



# EPA Enforcement — Significant Developments and Controversies

*An Environmental Law Update*

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## Introductions



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## Criminal Enforcement – Recent Developments



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## Clean Air Act New Source Review "GLOBAL" Settlements



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## 2008 – 2010 National Enforcement Priorities



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## Criminal Enforcement – Recent Developments

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# The Washington Post

SONDAY, SEPTEMBER 30, 2007

## Bush's EPA Is Pursuing Fewer Polluters

Probes and Prosecutions Have Declined Sharply

By Jane Slaughter and Juliet Eidelberger  
Washington Post Staff Writers

The Environmental Protection Agency's pursuit of criminal cases against polluters has dropped off sharply during the Bush administration, with the number of prosecutions, new investigations, and total convictions more than a third, according to Justice and EPA data.

The number of civil lawsuits filed against firms who refuse to settle criminal cases was down nearly 70 percent between 2002 and 2006, compared with a dip in the late 1990s, according to those data.

Critics of the agency say its lax enforcement has allowed polluters to skirt environmental laws, threatening progress in cleaning up hazardous waste sites, and countless other violations by the EPA.

"You don't get drunk, and you don't wear seat belts," said Eric Schaeffer, who heads the EPA's Office of Civil Enforcement and now heads the Edling Project, a watchdog group.

- "The EPA's pursuit of criminal cases against polluters has dropped off sharply during the Bush administration, with the number of prosecutions, new investigations, and total convictions all down by more than a third..."
- "The number of environmental prosecutions plummeted from 919 in 2001 to 584 last year, a 36% decline . . ."
- "... the number of people convicted for environmental crimes dropped from 738 in 2001 to 470 last year."
- "... the number of cases opened by EPA investigators fell 37 percent, from 482 in 2001 to 305 last year . . ."

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## Department of Justice

FOR IMMEDIATE RELEASE  
THURSDAY, OCTOBER 25, 2007  
WWW.USDOJ.GOV

### Fact Sheet: Prosecuting Environmental Crimes

The Justice Department's Environmental Crime Section enforces environmental laws, including the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

The results obtained in environmental crime prosecutions are significant. In 2006, the Department imposed over 1,000 criminal convictions on individuals (67.3 years total) and dollar amounts of criminal penalties (\$70.5 million). Not only are the results significant, but the number of convictions has rebounded after a temporary drop in the number of convictions in 2005.

In addition to ENRD prosecution, the Department has also brought criminal cases against individuals and corporations who violate environmental laws. In 2006, the Department brought 15 criminal cases against individuals and corporations who violated environmental laws.

Prosecuting environmental crime is a top priority for the Department. The Division has an ongoing initiative to increase the number of convictions and dollar amounts of criminal penalties. This will cut the air pollution by 240,000 tons per year.

The Justice Department is committed to protecting the environment.

Today, Acting Attorney General Alberto R. Gonzales announced that the Department will continue to bring criminal cases against individuals and corporations who violate environmental laws.

### Texas City Refinery Explosion

- On March 23, 2005, a catwalk collapsed at the Texas City Refinery, resulting in the deaths of 15 workers and the injury of 180 others. The 15 workers who died were killed by a massive fire that burned for 36 hours.
- The deceased were Glenn King, Larry Linenbaud, A. Larry Thomas, and Eugene T. Smith.
- BP admitted that beginning in 2001, it had failed to properly maintain the refinery's safety systems, and that it had failed to properly release excess heat from the refinery's storage tanks.

- "[DOJ] has 40 prosecutors who enforce federal environmental law"
- "... results obtained in environmental criminal cases in 2006 were at near-record levels for jail terms imposed on individuals (67.3 years total) and dollar amounts of criminal penalties . . ."
- "U.S. Attorney's Offices also bring environmental crimes cases. While there was a temporary drop in the number of overall environmental defendants charged immediately after 2001, there was a subsequent rebound and recent years have generally been consistent with pre-2001 numbers."

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## Recent Criminal Enforcement Activity

- ***United States v. W.R. Grace***
  - Libby, Montana mine
  - Indictment – 2005; Company and 7 corporate executives (including GC)
  - Exposure to vermiculite ore contaminated with asbestos
  - Hundreds of deaths and serious illnesses alleged
  - District court gutted government’s case; Ninth Circuit recently reversed many of the rulings
- ***British Petroleum***
  - Guilty plea – Two separate violations
  - Texas City refinery explosion
    - 15 employees killed
    - Clean Air Act violation
    - \$50 million in criminal fine
  - Prudoe Bay, Alaska pipeline spill
    - Clean Water Act violation
    - \$12 million criminal fine plus \$8 million restitution and other payments
  - Probation

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## Recent Criminal Enforcement Activity

- ***CITGO Petroleum***
  - Convicted of Clean Air Act violations after jury trial
  - Knowingly operating open tanks without emission controls
- ***Honeywell***
  - Negligently causing the release of hazardous air pollutant
  - Employee killed
  - Guilty plea; Clean Air Act violation
  - \$8 million fine; \$4 million in restitution, probation
- ***Rowan Companies***
  - Discharge of pollutants and garbage into Gulf of Mexico; company and nine employees
  - Guilty plea to Clean Water Act violations
  - \$7 million fine plus additional payments of \$2 million
- **Vessel cases**
  - Act to Prevent Pollution from Ships

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## U.S. DOJ Criminal Enforcement Priorities

- Worker Endangerment Initiative
  - OSHA referrals
- Vessel Initiative
- EPA's National Enforcement Priorities
  - Clean Air Act cases
  - Persistent non-compliance with permits under Clean Water Act

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## What Makes an Enforcement Action “Go Criminal”?

- Short answer: Hard to predict
- But, criminal enforcement more likely when:
  - Workers are killed or seriously injured
  - Large number of persons exposed
  - Substantial property interests affected
  - Target perceived as a “bad guy”
    - Non-compliant or indifferent to consequences of actions

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# Clean Air Act New Source Review "GLOBAL" Settlements

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## Main Discussion Topics

- Global Settlement Process and Results
- Pros & Cons to Government & Industry
- Controversies Surrounding Process

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## Recent Headlines

- October 9, 2007: "Largest Environmental Settlement in U.S. History"
- American Electric Power (AEP) \$4.6 billion CAA NSR settlement
- 16 facilities/5 states
- One of many "global" NSR settlements

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## “Globals”

- One company, multiple facilities
- EPA/DOJ, state governments, sometimes citizens groups
- Settle past claims and give releases for un-investigated potential past (and possibly future) violations
- Many but not all settled before filing of formal complaint

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## Pros and Cons

- EPA/DOJ primary benefits – (esp. on pre-litigation settlements)
  - "bang for buck" on resources (handling negotiations for several sources at once AND no investigations, document searches, etc.)
  - many tons of emission reductions in one fell swoop
  - bean counting – press releases with big \$\$\$
  - resolution of litigation risks (NSR cases coming out all over the place in courts)

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## Pros and Cons

- Industry benefits —
  - “don't ask don't tell”
  - broad releases for past
  - possible forward releases
  - certainty for future
  - resolution of litigation risks
  - savings of litigation costs

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## Pros and Cons

- Cons for both
  - arduous negotiating process (one now 4 years in making) esp. with multiple EPA regions multiple states
  - sometimes arduous process once presented to court (Chevron, WE discussed below)

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## “Sweetheart Deals?”

- Settlements challenged as "sweetheart deals" by public interest groups
- Intervened in judicial proceedings attempting to block them
- Two worst examples:
  - *U.S. v. Chevron*, 380 F. Supp.2d 1104 (N.D. Cal 2005)
  - *U.S. v. Wisconsin Electric*, 03-C-0371 (E.D. Wis., Decision and Order issued Sept. 30, 2007)

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- Exhaustive discovery focusing on settlement process, hearings, briefs
- In both, judges ultimately agreed to approve (highly deferential standard of review)
  - *Chevron* – lodged in court Oct 2003, approved by court October 2005 (Judge Breyer)
  - *WE* – lodged July 2003 approved September 2007 (Judge Clevert)

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- Few of most recent "global" NSR settlements – these and many more can be found on EPA's Website at: <http://cfpub.epa.gov/compliance/cases/index.cfm?templatePage=12&ID=1>
- (number on right shows estimated total compliance costs, not including penalties)

American Electric Power Service Corp., et. al. (10/09/2007)	16 coal-fired power plants: IN, KY, OH, VA, WV	\$ 4.6 B
Hunt Refining Co. & Hunt Southland Refining Co. (09/28/2007)	1 petroleum refinery; 2 asphalt refineries: AL, MS	\$48.5 M
Valero Energy Corp. (f/o/b Premcor Refining Group, Inc.) (8/16/2007)	3 petroleum refineries: OH, TN, TX	\$232 M
E.I. du Pont de Nemours & Co. (07/20/2007)	4 contact process sulfuric acid production plants: KY, LA, OH, VA	\$66 M
East Kentucky Power Cooperative, Inc. (07/02/2007)	3 coal-fired power plants: KY	\$650 M
Kerr-McGee Corp. (05/17/2007)	8 natural gas compressor stations: CO, UT	\$18 M
Rhodia Inc. (04/26/2007)	8 contact process sulfuric acid plants (6 plant locations): CA, IN, LA, TX	\$50 M (approx)



## Major Components

- New hardware (BACT or LAER equivalent)
- Some compromising on what might be BACT or LAER at some facilities
- Penalties (including SEPS)
- Releases (past and forward)

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## Penalties

- Penalties go to U.S. and the states, with cash component and SEP component
- Total penalties (including SEPs) averaging approx 3% of total compliance costs

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## “Amnesty” Controversy

- For "forward" release, Para 133 of AEP drew much attention
- Played in press (esp. *Wash Post*) as a 10-year "amnesty"
- Grossly mischaracterized

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## “Amnesty”

- Complex, but generally units can "modify" for next 10 years and escape NSR if maximum hourly emission rate net increase <10% (and other conditions met, such as system-wide annual tonnage limits in decree)
- Contrary to *Wash Post*, this type of provision has appeared in many other globals
- States/citizen groups refused to join in Para 133, however

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# 2008 – 2010 National Enforcement Priorities

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## Background

- Office of Enforcement and Compliance Assurance (“OECA”) carries out compliance and enforcement activities in 28 separate program areas
- Two components of national enforcement program
  - Limited number of national program priorities
  - Core program activities
- Evaluation criteria used for selecting national program priorities
  - Significant environmental benefit
  - Pattern of noncompliance
  - Appropriate EPA responsibility
- 2008 – 2010 National Enforcement Priorities published at 72 Fed.Reg. 58084 (October 12, 2007)  
[www.epa.gov/compliance/data/planning/priorities/index.html](http://www.epa.gov/compliance/data/planning/priorities/index.html)

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## Clean Air Act: Air Toxics

- Strategy focuses on sources that produce HAPs
- Leak Detection and Repair (“LDAR”)
- Industrial Flares
- Surface Coating

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## Clean Air Act: New Source Review/Prevention of Significant Deterioration

- Substantial increase in industrial production, but states issuing very few PSD or NSR permits
- Four industrial sectors
- Coal-fired electric utilities
- Cement manufacturing facilities
- Sulfuric and nitric acid manufacturing facilities
- Glass manufacturing facilities

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## Clean Water Act: Wet Weather

- Wet weather discharges can contain bacteria, pathogens and other pollutants
- Strategy focuses on four environmental challenges
- Concentrated Animal Feeding Operations (CAFOs)
- Combined Sewer Overflows (CSOs)
- Sanitary Sewer Overflows (SSOs)
- Storm Water

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## RCRA: Mineral Processing

- Concern is mineral processing facilities that generate corrosive and toxic wastes that contaminate surface water, groundwater, and soil
- Strategy focuses on facilities that use surface impoundments

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## Indian Country

- EPA will work with tribes to improve compliance in three areas
- Public drinking water systems
- Schools
- Solid waste management and assessing and closing open dumps

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## Financial Responsibility

- Many environmental statutes include financial responsibility provisions
- Require regulated entities to set aside funds or otherwise guarantee funds will be available to address short and long-term environmental risks
- EPA is using a phased approach to review
- RCRA Subtitle C closure/post-closure
- RCRA corrective action
- CERCLA
- TSCA
- Next, SDWA and RCRA Subtitle I

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## What To Expect – NSR

- More information requests
- Permit file reviews
- Increased site inspections
- Source emission testing information requests
- NOVs
- AOCs/penalty orders
- More filed cases in federal court

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## What to Expect – CAFOs

- Goal: To increase NPDES permit coverage for CAFOs
- Site inspections for large sized CAFOs, especially those near Waters of the US without NPDES permits currently
- Increased inspections for CAFOs with permits
- Focus on states with low CAFO permit coverage

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## What to Expect – Stormwater

- Focus on homebuilders, big box, sand and gravel, redi-mix concrete and crushed stone producers
- Additional consideration: Municipal Separate Stormwater Sewer Systems, Ports, Road Building Ops, Federal Facility Construction
- Multi-jurisdictional enforcement for national enterprises
- Increased inspections, MS4 audits

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## What to Expect – Sanitary Sewer Overflows

- Partner with states to seek administrative and civil judicial enforcement
- Continued focus from last cycle on capacity, maintenance

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## What to Expect – CSOs

- Implementation of Long Term Control Plans
- Focus on large population centers
- Administrative/Judicial enforcement
- Compliance assistance

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## What to Expect – Financial Assurance

- Focus on RCRA Closure and Corrective Action, CERCLA and TSCA
- Possibly add RCRA Title I and SDWA later
- Nothing specific outlined; EPA still “studying” options
- EPA likely to focus on methods used for cost estimates re: assurances

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## What to Expect – Mining

- More RCRA enforcement, but new focus on EPCRA and CWA requirements in inspections
- Injunctive relief (cease and desist)
- Partnerships with BLM, states, Forest Service to defray costs and conduct multi-media inspections/enforcement
- Development of more corporate assistance tools for waste handling, self-auditing, etc.

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## Questions & Answers

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