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EPA

Criminal Enforcement

Earlier this year, a Senate amendment called for disarming EPA's criminal investigators. But EPA's agents face risks similar to those confronted by other law enforcement officers, explains Mike Fisher, the legal division director in the agency's Office of Criminal Enforcement, Forensics & Training.

Fisher describes how EPA's law enforcement powers were conferred by Congress at the request of the Reagan administration, and why recent events underscore the wisdom of that bipartisan decision nearly 30 years ago. Citing threats that have arisen during recent EPA investigations, as well as prosecutions resulting from EPA's work—including a chemical discharge to a river that shut down drinking water supplies for several hundred thousand West Virginians, and the use of high school students from a vocational education program to illegally rip out asbestos-containing building materials without proper protective gear—Fisher argues that maintaining EPA's current law enforcement authority is necessary to protect both its agents and the American public from harm.

'Disarm the EPA?'

BY MICHAEL R. FISHER

In January 2015, as the Senate debated Keystone XL Pipeline legislation, Alaska Sen. Dan Sullivan (R) urged colleagues to vote for his amendment to the bill—one designed to address what he called “close to 200 armed EPA agents . . . roaming our country.” The

senator expressed concern over “big problems . . . when regulators are given guns to enforce these regulations.”

This proposal to “disarm the EPA” drew opposition from the Federal Law Enforcement Officers Association, as well as the Fraternal Order of Police and the In-

ternational Association of Chiefs of Police. Although the amendment never came to a floor vote, the issue could come up again, whether in the 114th Congress or in other public forums. To inform potential future deliberations on the subject, it seems appropriate to provide some historical context and current information regarding the Environmental Protection Agency's criminal enforcement program.

The Historical Context

Many Americans—and even a good number of federal agents—might be surprised that the EPA employs armed criminal investigators. They might be still more surprised to learn that Congress conferred on EPA's criminal enforcement agents the authority to carry firearms, execute warrants and make arrests for “any offense against the United States” (see 18 U.S.C. § 3063). And the biggest surprise of all might be that a majority-Democratic Congress gave EPA these authorities . . . at the request of the Reagan administration.

The EPA Law Enforcement Powers Act of 1988, was introduced in the House of Representatives by former Rep. John Dingell (D-Mich.). It was co-sponsored by dozens of representatives whose constituents and communities were suffering at the hands of intentional polluters undeterred by the prospect of potential civil fines—and whose efforts to evade detection by regulators made it unlikely that they would face even a civil penalty.

The bill was the final chapter in a six-year debate over the need for EPA investigators with traditional law enforcement powers. Headlines from two 1983 New York Times articles summarize the earlier events of those half-dozen years: “New Squad of EPA Investigators Hired but Given Limited Powers” and “Violent Acts Prompt Debate Over Guns for EPA Agents.”

In the early 1980s, after Congress had added criminal enforcement provisions to the nation's pollution control laws, EPA's first criminal investigators spent a few years attempting to conduct investigations without law enforcement tools or authority. In 1984, Attorney General William French Smith provided EPA investigators temporary law enforcement authority as Special Deputy U.S. Marshals, which led to dramatic increases in the number of environmental warrants executed, cases charged and convictions obtained.

By 1988, the debate was over: a half-dozen years of experience had convinced policy makers in both executive and legislative branches, and from both political parties, that formal EPA law enforcement powers were necessary. In August, Reagan administration officials at the Department of Justice (DOJ) sent the Senate a formal written request advocating passage of the legislation. Citing several years of effort to enforce the relatively new criminal penalty provisions of the major environmental statutes, the DOJ request explained: “EPA investigators are faced with the same resistance and dangerous circumstances encountered by other law enforcement personnel and therefore should have the same protections and enforcement tools as those similarly situated.”

The bill passed by an overwhelming bipartisan majority, and President Ronald Reagan later noted that he was “pleased to sign this bill into law because it contains the explicit law enforcement authority for the Environmental Protection Agency (EPA), which this Administration actively sought.”

A few years later, President George H.W. Bush signed the Pollution Prosecution Act of 1990, further supporting criminal enforcement of federal environmental laws and requiring EPA to hire additional investigators.

Thus there has been clear bipartisan support for EPA's criminal enforcement program over the past three decades. That support is based on a recognized need to protect the public from environmental criminals who put people and the environment at risk for personal gain, and in so doing, seek an unfair advantage over responsible business competitors who are committed to meeting their pollution control obligations.

The Fortymile River Investigation

Fast forward to the recently proposed amendment that would have disarmed EPA agents. In part, the amendment was said to be a reaction to an environmental investigation undertaken in Alaska's interior during August 2013, along the Fortymile River.

The Alaska investigation was conducted by several EPA agents working in conjunction with federal and state officers from an environmental crimes task force. It was prompted by multiple reports from other federal and state agencies that placer miners on the Fortymile River (which Congress has designated as a “Wild and Scenic River”) were repeatedly discharging illegal pollutants from facilities they had described to civil regulators as “zero discharge” operations. Manned aerial overflights corroborated the allegations, showing multiple ongoing discharges. Task force members conducted a field investigation over several days, interviewing miners and collecting samples for laboratory analysis. (They subsequently referred the results of their investigation to the state attorney general, and it is up to that office to decide whether and how to take further action.)

Internet news sources provided sensational accounts of the matter, illustrated with photos of paramilitary “SWAT” teams which lacked any connection to the federal and Alaska state law enforcement officers who actually conducted the Fortymile River investigation. Although the investigation consisted of sample collection and consensual interviews (no search warrants were executed, nor arrests made), news outlets uncritically adopted some miners' description of the events as a “raid.” Gov. Sean Parnell (R) subsequently appointed a special counsel to “identify areas of concern to the public and agency management . . . ascertain if any laws were violated, and determine whether different actions could have been taken.”

The special counsel conducted interviews, reviewed documents (including photos of the two four-person investigative teams and the miners with whom they interacted), and examined contemporaneous audio recordings of the investigators' interviews with miners, which had been made by the state law enforcement member of the task force.

The resulting 65-page report, published in March 2014, thoroughly debunked the sensational Internet accounts of SWAT tactics and “intimidation.”

“We found that task force members acted appropriately while conducting the Criminal Compliance Investigation. . . . It does not appear from listening to these recordings that task force members engaged in any overbearing or improper investigation tactics. . . . [T]he conversations that ensued [between investigators and

miners] seemed cordial and informative. . . . We found no evidence that any federal or state agency failed to follow regulations, policy, or practice in developing and implementing the Criminal Compliance Investigation.”

Continuing Need for Armed EPA Agents

The description of EPA’s special agents as “armed bureaucrats” (a term used by some arguing against EPA’s law enforcement powers) reflects a fundamental misunderstanding about our agents’ qualifications, training and job responsibilities. The vast majority of our program personnel—case agents and their field managers, forensic scientists, attorneys and others—work out of field offices around the country, so as to be able to access potential crime scenes as quickly as possible, and to work with federal prosecutors from the 93 U.S. Attorney’s Offices, along with those from “Main Justice” in Washington, D.C. EPA agents are law enforcement professionals who have undergone the same rigorous training program at the Federal Law Enforcement Training Center as the other federal agents who train there. For those interested in more detail, a video on EPA’s website describing our agents’ training is available at <http://www2.epa.gov/enforcement/criminal-enforcement-videos>.

The risks that EPA agents face on the job are also similar to those arising in law enforcement generally. The most prominent example involves Larkin Baggett, a Utah business owner who became a fugitive after his 2007 indictment on hazardous waste dumping and Clean Water Act charges, threatened to kill a state law enforcement official and was in possession of a small arsenal of firearms at the time of his initial arrest. He was listed on EPA’s fugitive website, which led to a tip regarding his whereabouts. In early 2009, EPA agents located Baggett, living in a trailer in a Florida Keys marina. As agents and local police approached, Baggett burst from his trailer and swung an assault rifle toward the officers, yelling that he would not go. The agents and local officers fired their sidearms, wounded Baggett, and took him into custody. He eventually pleaded guilty to the armed assault as well as his Utah environmental offenses, and now is serving a 13-year sentence.

More recent examples of the risks EPA investigators face on the job include:

- the 2013 arrest of a Nevada defendant who was later sentenced to seven months in prison for hundreds of false statements associated with the Clean Air Act; the intoxicated individual was found to have a handgun in his possession and initially resisted arrest.
- a 2014 Mississippi search warrant, in which agents secured seven handguns and a sawed-off pistol grip shotgun that was found stored in the cavity created by a missing desk drawer and pointed directly at the agents entering the room.
- a 2015 search warrant where approximately 75 percent of the employees on site had criminal histories, including firearms violations and crimes of violence.

Some might argue that unarmed EPA agents could obtain assistance from other law enforcement officers when they need to execute a warrant or make an arrest. But that approach to environmental crimes enforcement was tested, and failed, in the 1980s. The Justice

Department’s 1988 letter to Congress succinctly explained the necessity of EPA agents’ firearms authority:

This longstanding cornerstone of criminal investigation at all levels of federal and local enforcement is no less essential to officers who pursue those contaminating our nation’s air, land, and water. The risks associated with environmental criminal investigations are similar to those encountered in more traditional investigatory work. Agents must engage in extensive field investigations and surveillance. Given the often unique circumstances of environmental crimes, these events frequently take place in remote settings, far from easy access to supporting law enforcement authorities, during other than normal business hours.

As DOJ concluded later in the letter, “to turn to other [law enforcement] agencies for assistance [is] a burden likely to hinder rather than serve environmental enforcement.”

The need for EPA’s criminal enforcement authority is heightened by the scarcity of state law enforcement resources in this area. Although every state has environmental regulators, many lack environmental crime fighters: nearly two dozen states employ no dedicated environmental criminal investigators; in almost 20 more, the number of law enforcement personnel dedicated to fighting pollution crimes can be counted on one hand. Only nine states—California, Delaware, Louisiana, Michigan, Pennsylvania, Ohio, New Jersey, New York and Texas—employ more than a half-dozen full-time pollution control criminal enforcement personnel. Working alongside these state partners is a group of around 170 EPA Special Agents. This article’s final section will briefly address the results achieved through their exercise of law enforcement authority.

The Real World of Environmental Crime

As someone who has worked in EPA’s criminal enforcement program since the 1990s, I have found that people initially disturbed by the notion of armed EPA agents are likely to relinquish their concerns after learning about the important work we do to protect public health and the environment from egregious violators.

Here are a few recent prosecutions resulting from our work (for more details, see <http://www2.epa.gov/enforcement/criminal-enforcement>):

- In February, three Duke Energy subsidiaries were prosecuted for discharging nearly 40 tons of coal ash and millions of gallons of wastewater to North Carolina’s Dan River (a drinking water source), as well as illegal discharges from additional plants. The Dan River coal ash lagoon was an accident waiting to happen. For years, the company ignored warnings regarding the integrity of an aged stormwater pipe running beneath the facility; it eventually failed, causing the catastrophic discharge. On May 14, the defendants pleaded guilty, paid over \$100 million in criminal fines and community service and were sentenced to corporate probation that requires them to reserve over \$3 billion to remediate coal ash disposal sites in order to prevent additional harm.

- In January, Freedom Industries and six of its owners and officers were indicted for alleged Clean Water Act and other crimes (as well as related bankruptcy fraud charges, in the case of one defendant) resulting in a 2014 chemical discharge to the Elk River that contaminated and shut down drinking water supplies for

several hundred thousand West Virginians. The company and four individuals have entered guilty pleas, and two individuals await trial.

■ In January, a 27-month prison sentence was imposed on a Clean Air Act felon who used high school students from a vocational education program to illegally rip out asbestos-containing building materials without proper protective gear during demolition and renovation work at a former Air Force base. He and his co-defendants have been ordered to pay restitution of \$1.8 million to fund health monitoring of the people they exposed to this well-known carcinogen.

■ In November, an Alaskan platinum mining corporation and five company officials were indicted for alleged knowing violations of the Clean Water Act and false statements, related to pollution of the Salmon River from what defendants had told the state was a “zero discharge” facility that recycled all wastewater. The indictment alleges that the company and the individual defendants conspired to violate the law by concealing wastewater discharge violations from federal officials and submitting material false statements to federal agencies. The general manager has pleaded guilty to a felony; the other defendants await trial.

The offenses that EPA investigates are serious crimes with real consequences. They can impose real—and potentially deadly—harm on victims such as those high school students exposed to asbestos. They impose tremendous financial costs on those forced to clean up toxic messes, or whose livelihoods depend on a clean environment, such as Alaska’s commercial fishers.

And some environmental crimes impose acute and terrible harm to human health. Twenty-six of our current investigations involve death or serious injury (an aggregated 26 fatalities and 133 injuries). These types of cases range from large-scale catastrophes—such as the prosecutions of British Petroleum for the 2005 Clean Air Act felony at its Texas City refinery, where an explosion killed 15 people and injured hundreds, or the subsequent Deepwater Horizon disaster, which killed

11 more—to cases that most Americans have never heard about, but which also impose terrible costs on victims and survivors. EPA’s website contains videos showing a few of these victims’ stories.

Americans are fortunate to have a system of public health and environmental protection with dedicated public servants at the federal, state and local levels working to enforce our environmental laws. But where environmental violators cross the line into criminality, the special agents, forensic scientists, attorneys and others who make up EPA’s criminal enforcement program comprise a “thin green line” between Americans who cherish and benefit from a healthy environment and others who would risk human health and the environment to advance their perceived self-interest.

For more than 30 years, there has been broad, bipartisan agreement about the importance of an armed, fully equipped team of EPA agents working with state and federal partners to uphold the law and protect Americans. Exercising the authority conferred by Congress and affirmed by two Republican presidents, EPA’s criminal enforcement team has conducted its work with professionalism and respect, following a strict code of conduct for law enforcement officers. Maintaining this authority is critically important for public safety, for the safety of the agents themselves, and for the sake of the healthy environment that all Americans want to pass on to our children and future generations.

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EPA’s website containing environmental crime fugitives can be seen at <http://www2.epa.gov/enforcement/epa-fugitives>.

EPA’s website with videos containing victims’ stories can be seen at <http://www2.epa.gov/enforcement/criminal-enforcement-videos>.