even that they attempt an in-depth legal or investigatory analysis of whether criminal conduct has occurred or is occurring at regulated sources. These issues are complex and even the highly trained Special Agents in the CID usually do this in consultation with DOJ and EPA Criminal Enforcement attorneys.

Nevertheless, it is important that all acts of the regulated community exhibiting actual or suspected environmental criminal conduct be referred to the CID for review and possible investigation. The FIFRA inspector is an indispensable person in initially uncovering and/or identifying pesticide violations that may warrant criminal enforcement action.

The problem is, how does one recognize those actions that may potentially constitute criminal violations? How does one recognize:

- < Knowing or willful behavior - defined as criminal under all federal statutes?
- < Fraudulent reporting - defined under all statutes and the U.S. code as criminal behavior?

Evidence of criminal wrongdoing is seldom blatant, and usually is quite subtle. The FIFRA inspector must try to learn as much as he or she can when one of the types of findings listed below puts up a red flag of the possibility of criminal actions, and the Special Agent or Criminal Enforcement Counsel must be consulted. The following is exemplary only:

- < **Conflicting Data.** Two sets of books, inconsistent monitoring reports on the same incident.
- < **Conflicting Stories.** When an inspector is led to believe one thing and sees something quite different in records or through observation.
- < **Unsubstantiated Data.** Monitoring or other record keeping and reporting information which lacks any record or information to support reported information should raise suspicion.

- < **Deliberate Actions.** When an employee says he was told to do something the FIFRA inspector knows is illegal.
- < **Claims of Ignorance About Requirements.** Documentation displaying knowledge is discovered in records, or others make statements during interviews disclosing knowledge.

If any of these problems are in evidence, or others are present that make the inspector suspicious, he or she must attempt to obtain further information through interviews, observations, and records reviews and promptly consult with the CID about such findings.

Criminal Enforcement Compared to Civil Enforcement

This manual focuses primarily on procedures and techniques for collecting evidence that may ultimately lead to a form of administrative or judicial civil action. Generally, these same procedures and techniques are employed in criminal investigations as well. There are several exceptions, however, the most important of which are in the areas of search and seizure and compelling testimony. Because of the unique sensitivities and legal issues involved, FIFRA inspectors assisting in criminal investigations must always follow the instruction of the Special Agent (and enforcement attorney).

Searches

Criminal Investigators/Special Agents may search a person or the person's property when seeking evidence of alleged criminal activity only under the following circumstances: (1) with the person's consent; or (2) after obtaining a warrant based upon sworn testimony that demonstrates the existence of "probable cause" to believe that a crime has been committed and that the search is necessary to obtain evidence of the crime. The probable cause standard for obtaining a warrant in a criminal investigation is far more stringent than for a warrant in a civil enforcement case.

EPA's Special Agents seek and execute criminal warrants, but FIFRA inspectors may be requested to accompany criminal investigators to aid in the investigation. In such cases, instructions of the criminal investigator must be strictly followed since any evidence collected outside the authority of the search warrant would be illegally obtained.

It is important to point out, however, that evidence of a crime discovered through civil enforcement activity is generally admissible in court to prove the crime. For example, information collected by a FIFRA inspector during a routine inspection (with consent or in an administrative warrant) could be admitted as evidence in a criminal case provided it was lawfully obtained during his or her normal course of duties. Similarly, evidence of a crime obtained in accordance with the "open field" doctrine (e.g., an observation of illegal pesticide use from a public road) would also be admissible.

Inspectors frequently ask how the reading of “Miranda rights” applies to the facility staff they interview, particularly if the interviewee's answer to questions begins to suggest that there may be criminal activity. Miranda rights only apply when a person is in custody, that is, once he or she has been arrested. Information provided in routine interviews is lawfully obtained evidence that may be used in furtherance of a criminal investigation and prosecution.

Compelling the Production of Information

In addition to obtaining evidence through a search warrant, a prosecutor may subpoena witnesses to provide information through testimony to a grand jury. Although someone may be subpoenaed to require him/her to provide information in a civil proceeding, the prosecutor's ability to compel information in a criminal investigation is more powerful:

- < A witness who fails to appear in response to a subpoena is subject to immediate arrest.
- < An uncooperative witness can be forced to provide information through an enforceable court order.
- < Testimony provided to a grand jury for long-established, compelling policy reasons is secret, with severe penalties for anyone who violates that secrecy. (These rules of grand jury secrecy severely limit what can be disclosed by an agent concerning an investigation).

Persons subpoenaed for a civil proceeding are obligated as follows:

- < If a witness fails to comply with a subpoena, penalties can only be obtained after a hearing (a process that can take weeks).
- < In addition, the information provided by the witness cannot be kept confidential if it falls within the scope of the other side's discovery requests.

Charging the Commission of a Crime

Unlike in a civil judicial case where an agency files suit, or a civil administrative case where an agency issues an administrative order, it is the grand jury or U.S. Attorney who charges persons or corporations with crimes. A grand jury brings a charge by returning an “indictment,” which generally is issued for felonies (e.g., crimes subject to punishment by imprisonment for longer than one year). The U.S. Attorney brings a charge by filing an “information,” which generally is used in connection with misdemeanors (i.e., crimes subject to punishment by imprisonment for one year or less).

Discovery

The general rule in criminal cases is that there is minimal discovery permitted by the defendant but there are exceptions to the rule. For example, case law requires a prosecutor to give to the

defendant before the trial any exculpatory evidence (evidence that may show innocence) known to the prosecutor. A number of rules similar to this have been the basis for a few courts to adopt an open file policy. It allows counsel for the defendant to access the prosecutor's entire file. Defendants in criminal cases, however, cannot file interrogatories or request for admissions, or take depositions of witnesses, as they can in civil cases. Defense counsel may attempt to learn information about the government's case by directly contacting an inspector. While an inspector is not prohibited from communicating with defense counsel, it should be noted that the inspector is in no way required to talk to defense counsel. Inspectors that may be contacted about a pending criminal matter are strongly encouraged to consult with an agent or enforcement counsel first.

Burden of Proof

Because criminal sanctions can be severe, the burden of proof is greater in a criminal prosecution than it is in a civil enforcement case. To prove a violation in a civil enforcement case, the enforcement attorney is required only to show that a "preponderance of the evidence" is on his or her side (sometimes described as needing 50 percent of the material evidence on the government's side). To prove a criminal violation, a prosecutor must prove his or her case "beyond a reasonable doubt." If a reasonable doubt exists in the trier of facts mind about the defendant's guilt after the conclusion of a criminal case, the defendant must be acquitted.

Penalties

A person convicted of criminal violations of an environmental statute may be imprisoned and/or fined and, perhaps of greater consequence, suffer the societal stigma that is attached to criminal conviction. A person found through civil enforcement action to have committed a violation is subject only to injunctive relief orders, and/or financial penalties.

All individual defendants convicted of environmental criminal offenses that occurred after November 1987, will be sentenced pursuant to the new sentencing guidelines adopted to achieve uniformity in all sentences for federal trial courts nationwide. The sentencing guidelines for offenses involving the environment will increase both the likelihood of a minimum amount of imprisonment and the dollar amount of the fine imposed for knowing wrongdoing causing harm to the environment or endangering public health.

In addition, to make probation a meaningful and effective criminal sanction, the Office of Criminal Enforcement, Forensic, and Training has compiled a list of all individual and organizational defendants who are placed on probation and the length of such probation. Inspectors must familiarize themselves with the list to ensure that convicted criminal environmental violators are sufficiently monitored so that they do not repeat their criminal activity.

Criminal Investigations

Initiating an Investigation

An “initial lead,” or allegation of potential criminal activity, may come to the Agency from any of several sources, including State agencies, routine compliance inspections, citizens, and disgruntled company employees. Regardless of the source of the tip, whoever receives the tip must immediately notify the Special-Agent-in-Charge (SAIC) in the Region. The SAIC will evaluate the lead and, if necessary, assign a Special Agent for follow up, assign a case number, and open an investigative file.

If the reliability of the lead is unclear, the Special Agent will conduct a preliminary inquiry to determine the credibility of the allegation and make an initial assessment for the need of a more thorough investigation. This initial inquiry is brief and involves no extensive commitment of resources or time. The purpose is to reach an initial determination of the need for a complete investigation. The agent may consult with program enforcement personnel and legal staff to help determine whether a particular violation warrants criminal enforcement action.

During the course of a routine inspection, FIFRA inspectors are in a unique position to follow such leads. Inspectors must be alert to possible criminal activities such as falsified information in records and reports and illegal pesticide use. Facility staff employees may also volunteer information to inspectors about possible criminal activities.

Conducting a Criminal Investigation

If after the preliminary inquiry a decision is made to pursue a thorough investigation, the Special Agent contacts the Office of Regional Counsel and other appropriate offices to determine whether any civil enforcement action is pending or contemplated against the investigative target. If technical support for the investigation is needed, as it increasingly is as criminal cases become more complex, the Special Agent asks the appropriate Regional Program Division Director(s) to designate specific individuals to work on the investigation. All these activities are carried out in consultation with the Office of Enforcement Compliance, Enforcement, Forensics, and Training.

The Special Agent manages the investigation, under the supervision of the SAIC, and is responsible for the following:

- < Determining the basic investigative approach.
- < Leading in conducting interviews.
- < Assembling and reviewing records.
- < Planning and performing surveillance.
- < Coordinating with the U.S. Attorney's office and other federal, State, and local law enforcement agencies.
- < Communicating with informants.

- < Contacting other witnesses.
- < Performing other investigative functions.
- < Completing all required reports.
- < Carrying out all coordination and notification requirements.

Inspectors may be assigned to assist the Special Agent in one or more of these above duties.

Security of Criminal Investigations

Information on criminal investigations must be provided only on a “need-to-know” basis. Active criminal investigations must not be discussed with personnel outside of the Agency, except as is necessary to pursue the investigation and to prosecute the case.

Agency policy is to neither confirm nor deny the existence of a criminal investigation. If a FIFRA inspector receives a request for information from the news media, it must be referred to the Special Agent, who will determine the response in consultation with other Agency offices.

Written materials pertaining to the investigation must receive special care and attention. The CID criminal investigative offices and enforcement division offices are equipped with secure office space, filing cabinets, and evidence vaults. Similar security measures must be used by Regional staff assigned to an investigation.

Parallel Criminal and Civil Proceedings

While FIFRA inspectors do not routinely become involved in criminal investigations, the distinction between civil and criminal enforcement is often unclear and inspectors may find themselves associated (directly or indirectly) with a criminal investigation. Sometimes, while pursuing a criminal action, the Agency will also conduct a civil action if the environmental consequences of a violation pose a hazard requiring remedial measures by a defendant. When there are parallel criminal and civil enforcement actions relating to the same violation, it is important that the distinction between the two be clear to ensure that the government not be liable to claims of misusing criminal investigative processes for civil enforcement purposes and vice versa. There are five rules of thumb a FIFRA inspector will follow when involved in ongoing parallel proceedings:

- < Civil/administrative and criminal enforcement actions may be conducted simultaneously whenever deemed necessary by the EPA Assistant Administrator for the Office of Enforcement and Compliance Assurance in order to seek immediate relief to protect human health or the environment.

- < Until the Agency refers a matter to the Department of Justice for possible criminal prosecution, all EPA employees must continue to collect information (data) from potential defendants with the understanding that it may be used in either a civil or a criminal enforcement action.
- < No EPA employee shall ever tell a person or entity from whom information is being sought that it will not be used by the Agency as evidence in a criminal prosecution.
- < Once the Agency has referred a matter to the Department of Justice for possible criminal prosecution, all FIFRA inspectors and other EPA employees who continue to collect information/data from potential defendants (unless acting as an investigator for the prosecutor's office or CID) must have a clear need to obtain such data for an existing regulatory purpose that is wholly separate and independent of the criminal investigation.
- < Questions concerning any issue relating to parallel proceedings can be answered by criminal enforcement counsel at Headquarters or in the Office of Regional Counsel.

Compliance with the Jencks Act

The purpose of the federal Jencks Act is to allow the defendant in a criminal prosecution to have, for impeachment purposes, all of the relevant and competent statements of a governmental witness. If the defense's ability to cross-examine a witness is impeded because the government lost, either deliberately or inadvertently, the Jencks Act material, the Court may decide either not to allow the witness to testify or to strike the witness's entire testimony. Needless to say, the effect of excluding a government witness's testimony could be significant. Courts expect law enforcement agencies, including EPA, to have procedures to preserve potential Jencks Act Material.

Essentially, the Jencks Act provides that the relevant notes, records, and reports of a witness who has testified for the government in a criminal prosecution must be turned over to the defense if the defense requests them through the court. The request can only be made after direct examination of the witness, and material that does not relate to the subject matter of the testimony is exempt. The effect is limited, after-the-fact discovery. (In civil cases, discovery processes give the other side almost unlimited access to government information on the case prior to trial.)

For the inspector, the principal effect of the Jencks Act is to underscore one of the major points of this chapter - that accurate and complete notes, records, and reports are not only good practice, but essential. Further, notes and records must be factual,

containing no opinions or biases of the inspector. Finally, to avoid any potential appearance that Jencks Act material has been lost, the inspector must throw nothing away not even a scrap of paper with rough calculations on it. All materials associated with a criminal investigation must be stored in accordance with security procedures.

Participation in Grand Jury Investigation

With rare exception, federal grand juries are used to develop EPA's criminal cases following referral to DOJ. Frequently, EPA employees, including inspectors, attorneys, and technical personnel, assist in these grand jury investigations under DOJ supervision.

The conduct of Agency employees is frequently subjected to close judicial scrutiny, since defense attorneys routinely challenge aspects of the grand jury presentation during motions filed after an indictment. Accordingly, Agency employees who assist DOJ during the criminal investigations must be familiar with, and abide by, the rules of conduct established by case law and the Federal Rules of Criminal Procedures.

When involved in grand jury investigations, any EPA employee must follow the "Agency Guidelines for Participation in Grand Jury Investigations." Copies are available from the Regional Counsels and the Office of Enforcement and Compliance Assurance.

CASE STUDIES

The following are examples of how pesticide violations led to environmental criminal prosecutions:

Case Study No. 1

EPA's Regional office was alerted by a competing pesticide manufacturer that a firm was selling an algicide without an EPA Registration Number. The Region referred the allegation to the State Department of Agriculture. The State inspector confirmed the sale of the unregistered pesticide and had a stop sale order issued. After new allegations concerning the sale of the pesticide and submission of false pesticide reports to both the State and EPA, a federal search warrant was obtained and executed at the company. Evidence substantiating the false labeling of pesticides and the repeated sale of unregistered pesticides was seized.

The criminal investigation resulted in guilty pleas by the company, its president, and vice-president to federal charges of selling in 10 States unregistered pesticide products in knowing violation of FIFRA. The company was fined \$70,000, the vice-president \$10,000, and the president was sentenced to two months in jail. All were placed on probation for a period of five years.

Case Study No.2

As an act of spite in an ongoing dispute with his neighbors, a farmer disposed of waste pesticides, including lindane, parathion, strychnine, endrin, and dieldrin on the bank of a river used by his neighbors for recreational and farm use. An emergency cleanup was undertaken by the State.

EPA and State environmental officials jointly decided to handle the matter as a criminal violation of the federal hazardous waste statute since more severe penalties were then available than under other federal or State laws.

Case Study No.3

Two commercial pesticide applicators were arrested on State charges of operating without a license and federal charges of misuse. These applicators operated separate unlicensed structural pest control businesses for at least three years, applying restricted use agricultural pesticides indoors and distributing unlabeled pesticides in food and beverage containers. One of the commercial applicators was found guilty of 21 FIFRA misdemeanor counts of pesticide misuse, and the other commercial applicator was found guilty on all 48 counts of pesticide misuse. The commercial applicators were sentenced to 5 and 6 ½ years in prison, respectively. These convictions represent the longest sentence in the U.S. for an exclusively environmental crime.