THE INVESTIGATION

OF ENVIRONMENTAL CRIMES:

HOW TO PREPARE, RE-ACT

AND PROTECT YOURSELF

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I. INTRODUCTION

The criminal prosecution of environmental wrongs is not new to society. In the 1970s, however, the regulation of activity affecting the environment virtually exploded resulting in greater types of conduct being declared criminal. Allegations of criminal activity (crimes against nature) typically also include allegations of "traditional" criminal activity such as conspiracy, aiding and abetting, mail fraud and perjury. The investigation of environmental criminal activity usually encompasses scrutiny of multiple individuals and/or entities. As a result, it is absolutely critical to obtain at least some knowledge of the steps available to protect your company and yourself in an environmental criminal investigation.

II. CRIMINAL STATUTES

A. Major Environmental Criminal Statutes

Environmental criminal provisions have been "on the books" since the late-1800s, with the enactment of the Rivers and Harbors Act of 1890.[1] However, it was not until the 1970s that environmental criminal statutes began to fully blossom. Currently, there are twelve major environmental criminal statutes that govern the actions of the regulated community.[2]

B. Traditional Criminal Statutes Supplementing Environmental Criminal Statutes

In addition to the environmental criminal provisions, prosecutors "supplement" indictments with the addition of what are considered typical criminal statutes, such as conspiracy, aiding and abetting and others.[3] This "stacking" of offenses is important as in the

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1 33 U.S.C. § 406, 407 and 411.

2 Clean Air Act ("CAA"), 42 U.S.C. § 7413(c); Clean Water Act ("CWA"), 33 U.S.C. § 1319(c); Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9603(b); Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(d) and (e); Marine Protection, Research and Sanctuaries Act ("Ocean Dumping Act"), 33 U.S.C. § 1411 and 1415(b); Toxic Substance Control Act ("TSCA"), 15 U.S.C. § 2615(b); Emergency Planning and Community Right to Know ("EPCRA"), 42 U.S.C. § 11045(b)(4); Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136(j) and (1); Migratory Bird Treaty Act ("MBTA"), 7 U.S.C. § 703; Endangered Species Act ("ESA"), 16 U.S.C. § 1538 and 1540; Transportation of Hazardous Materials Act ("THMA"), 49 U.S.C. § 1809. *See also* note 1.

3 Conspiracy, 18 U.S.C. § 371; Aiding and Abetting, 18 U.S.C. § 2; False Statement, 18 U.S.C. § 1001; Mail Fraud, 18 U.S.C. § 1341; Wire Fraud, 18 U.S.C. § 1343; Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1963; False Claims, 18 U.S.C. § 287; Perjury, 18 U.S.C. § 1623; and Obstruction of Justice, 18 U.S.C. § 1503.

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event of a conviction, all of the activity charged is considered in the sentencing phase even though some of the charges may have been dropped or have resulted in an acquittal.

III. PERSPECTIVE (What Is Different About Environmental Crimes?)

A. Standards of Culpability

Criminal sanctions can be imposed under standards of strict liability, negligence, knowing conduct and intentional misconduct. Virtually all federal environmental statutes create general intent crimes, which means the government is not obliged to prove specific intent to violate the law or a 'black heart." Ignorance of the law is no excuse. The government must prove as part of its *prima facie* case that the defendant knowingly permitted, directed or participated in acts which are shown at trial to violate the law, irrespective of intent. A "knowing endangerment" charge under RCRA, CAA and/or the CWA could net a jail term of 15 years even in the absence of intent to do actual harm.

B. The Responsible Corporate Officer Doctrine

The theory of the Responsible Corporate Officer doctrine is that knowledge may be inferred from the position of responsibility and authority with a company.[4] The definition of "person" in the CWA and the CAA includes "any responsible corporate officer."[5] In its extreme, the doctrine equates *knowing* offenses with *negligence*.[6] This position has not gained universal support and some courts are rejecting the "should have known" standard.[7] The defense position is that status, position and authority should be used only as circumstantial evidence of actual knowledge.

IV. RESPONDING TO CRIMINAL INVESTIGATIONS

A. Corporate Strategy

In a criminal investigation, a corporate entity will typically have four broad interests that must be addressed. First, determine, under the cloak of privilege, what happened, why and who participated. This means that counsel should get involved as soon as possible. Second, take steps to avoid any inference of concealment, destruction or obstruction. Third, have appropriate separate legal counsel provide advice and counsel to employees of their rights and/or liabilities and company policy. Finally, help outside legal counsel formulate a theory of the defense and, where appropriate, enter a joint defense relationship with potential targets.

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4 *United States v. Park,* 421 U.S. 658 (1975); *United States v. Dotterwich,* 320 U.S. 277 (1943).

5 33 U.S.C. § 1319 (c)(3); 33 U.S.C. § 7413 (c)(6).

6 *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990).

7 *United States v. MacDonald Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991); *See also United States v. White*, 799 F. Supp. 873 (D. Wash. 1991).

B. Preparing For Criminal Investigations

No one ever says: "You know, I want to be the target of a criminal investigation." Nonetheless, criminal investigations occur and notwithstanding the system of justice that supposes everyone's innocence until otherwise proven, preparation is the best method to insure that the presumption of innocence is not inverted.

Preparation and planning is paramount. Designate an on-site corporate representative to receive and examine all process, such as subpoenas, warrants, or informal inquiries from government agents. Direct that representative to immediately notify either in-house or outside counsel. Prepare a management letter, authorized by the board of directors, appointing counsel and directing that a privileged internal investigation be conducted. Establish, in advance, a corporate policy on providing legal counsel for employees. Have outside legal counsel prepare the memorandum to the relevant employees notifying them of the investigation and of their legal rights.

C. Problem Areas Considered Obstruction

The Department of Justice and the Environmental Protection Agency each have their "hot buttons" in deciding whether to pursue criminal sanctions. Factors considered in the decision to prosecute include any actual or potential harm to the public, the company's history of noncompliance, whether there was prior notice of the matter under investigation, the continuing nature of the violations, the motive behind the offending conduct and whether the response to the investigation is characterized by lies, deceit and obstruction. Sure signs of trouble include the destruction of, or failure to produce, evidence subject to lawful process (a felony), the destruction of documents or tangible evidence that reasonably *may be* subject to a criminal investigation, even in the absence of process (a felony), counseling witnesses to mislead investigators (a felony),[8] lying to investigators (a felony).[9] Most importantly, in corporate investigations, it is a felony to threaten or intimidate employees with loss of job or position, to instruct employees not to speak with government investigators or to suggest a particular view of the facts to the employees.[10]

D. What Can/Should You Tell Employees

It is permissible to talk to your employees and it is important to talk to your employees. You should, at a minimum, tell them that there is an investigation, that they may be contacted by federal agents; that they have a right not to talk to them; that they are equally free, at their election, to speak with them; that if they do so, their answers to any questions must be full,

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[8] *See* 18 U.S.C. § 1512.

[9] *See* 18 U.S.C. § 1001. It is irrelevant that the interview or discussion is volunteered, off-the-record, unrecorded or unsworn.

[10] *See* Victim and Witness Protection Act, 18 U.S.C. § 1512.

complete and truthful; that they may consult with a lawyer prior to speaking to the agents and may state that their lawyer will be in touch with the agent. It is also perfectly legal (and important from the investigative aspect) to tell employees that the company may ask that it be informed of any such contacts. When it is company policy to do so, the notice to employees should also state that the company will provide a lawyer, at its own expense, for employees.

V. HANDLING THE SEARCH

A. The Basics of Warrants

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures and requires that warrants to conduct searches be supported by probable cause. An unlawful search, standing alone, however, does not preclude a prosecution. Instead, the usual sanction is suppression).[11] Probable cause to conduct a search is "a fair probability that contraband or evidence of a crime will be found in a particular place."[12] It is "a fluid concept" that is not easily reduced to "a neat set of rules," but rather turns on the "totality of the circumstances."[13] Probable cause can be based on hearsay from a known source or information from an anonymous informant that has been corroborated with independent facts.[14]

The Fourth Amendment requires particularity in the description of the place to be searched and the items to be seized).[15] There is no such thing as a general warrant, although courts reach for grounds upon which to save an overbroad warrant (and search) if the particularity requirement seems otherwise lacking.[16] Police and federal agents must comply with "knock and announce" requirements; they must state their authority and the purpose before a search, absent exigent circumstances permitting forcible entry.[17] Rule 41 of the Federal Rules of Criminal Procedure sets forth the procedures for issuance, execution and return of search warrants for federal searches. Among other strictures, the warrant must be executed and returned within ten days, it must also be executed during daylight hours, unless specifically authorized to be done at night.[18]

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11 *See Mapp v. Ohio,* 367 U.S. 643, 655 (1961).

12 *Illinois v. Gates,* 462 U.S. 213, 238 (1983).

13 *Id.*

14 *Draper v. United States,* 358 U.S. 307, 313 (1959); and *Illinois v. Gates, supra* note 12.

15 Fed. R. Crim. P. 41(c)(1).

16 *See United States v. Beaumont,* 972 F.2d *553,* 561 (5th Cir. I993)(incorporation by reference of an affidavit); *United States v. Bonner,* 808 F.2d 864 (1st Cir. 1 986)(personal knowledge of proper place to search by police officer).

17 *See* 18 U.S.C. § 3109 (1988).

18 Fed. R. Crim. P. 41.

B. Why a Search?

There are a multitude of reasons as to why a federal agency will conduct a search. They may have some concerns about the potential for the destruction or dissipation of evidence. They might be concerned about an issue of a continuing offense or harm. Do not overlook the effect that armed federal agents will have on the unlucky recipients during the execution of a search warrant.

C. The Limitations of Search Warrants

Two fundamental principles about search warrants merit discussion. First, a search warrant is not a license to conduct interviews or to take testimony. A search warrant is limited to "(1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense . . .."[19] Notwithstanding, government agents will try to interview employees during a search. They can and should be stopped from doing so, but it must be done in a lawful manner. Second, there is no such thing as a general warrant. Searches are limited to the subject matter and the description of the premises to be searched. A warrant is not a general license to look everywhere; make sure that the agents executing the warrant do not exceed their boundaries,

D. Preparing for a Search

Even though the execution of a search warrant is typically a surprise, you can prepare for the event. Establish a management response team with senior personnel at each plant or facility. Educate the team on how a warrant gets issued, what it looks like, the limitations of a warrant, how to respond to the presentation of a warrant and what to say to employees during and after the execution of a warrant. Establish a "key person" telephone list; that list should include legal counsel. Provide it to receptionists, security personnel, in-house counsel and management. Segregate all attorney-client privileged information and keep that information in a clearly marked section of the office. Draw up a floor plan identifying offices, business functions and files and records; the floor plan can be used to limit the scope of the search. The floor plan should clearly show where privileged material is stored. Obtain and retain a digital video camera to document the search, particularly the taking of samples. Prepare a "list of rights" that can be given to employees in the event of a search. The "list of rights" should also list the name and telephone number of the company's legal counsel. The telephone numbers of the management response team, with instructions of how to proceed, should be prepared and given to all receptionists and security personnel. Review the company's document retention policy. If there is none, establish one that provides that only necessary documents are kept for extended periods of time.

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[19] Fed. R, Crim. P. 41(a).

F. How to Conduct Yourself During a Search

With the proper preparation, you should be adequately armed to deal with the search. In the event a search warrant is served, notify legal counsel immediately and fax the warrant to legal counsel. Present the agents with a memorandum, pre-prepared, detailing that the company is represented by legal counsel and request that the execution of the search be delayed until legal counsel can be present. Alternatively, put the lead agent on the phone with legal counsel. Read the warrant to determine what officers are authorized to conduct the search, the areas of the office or manufacturing facility authorized to be searched and the items authorized to be seized. Demand a copy of the warrant.[20] Request all official identification and record the names of those agents present during the search. Request the affidavit(s) filed in support of the warrant. Accompany investigators on the search; no one should be left unattended. Confine the search to areas designated in the warrant. Provide the agents with the floor plan and identify legally protected files. If a dispute arises about the legal files, direct the agents to segregate the documents and require that they be submitted to a magistrate for *in camera* review. Agents should not be permitted to interview employees during a search. All inquiries should be directed to a company representative in charge, presumably legal counsel. Employees should be told, in writing and orally, that the agents have no right to interview them; that they are under no obligation to talk to the agents; that until the company and employees know more, it is prudent to defer a decision as to whether to talk to federal agents until they have had the benefit of counsel; and, if appropriate, that the company will provide such counsel after the search has been concluded. Obtain an inventory or receipt of what is seized. The government must file inventories with the court so the court may assess whether the warrant has been executed properly.[21]

A word about split samples; always ask for split samples. Always request the following: receipts describing the sample; a portion of the sample equal in weight and volume; a description of tests to be performed by the government; and the results of all such tests. The failure of the government to comply with such requests may prove useful at trial (for purposes of impeachment) and, in some instances, may preclude the government from using the evidence.[22] Additionally, request copies of all photographs taken.

During the course of the search, try to determine what the search is all about according to the case agents. After the search has been concluded, legal counsel and all management representatives involved should memorialize all aspects of the search; specifically, the time and duration of the search, the agents present, the offices searched, the records seized, the employees approached, the employees interviewed and key questions asked.

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[20] Fed. R. Crim. P. 41(d).

[21] *Id.*

[22] *See United States ". White,* 766 F. Supp. 873 (E.D. Wash. 1991) (relying on statutory requirement in 42 U.S.C. § 6927(a) to provide samples taken in inspections).

F. Post-Search Activity

After the search has been completed, additional work is necessary. If employees consented to interviews, they should be debriefed immediately. Legal counsel should obtain the "return" of the warrant as filed with the court. Review the case and nature of documents seized with senior management. Determine documents essential to current operations. Legal counsel should meet with prosecutor to determine the nature of his investigation and any targets. Request copies of items seized and ask how and when the originals will be returned. Legal counsel should assist in issuing a post-search memorandum to employees once again explaining their rights if approached by federal agents and instructing them to discard materials or documents *only* in a manner consistent with the company's then current document retention policy. Refer all media inquiries to counsel or other designated, trained individual. Commence a privileged, internal investigation.

G. Return of Items Seized

You do not always get the items seized by the government back from the government. In the absence of an indictment, the party seeking the return of items seized must show irreparable injury, inadequate remedies at law and callous disregard of the Fourth Amendment. Post indictment, the motion is dealt with as a motion to suppress, subject to the government's defense of good faith.[23] Frequently, parties have negotiated procedures for obtaining copies of the documents seized.

H. Warrantless Searches

In a heavily regulated industry, you may be subject to warrantless searches under a number of alternative theories. The Fourth Amendment does not bar all warrantless searches, just unreasonable ones. To be reasonable: "First, there must be a 'substantial' government interest . . .. Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.' [Third,] 'the statute's inspection program, in terms of certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."[24] Consent to search may be presumed for licensed or permitted facilities. CERCLA grants authority to inspect property for hazardous substances, to take samples and, upon reasonable notice, to examine records.[25] RCRA similarly authorizes inspectors to enter property at reasonable times and to obtain samples to test for hazardous waste.[26] No advance notice is required. Other environmental statutes provide for similar types of searches.[27]

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23 *See United States v. Leon,* 468 U.S. 897 (1984); Fed. R. Crim. P. 41(g).

24 *New York v Burger,* 482 U.S. 691, 702 (1987).

25 42 U.S.C. § 9604(e).

26 42 U.S.C. § 6927(a).

27 FIFRA, 7 U.S.C. § 136g(a); TSCA, 15 U.S.C. § 260(a); and CAA, 42 U.S.C. § 7414(a)(2).

I. Administrative Search Warrant

Administrative search warrants are executed to investigate potential civil violations. Notwithstanding its civil background, the evidence adduced as a result of such searches can be used in criminal proceedings. As a consequence, there is a constitutional underpinning to the execution of administrative search warrants. The agency must demonstrate that it is either seeking specific evidence of a violation or that the inspection is to be conducted pursuant to a neutral enforcement scheme.[28]

VI. GRAND JURY SUBPOENAS

A. Confer with the Prosecutor.

The first order of business when a grand jury subpoena is received is to retain legal counsel. Legal counsel will then confer with the prosecutor to determine the purpose and scope of the investigation. Legal counsel will also try to determine your status as either a "target," a "subject" or as a "witness." A "target" is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."[29] A "subject" is "a person whose conduct is within the scope of the grand jury's investigation."[30] This designation can mean that allegations have been made that involve you and the grand jury is investigating the basis for the allegations. A "witness" is not a target or subject but is someone whom the government believes has information relevant to the matter under investigation. When it is appropriate, you should inform the prosecutor that it is the company's policy to advise employees of their legal rights and to indemnify employees for the costs of representation. You should explicitly request that prosecutor go through corporate counsel, or otherwise designated retained counsel, before approaching any employees.

B. Responding to the Subpoena *duces tecum.*

A subpoena *duces tecum* seeks the production of documents or other tangible things. Confer with the prosecutor to narrow the scope of the subpoena. Through this process it may be possible to identify what the prosecutor is really looking for with the subpoena *duces tecum.* Once the scope is defined, prepare a management search letter. Upon receipt of a grand jury subpoena, it is often useful to distribute a memorandum from a senior corporate officer (usually the General Counsel) directing relevant employees to search for responsive documents, designating a custodian for responsive records, clearly stating that no records conceivably responsive to the subpoena, or related in any way to the matter under investigation should be

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28 *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *See v. City of Seattle,* 387 U.S. 541, *545* (1967) ("administrative entry, *without consent,* upon portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a [constitutional] warrant procedure.") (emphasis added).

29 Department of Justice ("DOJ") Manual, § 9-11.150.

30 *Id.*

destroyed, even pursuant to a standard record retention policy, without the specific advice of counsel.

Compliance with the subpoena should be strictly supervised and documented. The custodian of records should have no involvement in the matter under investigation for two reasons: integrity of production and testimony about compliance with the subpoena *duces tecum.* All documents must be reviewed to determine whether they are responsive to the subpoena *duces tecum* and, if so, whether they are subject to an attorney-client privilege claim, a work-product exemption or some other privilege or exemption. No documents should be delivered to the grand jury without first being copied and numbered; in fact, you may be able to produce copies of documents but make sure the prosecutor confirms that copies are sufficient.

C. Responding to a Grand Jury Subpoena for Testimony.

Most criminal defense counsel believe, as a general rule, that a target should never appear before the grand jury and that a subject should seldom appear. Similarly, as a general rule, targets will not be subpoenaed to testify before a grand jury. The government may, however, invite the target to appear voluntarily.[31] While a target, subject or witness has no legal right to testify before the grand jury, a prosecutor will usually grant a request to testify. It is the policy of the Department of Justice to notify a target before seeking an indictment in order to allow the target the opportunity to testify before the grand jury.[32] It is also the practice of the Department of Justice to excuse a witness from testifying before the grand jury if the witness advises the prosecutor in advance that he intends to invoke his Fifth Amendment right.[33] The sanction for refusal to testify without immunity is civil contempt. If the notice will not adversely affect the investigation, the prosecutor will generally advise a target when the individual is no longer considered a target. The notification is without prejudice; that is, the prosecutor can redesignate the individual as a target.[34] A prosecutor is not under any obligation to present exculpatory evidence to the grand jury.[35]

Counsel does have a role while the witness is testifying before the grand jury. Counsel is not allowed to sit in on the grand jury proceeding; however, counsel may be present outside of the grand jury chambers allowing the witness to confer if necessary. Counsel must debrief witnesses after testimony given.

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31 DOJ Manual, § 9-11.151.

32 DOJ Manual, § 9-11.153.

33 DOJ Manual, § 9-11.154.

34 DOJ Manual, § 9-11.159.

35 *United States v. Williams,* 112 S. Ct. 1735 (1992).

D. Monitoring the Grand Jury Proceeding.

Grand jurors are bound to secrecy; they cannot discuss testimony outside of the grand jury chambers. Witnesses, however, are not subject to the same constraints; they are free to discuss and disclose their testimony to anyone they choose. Where possible, legal counsel should interview them after their testimony is given to the grand jury. Legal counsel should also compare subpoenas and obtain copies from cooperating third parties of what is produced to the grand jury.

VII. SELF-REPORTING, CONSTITUTIONAL PRIVILEGE AND STRATEGY USE IMMUNITY

A. Fifth Amendment

The constitutional privilege against self incrimination applies only to natural persons. It does not apply to corporations.[36] Legal compulsion is coercion within the meaning of the Fifth Amendment.[37] Any statutory scheme that rests heavily upon self-monitoring and self-reporting implicates the Fifth Amendment if criminal sanctions can be imposed for violations of the statute.[38] The Fifth Amendment may be invoked if, what is to be reported, admits or may otherwise lead to evidence of environmental infractions subject to criminal sanction. The government may challenge the assertion of the privilege, however, on the grounds that submission of required reports is a *condition of employment* and not a disclosure compelled by law. Notwithstanding, the failure to file required reports is a crime.[39] Similarly, false filings are crimes.[40] An accurate and timely filing waives the Fifth Amendment protection as to the evidence reflected in the filing. You may fulfill your legal obligation to file and still assert the Fifth Amendment on the face of the required filing with respect to the information sought.

B. Statutory Use Immunity

Use immunity generally precludes the government from using testimony or other information compelled by law or any information directly or indirectly derived from such testimony of other information against the witness in any criminal case.[41] There is no use

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36 *United States v. Doe,* 104 S. Ct. 1237 (1984).

37 *See New Jersey v. Portash.* 440 U.S. 450 (1979).

38 *See Ward v. Coleman,* 598 F.2d 1187 (10th Cir. 1979). *rev'd on other grounds,* 448 U.S. 247 (1980).

39 *See e.g* CAA, 42 U.S.C. § 7413(c)(2); CERCLA, 42 U.S.C. § 9603(b)(3); CWA, 33 U.S.C. § 1321(b)(5); and EPCRA, 42 U.S.C. § 11045(b).

40 *Id.;* CWA, 33 U.S.C. § 1319(c)(4). *See also* 18 U.S.C. § 1001.

41 18 U.S.C. § 6002.

immunity for regular, periodic reporting, such as monthly or quarterly operating reports such as Discharge Monitoring Reports, from NPDES permit holders, under federal environmental statutes. Statutory use immunity is, however, extended to certain persons who file reports for unpermitted releases of hazardous substances in excess of reportable quantities and for the discharge of oil or hazardous substances in violation of substantive provisions of the CWA.[42]

The CWA provides for use immunity but the immunity only extends to natural persons.[43] As a consequence, reports of emergency discharges may be used against the company. Under the CWA, an anomaly arises because the duty to report is imposed on "any person in charge of a vessel or of an on-shore facility or of an offshore facility . . ." and case law holds the corporate employer is a "person in charge."[44] As a result, the natural person who signs the report enjoys immunity; but the company does not. Similarly, CWA use immunity may be limited to use of the notification itself and not "the fruits thereof." Immunity under the CWA does not extend to officers, directors or employees who do not, themselves, file the reports.

CERCLA also provides use immunity but it is different from the CWA. CERCLA immunity is not limited to the notice alone, but also includes the fruits thereof: "Notification received pursuant to this subsection *or information obtained by the exploitation of such notification* shall not be used against any such person in any criminal case . . .."[45] Also, CERCLA use immunity is not expressly limited to natural persons. Notwithstanding, it can be argued that its protections extend only to those upon whom a duty is imposed: "Any person in charge of a vessel or of an on-shore facility or an offshore facility . . .."[46] In other words, it is all in how the courts choose to interpret the immunity provision. Immunity under CERCLA does not extend to officers, directors or employees who do not, themselves, file the reports. EPCRA imposes similar emergency notification requirements, but does *not* grant use immunity.[47]

VIII. VOLUNTARY DISCLOSURE

The Department of Justice has set forth factors that it will take into consideration in deciding whether to prosecute an environmental offense. A premium is placed on voluntary disclosure and full cooperation. The Department of Justice's admittedly fluid test includes such

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42 42 U.S.C. § 9603(b) and 33 U.S.C. § 1321(b)(5).

43 33 U.S.C. § 1321(b)(5) ("Notification received pursuant to this paragraph shall not be used against any such natural person in any criminal case, except a prosecution for perjury or for giving a false statement.").

44 *See Alpex Oil Co. v. United States,* 530 F.2d 1291 (8th Cir. 1976).

45 42 U.S.C. § 9603 (emphasis added).

46 42 U.S.C. § 9603(a).

47 42 U.S.C. § 11004(a)(1) ("If a release of an extremely hazardous substance . . . occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires notification under [CERCLA], the owner or operator of the facility shall immediately provide notice [to the community emergency coordinator].").

items as whether there was prompt and voluntary disclosure of non-compliance; whether there was timely cooperation, including a willingness to provide the complete results of internal investigations; an evaluation of the quality and nature of environmental compliance programs; the company's history of noncompliance; the existence of mechanisms to discipline employees; and the company's subsequent compliance efforts.

Even if timely, there are potential adverse consequences associated with "voluntary disclosure." It is not a safe harbor. It may have a dire adverse impact on officers and employees. Finally, you cannot claim a "limited waiver." Once the "voluntary disclosure" is shared, it is out there for everyone.[48] Cooperation with the government after discovery of the non-compliance by the government will not preclude investigation, but it may figure significantly in the sanctions imposed under the federal sentencing guidelines. Interestingly, the voluntary disclosure guidelines exempt any disclosures of information that was required to be disclosed by statute, regulation, order, permit, etc. What environmental non-compliances are outside that arena?

IX. CONCLUSION

Oftentimes, the only difference between a civil/administrative investigation and a criminal investigation is who gets to the facility first, the civil inspector or the criminal investigator. With planning and preparation, the adverse effects that a criminal investigation has on a company can be managed. It will not make it go away or make it feel any better; however, it will minimize your exposure and pay dividends in the long run.

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[48] *Republic of the Philippines v. Westinghouse,* 1991 WL 268537 (3rd Cir., Dec. 1991).