

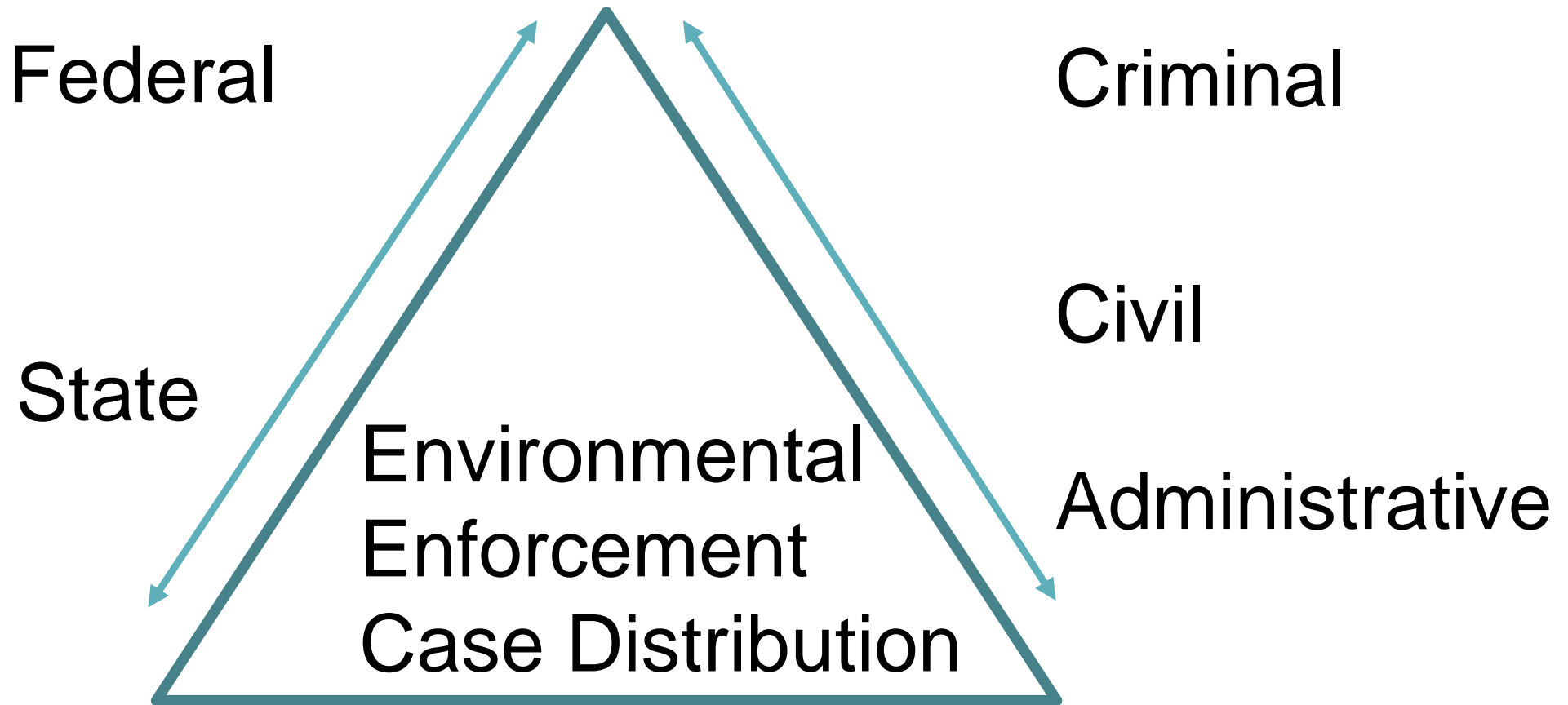
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ENVIRONMENTAL ENFORCEMENT UPDATE

Energy Series

ENVIRONMENTAL ENFORCEMENT OVERVIEW



ENVIRONMENTAL ENFORCEMENT REMEDIES

- **Penalties, civil or criminal**
- **Injunctive Relief**
- **Incarceration**
- **Restitution**
- **Suspension and Debarment**
- **Revocation of Operating Authority**
- **Negative Compliance History**

POLICY-CREATED ENVIRONMENTAL REMEDIES

- **Supplemental Environmental Projects**
 - “Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy (U.S. EPA March 10, 2015)”
- **Mitigation**
 - “Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements (2nd edition)(U.S. EPA Nov. 14, 2012)”

FEDERAL CIVIL ENFORCEMENT PROCESS

- **Cases primarily originate in EPA Regional Offices**
 - Fuels and mobile sources cases originate out of EPA Field Offices
- **Administrative cases heard by Administrative Law Judges**
 - Certain cases require Department of Justice (DOJ) approval
- **Civil Judicial Cases Referred Directly to DOJ from EPA Region**
 - “Expansion of Direct Referral of Cases to the Department of Justice, (U.S. EPA January 14, 1988)”

NEW EPA ENFORCEMENT POLICIES

- **Informal Enforcement Pilot Program**
- **“Interim OECA Guidance on Enhancing Region-State Planning and Communication on Compliance Assurance Work in Authorized States (U.S. EPA January 22, 2018)”**
 - EPA will generally defer to authorized States on inspections and enforcement
 - Exceptions identified through communications between upper management of EPA and the State

EPA ENFORCEMENT POLICIES

Factors for EPA Involvement in Enforcement

- a) Program audits indicate a need for the EPA to fill a gap until the State program deficiency is addressed.
- b) Emergency situations or, situations where there is significant risk to public health and the environment.
- c) Significant noncompliance that the State has not timely or appropriately addressed.
- d) Actions that require specialized EPA equipment (e.g., infrared camera) and/or expertise.
- e) Federal and State owned/operated facilities.
- f) Actions to consistently address widespread noncompliance problems in a sector/program (such as the National Enforcement Initiatives), to address companies with facilities in multiple States, or where there are cross-boundary impacts affecting other States, tribes, or nations.
- g) Program oversight inspections.
- h) Responses to State requests for assistance in a specific situation, or broader work-sharing arrangements in which the EPA takes the lead in particular sub-programs, sectors, or geographic areas.
- i) Serious violations that need to be investigated and addressed by the EPA 's criminal enforcement program.

NEW EPA ENFORCEMENT POLICIES

- **“Interim Procedures for Providing Early Notice of Civil Judicial Referrals (EPA March 23, 2018)”**
 - Case Team will brief Regional Administrator (RA) on case to be referred to DOJ
 - Assistant Administrator will receive RA briefing papers
 - Based on briefing papers, Assistant Administrator may request copy of referral prior to transmittal to DOJ

CIVIL PENALTY INFLATION ADJUSTMENT

- **Since 1990 all federal agencies required to adjust statutory civil penalties for inflation**
- **In 2015 all agencies required to implement a “catch-up” adjustment and make subsequent annual adjustments beginning 2017**
- **Civil penalty inflation applies to all agencies, not just EPA, e.g. OSHA, Coast Guard, federal Bureau of Safety and Environmental Enforcement (BSEE), the federal Bureau of Ocean Energy Management (BOEM)**
- **“Amendments to the EPA’s Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule, (U.S. EPA January 11, 2018)”**

CIVIL PENALTY INFLATION ADJUSTMENT

40 CFR Part 19

U.S. Code Citation	Environmental Statute	Statutory civil penalties, as enacted.	Penalties for violations that occurred after 11/2/15, where penalties are assessed on or after 8/1/16 but before 1/15/17	Penalties for violations that occurred after 11/2/15, where penalties are assessed on or after 1/15/17 but before 1/15/18	Penalties for violations that occurred after 11/2/15, where penalties are assessed on or after 1/15/18
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	25,000	93,750	95,284	97,229
42 U.S.C. 7413(d)(1)	CAA	25,000/200,000	44,539/356,312	45,268/362,141	46,192/369,532
42 U.S.C. 7413(d)(3)	CAA	5,000	8,908	9,054	9,239
42 U.S.C. 7524(a)	CAA	25,000/2,500	44,539/4,454	45,268/4,527	46,192/4,619
42 U.S.C. 7524(c)(1)	CAA	200,000	356,312	362,141	369,532
42 U.S.C. 7545(d)(1)	CAA	25,000	44,539	45,268	46,192

THIRD-PARTY SETTLEMENT PAYMENTS

- **Memorandum for All Component Heads and United States Attorneys, Prohibition on Settlement Payments to Third Parties, (Office of the Attorney General, June 5, 2017)**
 - Applies to all federal litigation
- **Settlement Payments to Third Parties in ENRD Cases, (Office of the Acting Assistant Attorney General, ENRD, January 9, 2018)**
 - Third-party payment allowed if it directly remedies the harm that is sought to be redressed.
 - Applies to administrative cases if DOJ approval required

THIRD PARTY SETTLEMENT PAYMENTS

- **UNITED STATES V. HARLEY-DAVIDSON, INC.**

CIVIL ACTION 1:16-CV-01687 (EGS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

- Consent decree lodged on August 18, 2016: Harley-Davidson agreed to pay a civil penalty of \$12 million, engage in other compliance-related activities directly related to sale and use of the defeat devices; also agreed to spend \$3 million on an Emissions Mitigation Project to reduce emissions from wood-fired stoves in the northeast. Project to be implemented by American Lung Association.
- Replacement consent decree lodged on July 20, 2017. This new consent decree omitted the previous Mitigation Project, on basis that the project did not comply with the new DOJ Policy due to its limited geographic scope

DOJ ENRD POLICY

“Enforcement Principles and Priorities, (Office of the Acting Assistant Attorney General, ENRD, March 12, 2018)”

- **Principles**

- Adhering to the Impartial Rule of Law
- Enhancing Cooperative Federalism
- Exercising Pragmatic Decisionmaking
- Employing the Full Range of Enforcement Tools
- Coordinating with Agencies
- Collaborating with United States Attorneys’ Offices
- Protecting Taxpayers and the Public Fisc

DOJ ENRD POLICY

- **ENRD Enforcement Priorities**

- Advancing the “Back to Basics” Focus on Protecting Clean Water, Clean Air, and Clean Land
- Maintaining the Integrity of Environmental Programs
- Fighting Fraud and Recovering Taxpayer Funds
- Fighting Violent and/or Organized Crime
- Protecting America’s Workers, Competitiveness, and Infrastructure

DOJ GUIDANCE POLICY

“Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Office of the Associate Attorney General, January 25, 2018)”

- Policy applies to civil enforcement cases for all agencies handled by DOJ
- DOJ may not use enforcement authority to convert guidance to binding rules
- DOJ may not use noncompliance with guidance as a basis for proving violations
- DOJ Policy also contains the standard disclaimer found on all government policies, i.e. it is not intended to create rights enforceable by any party to a government enforcement action.

CORPORATE OFFICER INDIVIDUAL LIABILITY FOR ENVIRONMENTAL VIOLATIONS UPHELD BY THE TEXAS SUPREME COURT

State of Texas v. Morello, No. 16-0457 (Texas Supreme Court, February 23, 2018)

- The court held that an individual who personally engages in acts that constitute violations of the law may be held liable, regardless of their status as a corporate officer. In so holding the Texas Supreme Court joined numerous other state and federal courts that have held that a person's status as a corporate officer does not shield them from liability if they personally participate in the wrongful conduct.

QUESTIONS?



SPEAKER BIOGRAPHY



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Education

The University of Texas School of Law, J.D. *with honors*, 1985

Massachusetts Institute of Technology, Masters of Science in Technology and Policy, 1980

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Professional Background

U.S. Department of Justice, Environment and Natural Resources Division, Environmental Enforcement Section, 1985-1996

Environmental Engineer, Trinity Consultants, Inc., 1980-1982

Carrick has practiced environmental law since 1985, when he received his law degree from The University of Texas School of Law. His practice has included all facets of environmental law: he has experience with all the significant federal environmental laws and their Texas counterparts; his practice has involved litigation, arbitration, enforcement, permitting, transactions, and counseling; he has worked with various industries including chemicals, energy, agriculture, manufacturing, and real estate; and he has practiced in government as well as in private firms.



THANK YOU

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