Civil and Criminal Enforcement

Inspection Reports, the Enforcement Process and Case Studies

Russell Deppe – VA DEQ

The foundation

to any enforcement case is the strength of the information *that has been* gathered and documented throughout the case development process.

Remember

- All states have different approaches to civil and criminal enforcement; speak to your state's enforcement coordinator for specifics.
- Inspection reports are critical and may become part of an Administrative, Civil, or Criminal enforcement case.
- The report will be used in case development and may end up as evidence.

Who uses an Inspection Report

- General Public
- State Agencies
  - DEQ – compliance, permitting and enforcement staff
- EPA
- DOJ
- Criminal Investigators
- The Regulated Community

Inspection Report Content

An inspection report should:

- Provide Context
  - source description, process description, wastes generated, etc.
- Accurately document compliance and non-compliance
- Specifically correlate each alleged violation to the permit condition, law and/or regulations
- Document thorough objective comments – **Just the Facts!**
- Include photographs
- Detail the schedule of events: dates, times, locations, conversations
- **Trust but Verify!**

Inspection Report Content (cont)

Opinion vs. Fact

- Statement of Fact can be verified or proven
- Statements of opinion are open to interpretation

- *Example*:

  Incorrect - The drums were stored in the warehouse and were unsafe.

  Correct – In the warehouse, a drum of ignitable hazardous waste was observed leaking at the time of the inspection.

From Inspection to Enforcement

Several things are considered by enforcement staff when noncompliance is evaluated for a potential enforcement case.

Those considerations include:

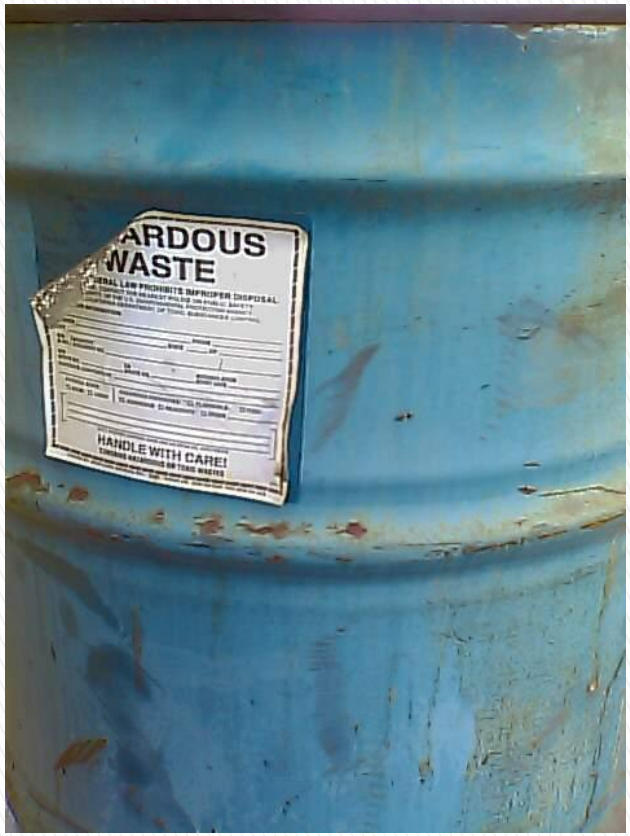
- Previous enforcement history
- Severity of violations
- Regional case prioritization
- Strength of the case and documentation.

Again, the inspection report will function as the primary source of Factual Data, Argument or Proof in any ensuing enforcement action

From Inspection to Enforcement

(cont)

The facility owner/operator bears the burden of maintaining compliance, while the agency has the burden of proving violations.



Enforcement Process

Can You Prove your Case?

Does the inspection report clearly identify:

- *Who is* the Responsible Party (RP)
- What permit conditions, statutes or regulatory provisions were allegedly violated and how?
- The FACTS that support the alleged violation(s) including documentation and witnesses

Enforcement Process

Are there unresolved alleged violations?

- Make sure to address all unresolved issues from the inspection:
  - Many facilities will promptly provide documentation that an alleged violation has been corrected.
  - Any outstanding alleged violations need to be documented as they will be included in the injunctive relief provided in an enforcement action
- Add subsequent violations to the current enforcement action.

Enforcement Process

Case law will confirm that decisions must be based on an adequate administrative record. Therefore, it is your responsibility to pay attention to the details, and they are in

the

Inspection Report.

DEQ
VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Hazardous Waste
40 CFR Part 262 and ref.
Container Management Checklist #4

Facility Name [redacted] EPA ID Number [redacted]

DEQ Representative(s) [redacted] Date **September 27, 2012**

1. ACCUMULATION AREAS

(a) List each container accumulation area. Specify the number, volume, and/or quantity/weight of each container type. [NOTE: Include any satellite accumulation areas and verify compliance with satellite accumulation requirements. Provide comments if observations indicate non-compliance.]
(S) = satellite

LOCATION	NUMBER / SIZE OF CONTAINERS/TANKS	CONTENTS
(S) Pumping Room – suite M	**1 / 55 gallon drum**	**Lead foam**
	1 / 55 gallon drum	**Methylene chloride**
(S) Oven area – suite D	**1 / 55 gallon drum**	**Lead foam**
(S) Paint Booth – suite E	**1 / 30 gallon drum**	**Toluene / Acetone based solvent**

	Yes	No	NA	NC
(b) Has the generator or TSD facility notified the Department of the exact location of his accumulation areas (NOTE: Satellite areas are excluded) prior to or upon establishment of the areas? (9 VAC 20-60-262 B.4.) (Note: previous inspection reports indicating existing and continued use, but not newly established, areas may qualify as adequate notification)	☐	☐	☒	☐

Enforcement Process

- Enforcement begins with alleged violations:
  - Inspections, document reviews;
- In Virginia 3 Instruments for Non-Compliance
  - Deficiency Letters;
  - Warning Letters;
  - Notices of Violation
    - Results in referral to Enforcement
- Upon issuance of the Notice of Violation:
  - Responsible Party meets with Department staff including enforcement representative
  - Enforcement Staff reviews case and determines appropriate enforcement action

Enforcement Process

- Regional enforcement staff work with regional compliance staff to develop:
  - Enforcement Recommendation and Plan (ERP)
  - Consent Orders
- These documents are based on the underlying NOV or NOVs

Enforcement Process

- **Enforcement Recommendation and Plan**
  - Provides a civil charge worksheet
  - Justifies the use or nonuse of additional penalty factors (Multi-Day component, etc.)
  - Explains the degree of culpability of the responsible party
  - Determines if any economic benefit was incurred by the responsible party due to non compliance.

- **Consent Orders**
  - Applicable administrative provisions
  - Enforcement authority
  - Observations and Legal Requirements
  - Final civil charge
  - Schedule of Compliance
    - Injunctive relief

Virginia DEQ Regions

Enforcement Process

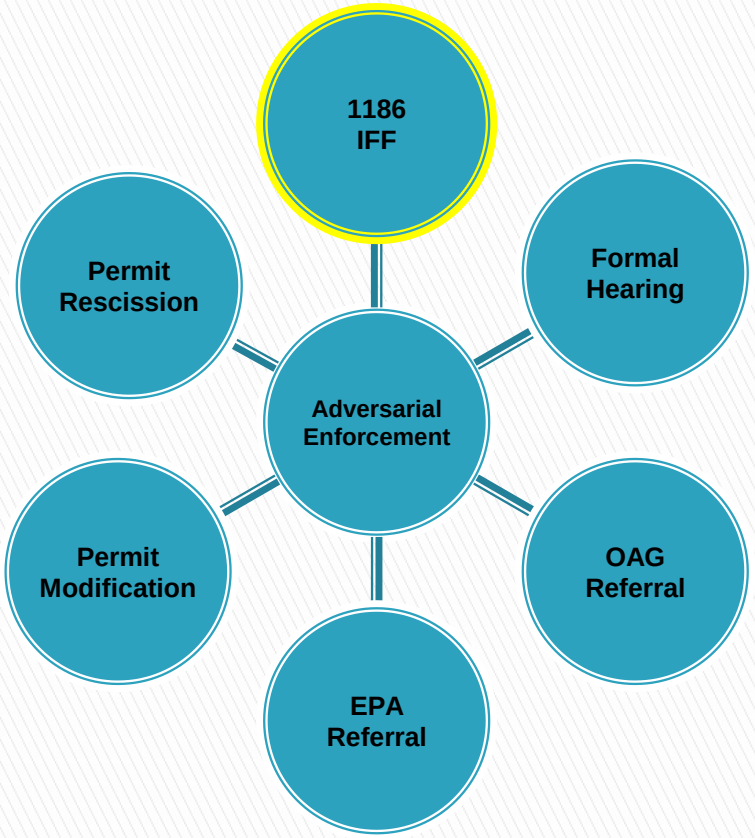
- Central Office (CO) and Regional Office (RO) Interaction:
  - RO sends a draft ERP and Consent Order to CO for review
  - CO reviews for proper party identification, status with the State Corporation Commission, validity of legal citations and connection to the stated observations
  - ENFORCEABILITY and CONSISTENCY
    - If regions exist, CO and ROs MUST work together to ensure consistency. If consistency is not maintained the enforcement process is compromised.

Adversarial Enforcement Toolbox

- Formal enforcement typically can be pursued using a variety of mechanisms or tools; the appropriate tool is determined by case factors and desired outcomes.
- The enforcement program and ultimately the Director of Enforcement decide which strategy will be employed
  - **Most enforcement actions result in consent orders**
  - If negotiations stall, party refuses to sign and a $10k penalty is warranted → Informal Fact Finding
    - If $10k is not appropriate → Formal Hearing
  - Attorney General referral is appropriate if there is a significant violation and environmental harm
  - Criminal Cases are referred at any point in the inspection/enforcement process; triggered by severity, culpability and level of proof

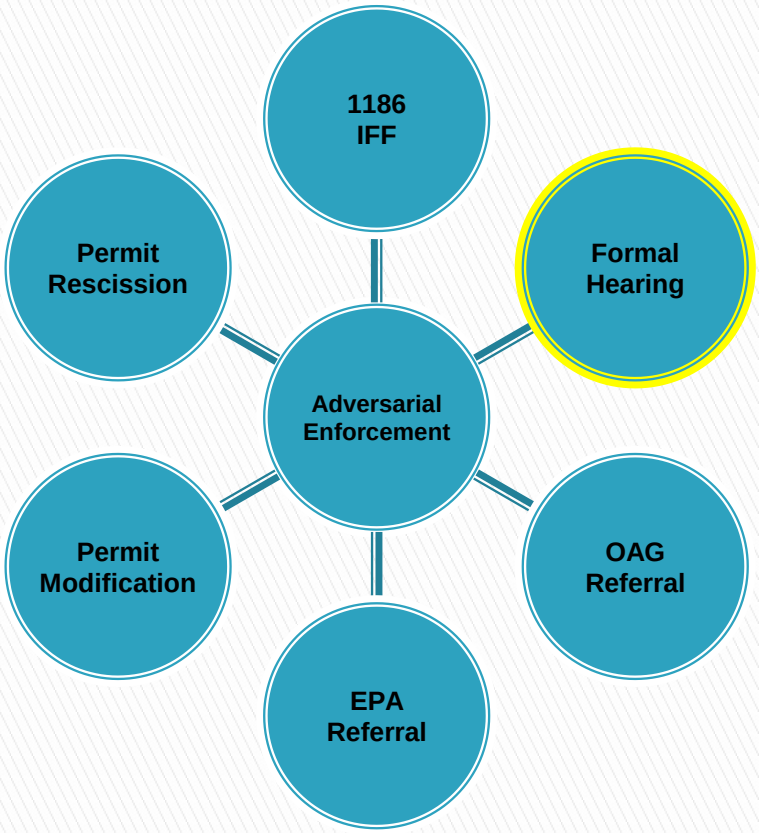
Informal Fact Finding

- Requires APA informal conference
- Issued by Director
- Penalties up to $10K
- Injunctive relief up to 12 months.



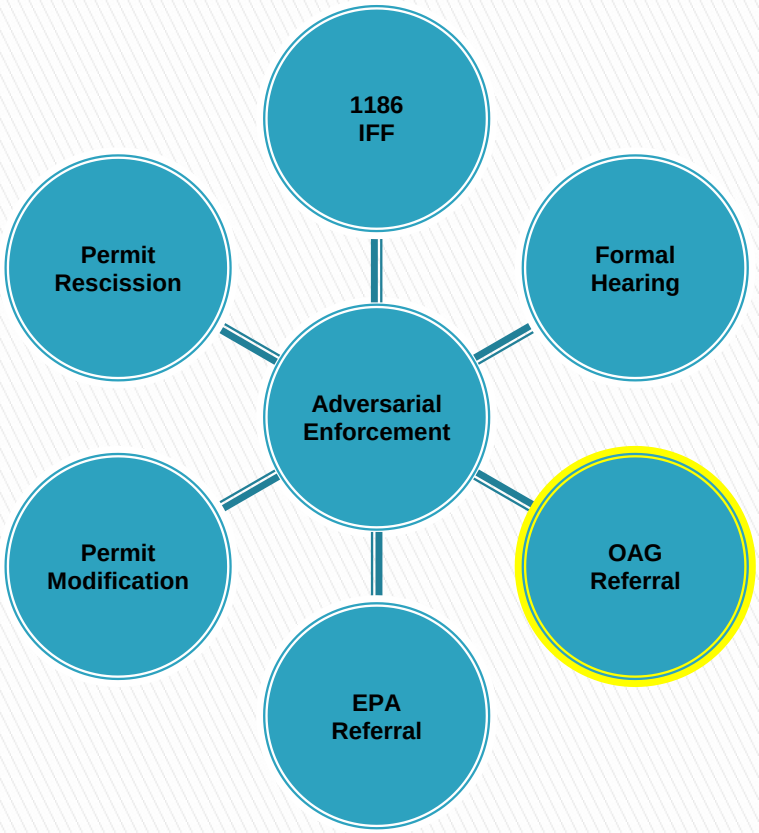
Formal Hearing

- Requires APA formal hearing
- Must have 2 NOVs and other requirements
- Issued by Director on behalf of Board
- Penalties up to $100,000
- No restriction on injunctive relief



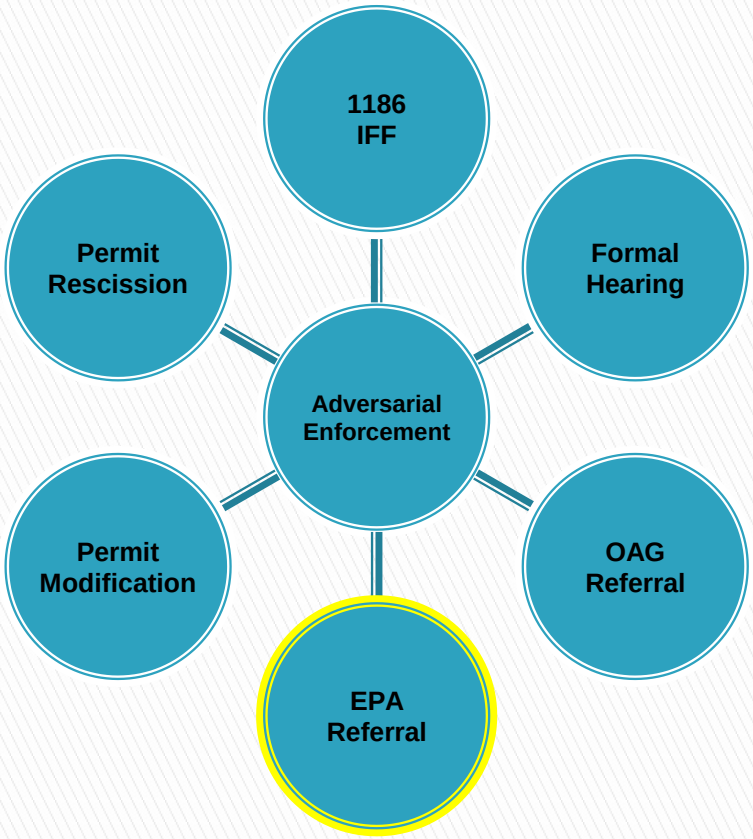
Office of the Attorney General Referral

- Filed in Circuit Court
- Trial
- $32,500 per day per violation with no maximum
- Injunctive Relief
- This is the first point where the enforcement action is no longer an administrative action



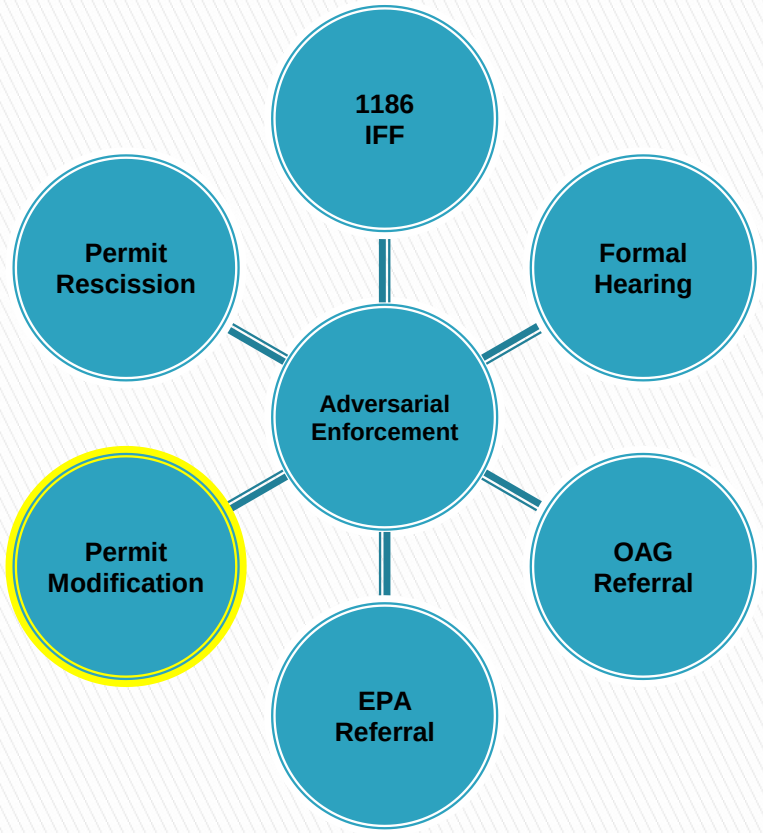
EPA Referral

- Available to EPA Delegated Programs
- All EPA Enforcement Authority
- If alleged criminal conduct, DEQ coordinates with EPA CID



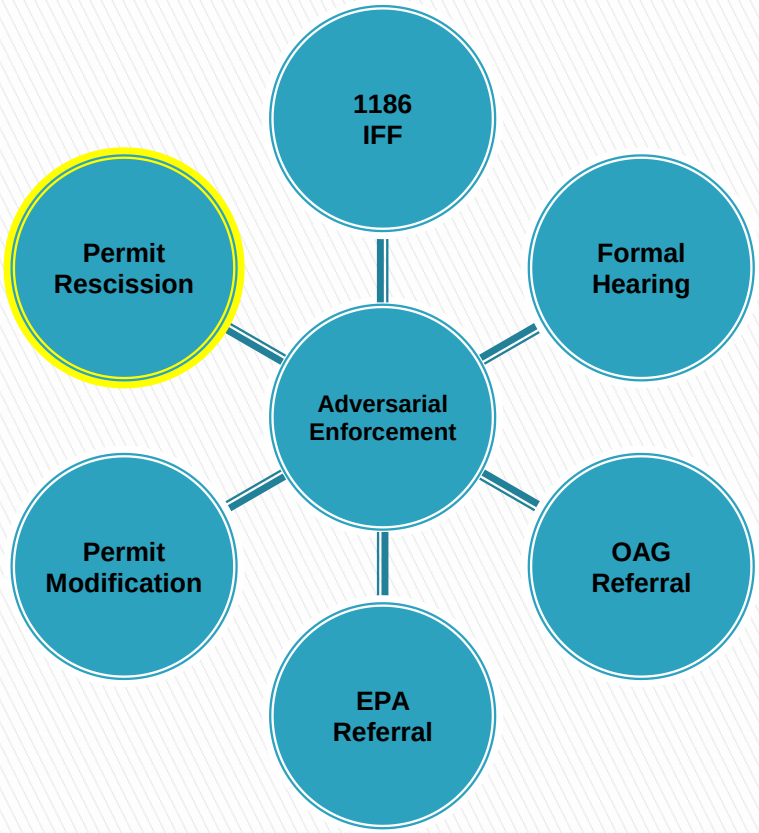
Permit Modification

- For Hazardous Waste Permitted Facilities:
  - Deny permit modification for non-compliance or
  - Add conditions to permit to achieve compliance



Permit Rescission

- For Hazardous Waste Permitted Facilities:
  - Revocation of the permit based upon non-compliance
  - DEQ can work with the Office of the Attorney General to Pursue Temporary Restraining Order



Differences Between Administrative, Civil and Criminal Enforcement Processes

- Administrative Process
  - Usually results in a Consent Order
  - Most widely used
  - Out of court process
  - Strict liability for violations
  - Regulators and RPs negotiate settlement or participate in adversarial hearing
  - Follows requirements of state's Administrative Procedure Act
  - Lower penalties but injunctive relief available

Differences Between Administrative, Civil and Criminal Enforcement Processes

- Civil Prosecution
  - In court process
  - Often used when the administrative process is exhausted
  - Can be used to facilitate the resolution of time sensitive matters (temporary restraining orders, etc.)
  - Typically allows for higher penalties and injunctive
  - **Burden of Proof: Preponderance of the Evidence**
    - Standard is met if the proposition is more likely to be true than not true

Differences Between Administrative, Civil and Criminal Enforcement Processes

- Criminal Prosecution
  - In court process
  - Severity, degree of culpability and specific statutory triggers prompt this
  - Can result in monetary penalties, injunctive relief and jail time for those convicted
  - **Burden of Proof: Beyond a Reasonable Doubt**
    - Highest legal standard that can result in the deprivation of a defendant's liberty
    - Proof is met if there is no plausible reason to believe otherwise

Deciding Which Tool to Use

- Three primary factors are used to determine what enforcement process will be used:
  - Severity
  - Degree of Culpability
  - Automatic Criminal Triggers

Deciding Which Tool to Use

- Severity is Key:
  - A violation is classified as serious if: (1) the violation has caused *actual exposure or presents a substantial risk of exposure to humans or the environment, and/or (2) the actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the program.*

Deciding Which Tool to Use

Degree of Culpability is Key:

- The factors may include one or more of the following:
  - a. the **degree** to which the violator **knew or should have known of the legal requirement that was violated**.
  - b. the **degree of control** the violator had over the events constituting the violation;
  - c. the **foreseeability** of the events constituting the violation;
  - d. whether the violator **knew or should have known of the hazards** associated with the conduct;
  - e. whether the RP **took reasonable precautions** against the events constituting the violation;
  - f. whether there is evidence of **unjustified delay** in preventing, mitigating or remedying the violation; and
  - g. whether the violator **failed to comply** with an administrative or judicial order;
  - h. whether there have been **NOVs in the same media program during the past 36 months** preceding the initial violation that is subject of the current enforcement action. However, staff do not consider NOVs that were withdrawn or not pursued because of insufficient evidence or strategic considerations;
  - i. whether there have been Warning Letters in the same media program for the same or similar violations;
  - j. **commonality of ownership**, management, and personnel with other RPs or facilities that have been subject of enforcement actions; and
  - k. the **level of sophistication within the industry** in dealing with compliance issues or the accessibility of appropriate control technology. This should be balanced against the technology forcing nature of the statute, where applicable.
- Lack of knowledge of a legal requirement is not used as a basis to reduce a civil charge or penalty. To do so would encourage ignorance of the environmental requirement.

Deciding Which Tool to Use

- Automatic Criminal Trigger:
  - Any person who **knowingly** transports, treats, stores, disposes of, or exports any hazardous waste…
  - …and who **knows at the time** that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be **guilty of a felony**

Parallel Investigations

- Definition: Investigations with parallel administrative enforcement action or civil prosecution with concurrent criminal prosecution

- Case law has established boundaries and rules regarding how the two processes can operate simultaneously

Parallel Investigations

- "The Supreme Court has held that the government may conduct parallel civil and criminal investigations without violation of the due process clause, **so long as it does not act in bad faith**."
  - United States v. Stringer, 535 F.3d 929, 937 (9th Cir. 2008) citing United States v. Kordel, 397 U.S. 1, 11(1970)

- "the Supreme Court held that the government **did not violate the due process rights of corporate executives when it used evidence it obtained from an FDA civil investigation to convict them of criminal misbranding**. 397 U.S. at 11, 90 S.Ct. 763, 25 L.Ed.2d 1. The Court explained that the FDA did not act in bad faith when it made a request for information, which ultimately was used in the criminal investigation, for **the agency made similar requests as a matter of course in 75% of its civil investigations**."
  - United States v. Stringer, 535 F.3d 929, 937 (9th Cir. 2008)

Parallel Investigations

- Case Law Cont.
  - courts should refuse to "block parallel investigations by these agencies in the absence of 'special circumstances' in which **the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government.**" *Id.* District courts have occasionally suppressed evidence or dismissed indictments on due process grounds where **the government made affirmative misrepresentations or conducted a civil investigation solely for purposes of advancing a criminal case.** *See, e.g., United States v. Carriles,* 486 F.Supp.2d 599, 615, 619 (W.D.Tex.2007)
    - United States v. Stringer, 535 F.3d 929, 937 (9th Cir. 2008)

CASE STUDY #1

- South West Virginia and Blue Ridge Region Dams Case
  - An exercise in interagency coordination

CASE STUDY #1

- DEQ received citizen complaint:
  - Down stream impacts
  - Degradation of water quality
- DEQ investigation ensues:
  - found a dam with a large pond blocking the stream
  - Heavy siltation from the construction of the dam and accompanying spillway
    - No DEQ VWPP wetlands permit
    - No USACE wetlands permit
    - No DCR dam construction permit
- Owner of the property identified and…

CASE STUDY #1

- HE HAD CONSTRUCTED TWELVE OTHER DAMS AND PONDS ON OTHER PROPERTIES HE OWNED!!!!
  - Stated goal was to be able to sell lake front property

CASE STUDY #1

off of U.S. Hwy 58 with a 1/2 mi of road frontage on Mountain Valley Road access is no problem. This convenience of this property which is located between Danville and Martinsville assures that is a desirable location as well as a great investment for future appreciation. There is an access road through the property as well as two creeks which cross the land where a new 25 acre lake has been built. Although the timber was cut on the property a decade ago, this property offers beautiful home sites and the hunting for deer and turkey is as good as it gets in the state. Due to

CASE STUDY #1

mile of road frontage on both sides of Corner Rd! Snail Creek runs thru middle of property! Two new lakes- 5ac and 12ac- both built in 2007. Once you see the lakes you will see that no expense has been spared in building them. The Timber is mainly pines planted \\'99, but there are mature hardwoods as well on the property.If you are looking for a beautiful place in the country to build that rustic log cabin or weekend country home, then you will find it at Whitetail trails.You will have

CASE STUDY #1

- Lessons learned from this case:
  - Identify the players (RP, Agency lead contacts, interagency contacts)
  - Have single points of contact from each interested agency
  - Ensure each agency knows their roles and the importance of consistency for overlapping jurisdiction; ensure unified strategy
  - Importance of detailed inspection records
    - Must be detailed and accurate the first time

CASE STUDY #1

- Keys to successful communication between Agency and RP:
  - Present all relevant information to RP
  - Don't label RP as a bad actor
    - Compliance assistance and timing are key to settlement
  - Identify all parties involved and what their interests are
  - Have a single point of contact for each agency to disseminate and forward information
  - Explain how process will unfold
  - RP given a single point of contact in each agency

CASE STUDY #1

CASE STUDY #2

- **Southern Finishing Co, Inc.**

- Martinsville, VA
  - The importance of inspections in a criminal proceeding
  - An example of parallel proceedings

APR 27 2004

CASE STUDY #2

- Case began with a complaint given to DEQ by an employee
- The employee had asked to remove hazardous waste stored in a kiln, owner refused to ship this material offisite

CASE STUDY #2

- Facility had already notified as an SQG
- DEQ conducted an unscheduled CEI inspection without disclosing the employee complaint

CASE STUDY #2

- Violations discovered during the inspection
  - Did not make hazardous waste determinations and had no supporting data to support the hazardous waste determination of several waste streams
  - Only one of 23 drums that was claimed to be reusable solvent was labeled hazardous waste

CASE STUDY #2

- Violations discovered during the inspection
  - Inside the Kiln:
    - (198) 55-gallon drums
    - (267) 5-gallon buckets
    - Stacked three pallets high

Case Study #2

CASE STUDY #2

- Following identifiers found on containers:
  - D001, F003 hazardous waste still bottoms
  - Melted filters
  - Waste
  - Flammable liquid labels
  - Flammable solid
  - Poison
  - Hydrochloric acid
- No documentation that a waste determination has been made on all waste materials to determine whether they are characteristic Hazardous waste (Burden on facility per 40 CFR 261.1 and 261.2)

CASE STUDY #2

KILN AREA AND INSIDE KILN

Photo 7: Front of kiln. Mobile racks on left and right were in front of doors. Facility representatives had to move racks to positions in photo to enter kiln.

Photo 8: Drums inside kiln; double stacked. Note condition of drums - some rusted at bottom, and color residual down sides

Photo 9: Left Middle inside kiln. Drums and shrink-wrapped pails; double and triple pallet stacked high. Labels observed on several containers. Note yellow hazardous waste label on top row towards right of photo.

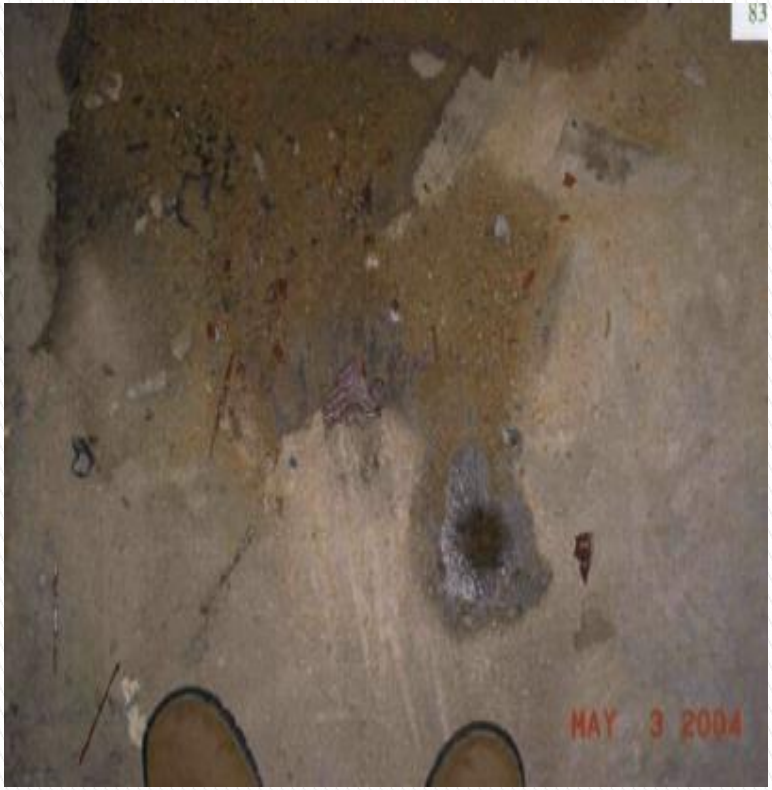
CASE STUDY #2

- Additional Violations:
  - Containers were in poor condition
  - One drum was punctured and leaking
  - No weekly inspections
  - No plan to demonstrate air emission compliance with Subpart CC
  - No “Hazardous Waste” label or start accumulation date

CASE STUDY #2

- Additional violations:
  - Inadequate aisle space
  - No arrangements with local emergency response personnel
  - Inadequate contingency plan
  - No up to date training records
  - Did not notify DEQ of accumulation areas
  - No UW program in place despite UW management
- Moving forward:
  - DEQ contacted EPA CID
  - Facility refused access
  - EPA was granted a search warrant and inspected the property
  - DOJ was brought in and the criminal case began

CASE STUDY #2



Case Study #2

- Civil and Criminal Interaction
  - Differing standards for evidence for civil and criminal
    - Civil: preponderance of the evidence
    - Criminal: beyond a reasonable doubt
  - DOJ cannot use standard DEQ inspection reports if DEQ conducted the inspection for the sole purpose of pursuing a criminal case
    - The DEQ inspection formed the backbone of the case as evidence of a normal CEI inspection, criminal evidence was later gathered by EPA CID

CASE STUDY #2

CLERK'S OFFICE U.S. DIST. COURT
AT DANVILLE, VA
FILED

SEP 18 2007

JOHN F. CORCORAN, CLERK
BY: H McOneal
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA :
:
v. : **Criminal No.** 4:07CR00027
:
SOUTHERN FINISHING COMPANY, INC. :

PLEA AGREEMENT

Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the United States and the defendant, **SOUTHERN FINISHING COMPANY, INC.**

4. THE AGREED SENTENCE

The parties agree that the following sentence is an appropriate disposition of this case:

A. Imposition of a $200,000.00 fine, pursuant to Title 18, United States Code, Section 3571, to be paid as follows: (a) $66,667.00 due on or before 30 days after the date of sentencing; (b) $66,667.00 due on or before one year after the date of sentencing; and, (c) $66,666.00 due on or before two years after the date of sentencing; and

B. Placing **SOUTHERN FINISHING** on probation for three years on the terms and conditions specified in paragraph 5, below.

CASE STUDY #2

- Lessons:
  - Even though EPA and DOJ took over the case, DEQ's inspection report and photographs provided the basis of the entire ensuing criminal case
  - DEQ inspectors were prepped to testify and write affidavits in conjunction with the proceeding based on the initial inspection that was conducted in the normal course of business
  - Following leads, taking detailed notes and pictures, and properly coordinating are critical to successful criminal cases

- QUESTIONS?