

Hazardous Waste Criminal Investigations in West Virginia

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Abstract: The author describes the development of this State's program to investigate crimes dealing with hazardous waste disposal. Particular emphasis is placed on the pitfalls and advantages of a hybrid position as used in this state. As illustrated in the summary, it is not beyond the scope of state wildlife enforcement agencies to investigate and prosecute these crimes that do vast amounts of damage to the natural resources. In many cases, an act of hazardous waste disposal can do more damage to an ecosystem and its natural resources than an entire family or even generations of poachers.

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In 1988, a need was recognized for criminal investigations of complex environmental crimes, specifically violations of the West Virginia Hazardous Waste Management Act (WV20-5E) which is a direct parallel to the Federal Resource Conservation and Recovery Act (42 USC 6928). These hazardous waste crimes are unique for several reasons:

- 1.) They are the only environmental felonies in the state code.
- 2.) It is practically impossible to prove one of these crimes without analytical data.
- 3.) Very few law enforcement officers have the legally required training to be on a hazardous waste site to collect evidence (one officer in West Virginia).

The Law Enforcement Section in West Virginia is primarily geared to patrol type activity related to game and fish enforcement with additional responsibility in other types of environmental enforcement as a supplement to voluntary regulatory compliance.

The Waste Management Section is charged with the responsibility to inspect the regulated community for compliance. Noncompliance is usually dealt with by the Waste Management Section through administrative procedures and civil processes.

When a criminal act occurs in the regulated community neither section has been geared to criminal investigations of these types of activities. Conservation officers

traditionally do not work cases where they are required to enter contaminated sites, conduct grid samplings, operate on self-contained breathing apparatus or must be concerned with how to decontaminate a soil sampling instrument to prevent analytical interference with the suspected hazardous waste. The environmental inspector routinely deals with these types of considerations. On the other hand, the environmental inspector normally does not have to consider the concept of an illegal search, an individual's fourth and fifth amendment rights, chain of custody for court, nor the concept of beyond a reasonable doubt (is it there vs. how did it get there). These are all concepts that the conservation officer deals with daily.

West Virginia decided to address these unusual enforcement issues by assigning one conservation officer to the Waste Management Section. The idea was to have a full-time certified law enforcement officer who would be provided the special OSHA training and other technical training by the Waste Management Section to allow that officer to understand the complex regulations, operate the analytical equipment and safely and legally enter contaminated sites. The belief was that since a multitude of technical staff was needed to support these prosecutions, it would be simpler to move one officer rather than a technical staff of several people. This explains how my position came about.

This hybrid system has many advantages and disadvantages as any collaborative effort always does. The most notable advantages in my experience are:

1.) By working in a specialized area you become, at least, conversant with the regulations; all 1,043 pages related to hazardous waste.

2.) You have the opportunity to educate the regulatory inspectors as to the elements of the various crimes and the types of proof that will prove each element. Alert aggressive inspectors can aid any investigation if they prepare a thorough and complete regulatory foundation. For example, by notifying and documenting explanations and instructions to the companies the knowledge element of the crimes is made; by knowing the elements that must be proved in criminal court they will recognize potential criminal activity and refer it for investigation.

3.) Practically all referrals of hazardous waste crimes come from the inspectors. By working with them they develop trust that their referrals aren't placed in the black hole of inaction, and more referrals are generated.

4.) The tremendous technical skills and regulatory knowledge of the environmental inspectors is immediately available to the conservation officer.

The disadvantages of this system include:

1.) Care must be taken to obtain the cooperation of the local conservation officer: he must not be alienated. Special efforts must be made to demonstrate how these types of cases protect the environment and help the local conservation officer protect the resources. The local officer can provide invaluable help.

2.) The environmental inspectors have certain rights of entry that can raise fourth amendment questions if abused. As aggressive inspector can be an asset, an abusive inspector can destroy an otherwise good case.

3.) Regulatory personnel are generally charged with the clean-up of environmental contamination. This clean-up can destroy evidence of criminal activity. This can place the conservation officer's enforcement needs at odds with the inspector's regulatory mandate.

4.) Regulators are generally satisfied with a preponderance of evidence, which is sufficient in civil proceedings, but totally inadequate to meet the criminal court standard of beyond a reasonable doubt.

5.) The conservation officer is expected to supervise site investigations using a wide variety of technical personnel who have no direct obligation to accept the officers supervision.

6.) Being in a hybrid position makes it difficult to maintain appropriate discipline to the chain of command.

As in most enforcement matters the issues are not clear cut; there is no one right way. The various factors, enforcement resources, regulatory resources, state prosecutorial system, availability of analytical resources, state agency structure, and public sentiment are all factors that have a bearing on how a state chooses to attack environmental crime.

In a Cinderella scenario, I would wish for an independent unit within the Law Enforcement Section dedicated to environmental crimes. The unit would contain sworn law enforcement officers as well as scientific/technical staff. This unit would build a close rapport with the environmental inspectors who discover and refer the majority of these types of crimes. However, by being segregated, the problems associated with parallel civil and criminal proceedings, regulatory right of entry, and the competing interests of evidence preservation and site remediation are more apt to be dealt with as independent but related issues. Under our current system, these issues can be so intertwined that compromise decisions are made which do not adequately address either the regulatory or enforcement needs and lead to unsatisfactory results. This is not how West Virginia has chosen to address this enforcement issue.

The West Virginia program to date has led to 32 felony indictments and 182 misdemeanor indictments. Guilty pleas or guilty verdicts have been obtained in all cases completed to date with 184 outstanding indictments. Sentences have included \$355,550 in fines, 5 years of prison time, 19 years of probation, and 1 license revocation. Related civil penalties as a result of criminal cases has generated >\$500,000 in penalties. This has cost the state approximately \$35,000 in additional expenditures, (exclusive of salaries, as personnel levels were not increased).