UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Upton:

Thank you for your February 3, 2012 letter, co-signed by Chairman Ed Whitfield, regarding the Environmental Protection Agency's (EPA's) administration of the Renewable Fuels Standard (RFS) program and Renewable Identification Number (RIN) fraud. We appreciate your interest in this matter. The Agency's responses to your specific questions regarding EPA investigations into RFS program fraud are enclosed.

We understand that EPA staff spoke with your constituent, Mr. Andy Sprague of Union County Biodiesel, on February 7, 2012, to understand his situation and recommendations. In addition, EPA staff met with Committee staff on February 10, 2012 to discuss the RFS program more broadly. We trust that those discussions were productive and we welcome this opportunity to address the important issues raised in your letter.

As you know, Congress established the RFS1 program in the Energy Policy Act of 2005 to reduce the nation's reliance on imported petroleum by requiring that transportation fuel sold in the United States contain a minimum volume of renewable fuel. Congress expanded the program (RFS2) in the Energy Independence and Security Act of 2007 (EISA) to require significantly higher volumes of renewable fuel, lay the foundation for achieving significant reductions in greenhouse gas emissions, and to encourage the development and expansion of the nation's renewable fuels sector. The EPA developed the regulations for implementing the RFS program in collaboration with renewable fuel producers, distributors and obligated parties (gasoline and diesel producers and importers) to work largely in concert with the fuels market and existing business practices. Consistent with the statutory provisions concerning the RFS program and the long history of fuel programs from unleaded gasoline to ultra-low sulfur diesel fuel, the EPA placed the obligation to meet the RFS volume mandates on gasoline and diesel fuel producers and importers.

The EPA also included in the RFS regulations the flexibility sought by obligated parties to demonstrate compliance with renewable fuel volume requirements either by acquiring renewable fuel and the associated RINs or by purchasing RINs without also purchasing the renewable fuel.

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RINs were created to implement that flexibility, as well as to implement the statutory provision for a credit program that would allow obligated parties to generate and use credits for over compliance with the annual requirement.

The RFS regulations make clear that it is the responsibility of obligated parties to ensure that they use valid RINs to demonstrate compliance and that there is not a safe harbor provision with regard to invalid RINs. The regulations, as revised to implement EISA, maintained that the underlying principle of RIN ownership is "buyers beware." As the EPA explained in establishing the regulations, the agency would not validate or certify the actual production of renewable fuel and associated RINs prior to their transfer and use for compliance purposes.

At the same time, RFS regulatory requirements and compliance efforts are not focused exclusively on obligated parties. The EPA's Office of Enforcement and Compliance Assurance and the Office of Transportation and Air Quality are working together to identify and pursue fraudulent RIN generators. The fact that the agency is pursuing fraudulent RIN generators demonstrates our commitment to an effective RFS program and a level playing field for all renewable fuel producers, obligated parties, and other RIN owners and users. As you are aware, the EPA has issued Notices of Violations (NOVs) to companies that used invalid RINs. We are now working with obligated parties that used invalid RINs to resolve their liability and come into compliance. The RIN market structure depends on the volume mandate to drive demand and hence renewable fuel production. If fraudulent RINs could be used, there would be no market for valid RINs, which would cause serious problems for legitimate renewable fuel producers.

Again, thank you for your letter. If you have further questions, please contact either of us or your staff may call Diann Frantz in the Office of Congressional and Intergovernmental Relations at 202-564-3668 or Carolyn Levine at 202-564-1859.

Sincerely,

Cynthia Giles
Assistant Administrator for
Enforcement and Compliance Assurance

Gina McCarthy
Assistant Administrator for
Air and Radiation

Enclosures

Enclosure 1

EPA Responses to February 3, 2012 letter

1. *Please provide a detailed chronology of EPA's actions with regard to Clean Green as well as the agency's communication of these actions with the regulated community, including, but not limited to, when EPA first learned that the company's RINs may be invalid, and when the purchasers of these RINs were notified.*

   On July 15, 2010, the EPA's Office of Civil Enforcement received a tip from a competitor indicating that Clean Green may have been illegally generating RINs. On July 22, 2010, and on July 28, 2010, EPA conducted inspections of Clean Green. On December 14, 2010, EPA sent an information request to Clean Green. Clean Green responded to this information request on January 4, 2011, and on February 4, 2011. On May 12, 2011, the United States executed multiple criminal search and seizure warrants at Clean Green facilities. On October 3, 2011, the United States filed criminal charges alleging that Clean Green's owner fraudulently generated RINs, and on November 11, 2011, the United States issued a superseding indictment against the owner of Clean Green. On November 7, 2011, EPA issued NOVs to parties that used Clean Green RINs to meet their obligations under the RFS program. The EPA did not inform the regulated community about its investigation into Clean Green until the Agency issued these NOVs. Pursuant to the EPA's September 24, 2007, Parallel Proceedings Policy, the Office of Civil Enforcement and the EPA's Office of Criminal Enforcement, Forensics and Training "coordinated decisions by the civil and criminal programs as to the timing and scope of their activities."

2. *Does EPA consider its communications with the regulated community prior to the NOVs to have been adequate? Is there a risk that obligated parties may purchase RINs from companies currently under investigation by EPA but for which the agency has not informed the marketplace? Explain EPA's process, procedures, or criteria for informing, including when to inform, the RIN marketplace of other potentially fraudulent RINs and include a description of when and how this process was developed. Provide all documents relating to the development of the agency's process, procedures, or criteria for informing the RIN market of potentially fraudulent RINs.*

   The EPA does consider its communications with the regulated community prior to issuing NOVs relating to the Clean Green RINs to be adequate. The EPA conducted extensive outreach to the regulated community regarding the RFS program, and has been clear from the beginning of the program that invalid RINs cannot be used for compliance, regardless of a party's good faith belief that the RINs are valid. The Agency has also been clear that it does not validate RINs. The EPA issued NOVs to parties that used Clean Green RINs when we developed sufficient proof that the Clean Green RINs were invalid, and after appropriate consultation with the Office of Criminal Enforcement and Forensics Training (OCEFT). After issuing the NOVs, the EPA sent an EnviroFlash to the regulated community to inform parties about the allegations in the EPA's NOV. An EnviroFlash is a service that allows the EPA to communicate with those interested in receiving EPA Fuels Programs alerts.

It is incumbent upon obligated parties to undertake due diligence to ascertain the validity of RINs to be used to meet a renewable volume obligation under the RFS program. This is both commercially feasible and reasonable, and it is what most obligated parties are doing now. The EPA does not seek to make public many of its activities in civil or criminal investigations, both to maximize the effectiveness of the investigation and to minimize the potential harm to parties under investigation who may not have violated the law. The EPA will generally notify the regulated community that it has alleged that RINs are invalid when the agency has developed sufficient proof and determined that such notification will not unduly impair ongoing investigations. There is always a risk that an obligated party will unknowingly purchase RINs from a company under investigation by the EPA and that the purchased RINs are ultimately found to be invalid.

The EPA does not have specific written procedures or criteria for informing the RIN marketplace of allegations that RINs are invalid. For cases that involve both civil and criminal proceedings, the EPA follows its September 24, 2007, Parallel Proceedings Policy and determines the appropriate time and method of informing the regulated community about invalid RINs on a case-by-case basis. The premature disclosure of information regarding a pending or prospective law enforcement proceeding could interfere with active law enforcement investigations. Furthermore, the fact that the EPA has commenced an investigation into potentially invalid RINs does not necessarily mean that the target of the investigation generated invalid RINs. A copy of EPA's Parallel Proceedings Policy is enclosed with this letter (Enclosure 2).

3. *Explain the basis for EPA's apparent position that participants in EPA's Moderated Transaction System (EMTS) should have known or been able to ascertain that Clean Green was a fraudulent operation. Explain EPA's process for registering and validating producers that participate in the EMTS. Explain what controls EPA has put in place to protect program integrity, particularly in relation to participation in the EMTS.*

The RFS regulations are clear that invalid RINs may not be used for compliance. The EPA does not certify or otherwise validate RINs. In providing regulated parties with the flexibility of purchasing RINs to meet RFS requirements, the EPA stated that the buyer must beware. The Agency launched the EPA Moderated Transaction System (EMTS) in July 2010 as part of the RFS2 program. EMTS was developed and implemented to manage the tens of thousands of RIN transactions (generation, buy/sell, and retirement) that occur each day. Clean Green participated in the RFS1 program but did not re-register to participate in RFS2. Therefore, it was not part of EMTS.

While the EPA expects the regulated industry to exercise due diligence as it would with any commercial transaction, the Agency did include a number of provisions in the RFS2 program to help ensure program integrity. In the RFS2 program, renewable fuel producers must provide information on the renewable fuel product they produce, the production process employed, the feedstocks they are capable of using, and their facility production capacity in order to register with EPA. Producers must also provide certain documentation, including evidence that their fuel has been registered with the EPA's fuel and fuel additives registration system, copies of air permits, a feedstock plan, and an independent engineer's review and report confirming that they are capable of producing the renewable fuel product they plan to

produce. Some producers (e.g., those claiming an exemption from the 20% minimum lifecycle greenhouse gas reduction requirements, foreign renewable fuel producers) must supply additional information.

In general, the EPA reviews each party's registration submission package to ensure that it contains the information required under the EPA's regulations and that the information is consistent with the registrant's proposed plan for RIN generation. The EPA accepts the registration application if it determines that the application is complete and that it contains the requisite information and supporting documentation. After the EPA accepts the registration application, it allows generation of RINs in the EMTS, the electronic RFS2 reporting and RIN tracking tool.

Two third-party elements were designed into the RFS2 program to minimize fraud. First, an independent engineering review and report is required as part of the registration. Second, an independent auditor's attestation report is required to be completed annually by a certified public accountant (CPA) or certified auditor. For U.S. producers, the third-party engineering review must be conducted by a Professional Chemical Engineer who is based in the United States and is licensed by an appropriate state agency (40 CFR § 80.1450(b)(2)(i)(A)). For foreign producers, the third party engineering review must be conducted by an independent third party who is a licensed professional engineer or foreign equivalent who works in the chemical engineering field for a foreign production facility (40 CFR § 80.1450(b)(2)(i)(B)). The attest process requires that a party that is engaged in the RIN system as a RIN generator, obligated party, and/or RIN owner hire an independent auditor to review the party's records and reports according to the schedule provided in the regulations. This audit helps ensure that information reported to the EPA is backed by documents such as purchase receipts for feedstocks, bills of lading for delivery, invoices, laboratory test results, etc., as required by the program.

Additionally, the EMTS is tied into the registration system to ensure that only registered renewable fuel producers or importers generate RINs and only for the specific products for which they are registered. For example, a registered ethanol producer would not be able to generate biomass-based diesel RINs without additional registration submissions and EMTS authorization. The EMTS also allows an obligated party to block RINs that might come from renewable fuel sources that it considers questionable or that it has not verified, and it also allows a RIN owner to "lock" out RINs it owns and believes may not be valid to avoid those RINs from being traded and used for compliance.

4. *EPA has stated that the buyers of RINs, regardless of their reliance on the EMTS and on EPA's registration process for biodiesel producers, must nonetheless perform "due diligence." What does due diligence require? Please describe the measures that could have been undertaken by obligated parties that would have prevented the purchase of invalid RINs such as those allegedly originating from Clean Green.*

Congress created the RFS program to increase the production and use of renewable fuels in our transportation system. The legislation obligates refiners and fuel blenders to use an increasing volume of renewable fuels. One way to do this is for refiners or importers to buy and use the renewable fuel. At the request of the refiners and importers, EPA added greater

flexibility for refiners and importers, by allowing them to acquire RINs that represent a volume of renewable fuel. The ability to show compliance using a RIN-based system rather than through the purchase and sale of actual renewable fuel volumes came at the refining industry's request.

EPA's fuel programs for decades have relied on a regulatory system that calls for each party in the fuel delivery system to do its due diligence to ensure that fuel quality (gasoline sulfur, diesel fuel sulfur, etc.) is maintained. Each party in the chain takes seriously its obligations to ensure that the fuel it buys is of the appropriate quality, and exercises appropriate business oversight and diligence to achieve this result. The industry implements and maintains this system of checks on its own in a highly efficient manner that is tailored to the size and characteristics of each of the market participants.

Just as EPA does not direct parties in the fuel supply chain how to ensure that the fuel they buy and sell meets the sulfur requirements, we do not direct the industry on the most efficient way to validate RINs as they pass them through the system. Each party in the system must make its own assessment of the most appropriate business practices. Experience to date has shown that fact checking, diligent questioning, and site visits by potential RIN buyers can identify possible problems. In the case of Clean Green, had the RIN purchasers conducted the same sorts of due diligence they would have conducted if they were buying a volume of renewable fuel instead of buying a RIN, they would have likely discovered the fraudulent producer before it came to the EPA's attention. A simple site visit would have revealed that the company was not producing renewable fuel.

Industry participants in the RIN market are in the best position to develop best practices for identifying properly or improperly generated RINs. Several private sector systems are now under development to assist market participants in evaluating whether the fuel offered for sale qualifies as renewable fuel under the EPA's RFS2 regulations and whether the RINs associated with that fuel are valid. Additionally, the National Biodiesel Board has formed a RIN Integrity Advisory Task Force to identify a solution or solutions to enhance RIN integrity.

While due diligence is not an affirmative defense to liability under the EPA's RFS regulations, the EPA may consider the level of due diligence in determining an appropriate penalty for any particular violation.

5. *What investigative resources and time were expended by EPA to ascertain that Clean Green's RINs were invalid? Do smaller obligated parties have the resources to conduct such investigations? What analysis has EPA performed to ensure smaller obligated parties are able to compete in the EMTS under EPA's due diligence standards?*

Because of the sensitivity of information regarding investigative resources and time expended by the EPA to ascertain that Clean Green's RINs were invalid, the EPA does not disclose such information because it could jeopardize enforcement actions.

EMTS allows obligated parties to block RINs generated by specific renewable fuel producers, or conversely allows only transactions involving RINs generated by trusted producers. Smaller obligated parties can choose to only purchase RINs generated from

producers they trust. In the case of Clean Green, had smaller obligated parties exercised the same due diligence used in the normal course of business involving buying actual renewable fuel volumes, we believe that they would have recognized that no fuel was being produced by Clean Green. Because the volume of RINs necessary to be purchased is proportional to an obligated party's total fuel production and directly equivalent to the volume of renewable fuel obligation they would have to purchase in order to comply with the program, we do not believe that the buyer-beware nature of the RIN program places any higher burden on small producers than they would have borne in simply purchasing actual renewable fuel volumes. Of course, the option of purchasing actual renewable fuel volumes is available to all obligated parties.

6. *What specific steps is EPA taking to reduce uncertainty in the renewable fuels markets since the issuance of the NOVs and to reduce the impact on RIN sales and prices? Is EPA considering structural changes to RIN markets in order to reduce the likelihood of fraud? If so, please describe these potential changes.*

   The settlement offers extended by the EPA in January 2012 were one step toward providing some certainty to the obligated parties who used invalid RINs generated by Clean Green Fuels, LLC, protect RIN market integrity, and reinforce the need for companies to ensure they are using only valid RINs for compliance purposes. EPA actions against violators are a deterrent against future fraud and send the message the Agency is monitoring whether RINs that are transferred or retired represent actual renewable fuel.

   EMTS already provides several tools that can help RIN purchasers determine the validity of RINs (e.g., by allowing them to identify the generator of RINs) and avoid buying RINs from sources they question (i.e., by blocking receipt of RINs from such sources). We also post on our website monthly aggregated renewable fuel production information and we plan to post facility-specific production information in the future (pending determination that such production information is not entitled to treatment as confidential business information). We believe any structural changes the Agency could make to the program to reduce the likelihood of fraud would most likely reduce program flexibility. However, we have reached out to the regulated community through meetings and conference calls to solicit regulatory changes to address the RIN fraud situation and we are awaiting their input.

7. *Obligated parties have until February 28, 2012 to comply with their Renewable Volume Obligation (RVOs) for 2011. Given the current challenge of finding valid biofuel RINs, has EPA considered an extension of this deadline or any other near-term measures that may facilitate compliance? Given the difficulties finding valid RINs to replace invalid ones, has EPA considered expanding the universe of allowable replacement RINs, broadening the carryover provisions, or foregoing the requirement of procuring replacement RINs? Does EPA believe that there is sufficient latitude under existing law to create such flexibility?*

   We believe the existing flexibilities provided by the RFS2 regulations are more helpful to obligated parties required to meet their RVOs than changing the reporting deadline would be, especially at this point in time. Specifically, the RFS2 regulations provide the ability to carry a RIN deficit so obligated parties and renewable fuel exporters that have used invalid RINs

may be able to show that they meet their RVOs for 2011 by carrying a deficit forward in accordance with the limitations specified in the regulations and making up the deficit with valid RINs in the 2012 compliance year.

The statute currently limits deficit carry forward to the calendar year following the year in which the renewable fuel deficit is created. Therefore, extending the deficit carry forward provisions for an additional year would require a change in the statute.

Congress' goals in establishing the RFS program would not be met if fraudulent RINs could be used for compliance. The RIN market structure depends on the volume mandate to drive demand and hence renewable fuel production. If fraudulent RINs can be used, that will undercut the market for valid RINs. Requiring obligated parties to replace fraudulent RINs they have purchased will drive demand for valid RINs from real, legitimate producers. Failure to require replacement of the fraudulent RINs could have a devastating effect on small biodiesel producers as the small producers in particular may find themselves holding good RINs that no one needs and that will in the end expire without ever being sold. Therefore, the Agency has no plans to forego the requirement for obligated parties to procure valid replacement RINs.

8. *In EPA's January 9, 2012, Final Rule for the 2012 RFS, the agency recognized the problems caused by invalid RINs being bought and sold and thereby creating violations at each step. In the section entitled "RIN Retirement Provision for Error Correction," EPA included measures allowing improperly generated RINs to nonetheless be used for compliance by obligated party purchasers, while EPA focused on addressing the source of the invalid RINs. Although this solution was only contemplated for RINs generated in error rather than fraud, have you considered expanding this flexibility to the current situation?*

   The RIN retirement provision for error correction was put in place to address instances where renewable fuel producers or importers may improperly generate RINs in EMTS as a result of calculation errors, meter malfunctions, or clerical errors. As stated in the regulations, improperly generated RINs are invalid, and cannot be used to achieve compliance with any RVO. This provision allows certain RINs that were improperly generated to nevertheless be transferred and used for compliance provided the RIN generator retires an equivalent number of valid RINs of the same vintage (fuel category and RIN year) in order to make the market whole. This flexibility may only be used under certain conditions, though, in order to mitigate harm to the RIN market. For the reasons discussed in our response to question 7, above, Congress' goals in establishing the RFS program would not be met if fraudulent RINs could be used for compliance purposes, except under very limited circumstances.

9. *In the preamble to EPA's March 26, 2010, Final Rule on the RFS program, the agency made clear that it "would normally look first to the generator or seller of the invalid RINs both for payment of penalty and to procure sufficient valid RINs to offset the invalid RINs." However, the agency's NOVs focused first on the ultimate purchasers as the parties to be penalized and made responsible for procuring valid RINs. What is the reason for this approach?*

The EPA is focusing its enforcement authority on Clean Green and is taking appropriate action to ensure that the invalid RINs generated by Clean Green are not used to meet the Congressionally mandated renewable fuel standards. The United States filed criminal charges against Clean Green and has seized about $7.8 million in assets from the company that may be available for restitution to victims that purchased invalid Clean Green RINs. The preamble and regulations make it clear that obligated parties are liable for violations if they use invalid RINs. While the preamble states that the EPA "would normally look first to the generator or seller of the invalid RINs both for payment of penalty and to procure sufficient valid RINs to offset the invalid RINs," the EPA also issued NOVs to parties that used Clean Green RINs because these parties failed to meet their compliance obligations, and to ensure that the renewable fuel mandates were met in a timely manner.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 24 2007

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Transmittal of Final OECA Parallel Proceedings Policy

FROM: Granta Y. Nakayama

TO: Regional Administrators
Regional Counsel
Regional Enforcement Directors
OECA Office Directors

Attached is the final revised Parallel Proceedings Policy which supersedes both the Memorandum, *Parallel Proceedings Policy*, Steven A. Herman, Assistant Administrator, Office of Enforcement (June 21, 1994), and the Memorandum, *Coordinated Settlement of Parallel Proceedings: Interim Policy and Procedures*, Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance (June 9, 1997).

This Policy reaffirms and clarifies the earlier policies, while adding procedural mechanisms to enhance effective communications between the Agency's civil and criminal enforcement programs. The Policy was developed through extensive coordination between the Office of Enforcement and Compliance Assurance's civil and criminal programs, consulting with Regional Counsels and the Department of Justice, Environment and Natural Resources Division's Environmental Enforcement Section and Criminal Enforcement Section.

Should you have any questions, please contact me at (202) 564-2440, or your staff may contact Melissa Marshall at (202) 564-7971 in the Office of Civil Enforcement, or Bette Ojala at (202) 564-4226 in the Office of Criminal Enforcement, Forensics and Training.

Attachment

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 24 2007

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Parallel Proceedings Policy

FROM: Granta Y. Nakayama Granta Y. Nakayama

TO: Regional Administrators
Regional Counsel
Regional Enforcement Directors
OECA Office Directors

Introduction

Most statutes administered by EPA include both civil and criminal enforcement authorities; effective protection of human health and the environment requires appropriate use of the full range of these authorities to identify and resolve violations. This Parallel Proceedings Policy up-dates the Agency's earlier policies regarding coordinated use of EPA's civil and criminal authorities to achieve environmental compliance.[1]

Although the great majority of EPA's enforcement actions are brought as either civil or criminal matters, there are instances in which both enforcement responses are appropriate. These include situations where the violations merit the deterrent and retributive effects of criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions make both criminal and civil enforcement appropriate.

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[1] The following are hereby superseded: Memorandum, Parallel Proceedings Policy, Steven A. Herman, Assistant Administrator, Office of Enforcement, June 21, 1994; Memorandum, Coordinated Settlement of Parallel Proceedings: Interim Policy and Procedures, Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, June 9, 1997.

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Definitions

EPA defines parallel proceedings very broadly to mean civil and criminal enforcement activities taken with respect to the same or related parties, dealing with the same or a related course of conduct.

- Proceedings include enforcement activities at both the investigative stage (including the use of entry and information-gathering authorities) and the litigation stage.

- Parallel proceedings are simultaneous or sequential enforcement actions taken with respect to the same or related parties and dealing with the same or a related course of conduct.

- Enforcement includes actions for criminal sanctions, civil penalties, injunctive relief, compliance orders and cost-recovery.

Consultation and Cooperation

Active consultation and cooperation between EPA's civil and criminal programs, consistent with all legal requirements, are critical to the success of EPA's overall enforcement program. The success of any parallel proceedings depends upon coordinated decisions by the civil and criminal programs as to the timing and scope of their activities. For example, it will often be important for the criminal program to notify civil enforcement managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the criminal program when there are significant developments in the civil matter that might change the scope of the outcome being sought. In every parallel proceeding, communication and coordination should be initiated at both the staff and manager levels and should continue through the resolution of all parallel matters.

In all parallel proceedings, the civil and criminal programs should initially meet to weigh the options and determine how to achieve the most complete and appropriate relief. In those instances where it is decided that only the criminal matter will go forward, the criminal enforcement program must ensure that the civil program is timely advised if the criminal matter will not be charged. That notification should occur no later than a year before the expiration of the statute of limitations in the civil matter.

Consistent with legal restrictions, emphasis should be placed on ensuring that the activities of each program complement – but do not interfere with – the other program and that information is gathered in such a way that it may be shared to the maximum extent appropriate. Communication and consultation with the Department of Justice (DOJ) should occur regarding all parallel proceedings. In matters where EPA's civil action is purely administrative, EPA's

criminal enforcement personnel should discuss the parallel proceeding with DOJ prosecutors. In matters involving a potential or filed civil judicial action, EPA civil and criminal enforcement personnel should each consult with their DOJ colleagues.

Each Region must establish a system for communication and coordinated decision-making that includes staff and managers from the Criminal Investigation Division (CID) and the Office of Regional Counsel and Regional enforcement office (RC). Similarly, the Headquarters Office of Enforcement and Compliance Assurance (OECA) must establish such a system between the Office of Criminal Enforcement and Forensics Training (OCEFT), the Office of Civil Enforcement (OCE) and/or the Offices of Site Remediation Enforcement (OSRE) and Federal Facilities Enforcement (FFEO), as appropriate, for proceedings where OCE, OSRE or FFEO has the lead or where a significant national interest has been identified. If there is disagreement between Regional civil and criminal enforcement managers as to whether parallel proceedings are appropriate or the order in which the actions will go forward, the applicable OCE, OSRE, FFEO and OCEFT Office Directors should be notified. The Directors will either resolve the issue or refer it to the Principal Deputy Assistant Administrator for OECA.

Types and Management of Parallel Proceedings

There are essentially two types of parallel proceedings. The more frequent parallel proceedings involve criminal actions where a parallel civil administrative compliance or cleanup order is also required for protection of human health or the environment. In these situations, a civil penalty action ordinarily should not be brought unless the criminal proceeding does not go forward.[2]

The other type of parallel proceedings is where the nature of the conduct is sufficiently egregious that both civil and criminal responses are appropriate. These parallel proceedings are infrequent. They tend to be significant and complex enforcement actions, requiring careful case-by-case management and on-going effective communication and coordination. There are a number of ways to approach management of this second type of parallel proceedings, including:

- Deciding that either the civil or criminal action will be sufficient to achieve the

[2] In exceptional instances where the respondent/defendant refuses to comply with an order, it may be necessary to impose civil penalties for that failure in order to achieve a timely cleanup. Such action must be jointly decided upon by the civil and criminal programs and subject to the considerations discussed in this section and should be managed pursuant to the procedures used in the more complex type of parallel proceedings.

Agency's interests;[3]

- Deferring the civil proceeding until the criminal case is resolved;
- "Carving-out" civil or criminal claims where allegations in either proceeding do not overlap or where the defendants are not the same;
- Proceeding simultaneously while attempting to resolve the civil matter through negotiation, rather than filing the civil action;
- Filing a civil action where it is necessary to preserve a claim and moving to stay the action; or
- Proceeding with the civil and criminal matters simultaneously.

If a determination is made to file a civil complaint before resolution of the criminal matter, the civil and criminal programs should meet to decide whether to request a stay of any part of the civil case pending resolution of the criminal case. This meeting is not required where the civil matter has been resolved either administratively or through a judicial consent decree or other settlement agreement that will be lodged with the filing of a complaint.

Legal and Practical Implications of Parallel Proceedings

In deciding whether parallel proceedings are appropriate and how best to manage them, the enforcement team should be aware of the legal and practical issues affecting related proceedings, as well as the timing of enforcement activities. Factors that favor bringing the criminal proceeding to conclusion first include:

- The significant deterrent and punitive effects of criminal sanctions;
- The ability to use a criminal conviction as collateral estoppel in a subsequent civil case;
- The possibility that imposition of civil penalties might undermine a prosecution or the severity of a subsequent criminal sentence;
- Preservation of the secrecy of a criminal investigation, including completion of covert sampling;
- Prevention of a defendant's premature discovery of evidence in the criminal case, through a defendant's exploitation of the civil discovery process to obtain evidence regarding the criminal proceeding;
- Avoidance of unnecessary litigation issues, such as unfounded defense claims of misuse of process in the civil or criminal action;
- Avoidance of duplicative interviews of witnesses and subjects;

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[3] Generally, if a criminal proceeding can accomplish complete relief the matter should go forward criminally. However, where the civil proceeding has been significantly developed and the criminal proceeding is relatively undeveloped and speculative, then the civil matter should continue, maintaining coordination with the criminal program.

- The Speedy Trial Act requirements that trial be held within specified time frames after indictment.

Factors supporting the initiation or continuation of the civil judicial or administrative action prior to conclusion of the criminal action include:

- A threat to human health or the environment that should be expeditiously addressed through preliminary injunctive relief or response action;
- A threat of dissipation of the defendant's assets;
- An immediate statute of limitations or bankruptcy deadline;
- Where only a marginal relationship exists between the civil and criminal actions;
- The civil case is in an advanced stage of negotiation or litigation when the potential criminal liability is discovered;
- The civil case is integral to a national priority and a decision to postpone the case could substantially and adversely affect implementation of the national effort.

Memorialization

Once the civil and criminal programs decide to pursue parallel proceedings and agree upon their timing, they should promptly memorialize these decisions in a case-specific Parallel Proceedings Memorandum. The Memorandum should provide only essential information, including a description of the key factual allegations and potential statutory and regulatory violations. Most importantly, the Memorandum must contain a summary of the decision(s) regarding the timing and scope of the parallel proceedings.

The Memorandum must be signed by the appropriate CID Special Agent in Charge and the RC. In identified cases of national interest or those in which OCE, OSRE or FFEO has the lead for the civil matter, the Memorandum should be signed by the OCEFT and OCE, OSRE or FFEO Office Directors. It should be written as a memorandum to the case file and distributed to all members of the civil and criminal case teams. In cases of national interest, a copy of the Memorandum should also be provided to the Principal Deputy Assistant Administrator of OECA. As parallel proceedings are developed and moved toward resolution, it may be necessary to revisit the decisions recorded in the Memorandum; any new or modified changes should be documented and then distributed to the civil and criminal case teams. The Memorandum should be marked as Attorney/Client Privileged and Work Product and be maintained as an enforcement confidential record.

Legal Guidelines

Parallel proceedings present specific legal issues regarding investigations, discovery and litigation. In addition to complying with all legal and ethical requirements, enforcement personnel should follow practices that avoid even the appearance of overreaching or unfairness.

These guidelines apply to all parallel proceedings.

Grand Jury Materials

EPA criminal investigative personnel obtain access to grand jury materials only if permitted by a federal prosecutor. Agency personnel must comply with the prosecutor's directions in order to assure their compliance with the law and procedures of that judicial district.

Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of any matter occurring before a grand jury or information that is part of a grand jury's record except in very limited circumstances, usually involving an authorizing order from the court. EPA personnel must take utmost care not to violate this secrecy rule; violators may be subject to civil and/or criminal sanctions. The Rule prohibits using grand jury information for any purpose other than assisting the prosecutor in the criminal proceedings; for example, knowledge drawn from the grand jury record must not be used in civil enforcement activities, absent a court order authorizing the use. To avoid either the release of grand jury information or the appearance of misuse, EPA personnel to whom Rule 6(e) grand jury information has been disclosed should not be assigned to any parallel civil enforcement matter.

Criminal investigative information that is not subject to grand jury secrecy and use rules may be shared with the civil program without violating Rule 6(e). However, once grand jury proceedings are initiated, such information sharing should not occur unless the prosecutor agrees that the disclosure or use will not violate Rule 6(e). When this information sharing does occur, a record should be made in the criminal case file of DOJ's agreement that the information could be shared; what material was transmitted; the source of that information (*i.e.*, a description of its non-grand jury status), and who may receive it.

Information Requests and Inspections

The criminal program does not direct the civil program's investigative activities, nor does the civil program direct the criminal program's investigative activities. It is entirely appropriate for the civil enforcement personnel to bring information to the attention of the criminal program and for criminal enforcement personnel to bring information to the attention of the civil program, subject to the restrictions discussed in this Policy's section on grand jury materials, above.

EPA's regulatory inspections, including administrative searches with a warrant, must be objectively reasonable and properly limited within the scope of the authorizing statute and warrant. In every situation, the government has a duty to act in good faith and must ensure that its use of administrative entry authorities is properly within the mandate of the Fourth Amendment.

EPA's information-gathering authorities must be used in accordance with authorizing

statutory provisions. There is no general legal bar to using administrative mechanisms to investigate suspected criminal matters. However, the government must not intentionally mislead a person as to the possible use of any responsive information in the criminal context in such a way as to violate the Fifth Amendment Due Process Clause or the Self-Incrimination Privilege.[4] Accordingly, although not a legal requirement, it is a common EPA practice to include a warning in EPA information requests that all information sought may be used in an administrative, civil judicial or criminal action. Furthermore, it is EPA policy that any information request issued by EPA's criminal enforcement program must clearly reflect that the information is being sought by that program.

Civil Discovery

Any information obtained as a result of a legitimate civil purpose, including discovery, may be shared with criminal enforcement personnel.[5]

In responding to civil discovery, government attorneys may assert a law enforcement privilege to protect responsive files in a parallel criminal case. If there is a motion to compel production of the criminal files, the law enforcement privilege must be asserted by a high EPA official (such as the Assistant Administrator or Deputy Assistant Administrator for OECA) explaining the harm that would be caused by disclosure of the records. This is a qualified privilege, however, and can be overcome if a litigant's need outweighs the government's interests in keeping the information confidential. Thus, the possibility that criminal investigation files might have to be produced is a factor to consider when determining whether civil litigation should go forward while the criminal proceeding is pending. Prior to informing a defendant of a decision by EPA not to assert this privilege, the civil attorney should coordinate closely with the EPA and Department of Justice criminal programs to ensure that the privacy interests of individuals mentioned in the criminal case records are fully protected.

Double Jeopardy

Parallel proceedings under the environmental laws do not give rise to double jeopardy

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[4] The Fifth Amendment privilege against self-incrimination may only be raised by individuals, not by business entities. A business must respond to an information request, even if individuals within that entity claim the privilege and refuse to respond in their individual capacities.

[5] United States v. Kordel, 397 U.S. 1 (1970). Note that protected Confidential Business Information can only be disclosed to those authorized to receive it.

concerns.[6] The Double Jeopardy Clause of the Fifth Amendment only protects against the imposition of multiple *criminal* punishments of the same person for the same offense. To raise even a question about possible double jeopardy arguments, a civil penalty would have to be so punitive in form and effect that it transforms an intended civil remedy into a criminal penalty.

Disproportionate Penalties

Civil penalties should not be imposed that, taken together with criminal sanctions, are so grossly disproportionate to the underlying violations that they violate the constitutional prohibition of excessive fines.[7]

Ethical Considerations

Attorneys and other persons representing EPA in enforcement actions must never use the threat of criminal prosecution to obtain a civil settlement, nor may they use the threat of civil enforcement to resolve a criminal matter. This ethical rule is important in every case, and is particularly important in the context of parallel proceedings to avoid even the appearance of impropriety.

Coordinated Resolutions

A coordinated resolution is the simultaneous resolution of both civil and criminal liability in a parallel proceeding.[8] Although not required by law, it is EPA policy that only the defendant may make this proposal. In such an event, EPA, in conjunction with DOJ, should consider whether coordinated settlements of civil and criminal liability would be a timely, practical and appropriate resolution of the violations and in the best interests of the United States. A coordinated resolution would not be appropriate if, for example, the process of negotiating civil relief would unduly delay or interfere with the criminal proceeding. It would also be inappropriate if the negotiations regarding the criminal case limited EPA's ability to respond to an environmental or human health threat or limited the Agency's ability to obtain appropriate injunctive relief.

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[6] Hudson v. United States, 522 U.S. 93 (1997).

[7] Id., 522 U.S. at 103.

[8] Simultaneous resolutions of a defendant's civil and criminal liability were formerly known as "global" settlements. That term is now applied to civil settlements that resolve similar violations at most or all of a defendant's facilities. The term "coordinated" resolutions more accurately describes the simultaneous conclusion of parallel civil and criminal proceedings.

When EPA approves a coordinated resolution, the following limitations apply:

- The settlement documents must be negotiated separately;
- EPA will not agree to release criminal liability in a civil settlement;
- EPA will not approve the waiver or discharge of civil liability in a criminal plea agreement; and
- The civil and criminal resolutions must conform to all applicable policies; and must be memorialized in separate settlement documents.

Reservation of Rights

This Policy provides internal guidelines for the Environmental Protection Agency. It is not intended to, and does not, create any rights, substantive or procedural, that are enforceable at law by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Environmental Protection Agency.