ENVIRONMENTAL CRIMES

PANELISTS

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OREGON ENVIRONMENTAL CRIMES

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Environmental and Cultural Resources Enforcement Unit (ECREU)

Who is ECREU?

Environmental and Cultural Resources Enforcement Unit

- We are housed within Oregon DOJ's Criminal Justice Division
  - 3 AAGs plus support staff
  - Our role is to assist Oregon DAs in the prosecution of crimes that fall under these statutory schemes and issues in these subject matters
  - We are uniquely connected not only to other AAGs and the network of DAs across the state, but to federal partners, out-of-state partners, tribes, and state agencies

What does an environmental prosecution look like?

- Prosecutions under Oregon Environmental Crimes Act (OECA)
  - ORS 468.920 to ORS 468.963
  - Covers water, air, haz waste, etc.
- Prosecutions under criminal provisions of state agencies' statutory schemes
  - DEQ, OWRD, DSL, ODA, ODFW, etc.
- Including traditional criminal charges when appropriate
- Guideline adoption and certification requirements for felonies
  - ORS 468.961
  - Purpose is for statewide consistency
  - Related rules codified in OAR Chapter 137, Division 95

What does an environmental prosecution look like?

- Generally, what differentiates an environmental crime from a mere violation?
  - Culpable mental state
    - Criminal negligence
    - “Knowing” or “Knowingly”
      - Criminal code definition AND definition in OECA
      - “Knowingly disregarding”
      - History can play a part
  - Harm to human health or the environment can be a major factor
    - Not enough in isolation, however
  - 3 D’s
    - Deceitful, Deliberate or Dishonest Conduct

Criminal vs. Civil

- The criminal process is independent of any civil process
  - While an agency may make a referral, it is up to investigators and prosecutors to make the decision
  - Parallel proceedings
- Look to the AG Guidelines to know what factors we consider

Staying out of Trouble: Environmental Compliance & Responding to Criminal Investigations

KEVIN FELDIS
PARTNER, PERKINS COIE LLP

Note: The content of this presentation is for general informational purposes only and is not a substitute for seeking legal advice about specific compliance issues.

Individual Responsibility and Corporate Accountability

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Individual Responsibility: what your employees say and do matters

- Companies act through their employees
- Employees are agents of their companies
- Employee actions may create liability for company

Your employees are on the front lines of accountability and compliance

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Respondeat Superior

Employer is responsible for the acts of its employees and agents where:

1. Employee/agent is acting within the scope of their employment

2. At least some benefit to the employer (low threshold to meet)

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Components of Accountability

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Company and its Employees Must

- Know what is required
- Take ownership of compliance
- Seek the resources necessary to comply with laws and regulations
- Create a culture of communication and learning

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Avoiding Criminal Violations: Compliance Guidance

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Control What You Can Control

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Three Parts to Successful Compliance:

1. BEFORE = Have a Meaningful Pre-existing Compliance Program
2. DURING = Respond Effectively (timely response and investigation)
3. AFTER = Meaningful Remedial Action to Prevent Future Problems

Designing Compliance Programs

Corporate Compliance Programs

Foundational Elements

- Adequately designed to prevent and detect wrongdoing
  - Tailored to the misconduct most likely to occur in your line of business
- Enforced by management
- Reviewed by Board (reporting systems in place)
- Evaluated to determine if working

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Evaluating Compliance Programs

DOJ Evaluation of Corporate Compliance Programs

Fundamental Questions

Is the compliance program well designed?

- Risk Assessment
- Tailored Policies & Procedures
- Training & Communication
- Complaint & Investigation Process
- Includes Third-party Management
- Reporting Upwards & Oversight by Board

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Evaluating Compliance Programs (continued)

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Is the compliance program implemented effectively?

- Commitment by Senior & Middle Management
- Autonomy & Resources (structure)
- Incentives & Disciplinary Measures

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Evaluating Compliance Programs (continued)

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Does the compliance program work?

- Periodic Testing & Review
- Continuous Improvement
- Investigations of Misconduct
- Analysis and Remediation of Misconduct

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Enforcement Priorities

Priorities Change, Enforcement is Consistent

- Government wants to create incentives for companies to invest in compliance up front, and to make good decisions in the face of misconduct
- Consistent focus on bad actors, repeat offenders, significant pollution, harms to people and the environment
- Criminal enforcement will always be a consideration
- Prosecutors will consider how well companies:
  - Prevent and detect problems
  - Investigate misconduct, voluntarily report and cooperate
  - Implement appropriate remedies
- Recognize bad things happen to good companies

Responding Effectively

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- Demonstrate accountability
- Repair damage
- Invest in change
- Enhance compliance
- Reassure public/employees
- Analyze root cause

- Update Incident Response Plan
- Include full range of incidents*
- Practice the plan
- Retain outside advisors in advance
- Invest in compliance now
- Anticipate enforcement actions and litigation

- Restore operations and highlight core values
- Investigate internally
- Self-disclose & cooperate
- Respond to subpoenas
- Identify other responsible parties
- Assess political implications
- Manage litigation, media and continued messaging

- Identify the incident quickly
- Protect health, safety & environment
- Assemble the team/don't go it alone
- Control scene & flow of information
- Make required notifications & coordinate with investigators
- Protect privileges
- Gather initial facts
- Remember the human element
- Avoid misstatements/admissions

How you Respond Matters

- Respond quickly to minimize damage
- Identify and prepare your team in advance
  - Who needs to be informed and who will be involved in responding to different types of incidents
- Don’t make things worse through speculation, snap judgments, email debates, placing blame or making premature definitive statements
  - Get legal involved early
- Preserve Evidence
- Remember the Human Element

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Final Compliance Tips

Key Compliance Components

- ✓Senior Leadership Support & Oversight
- ✓Autonomy & Resources
- ✓Tailored Policies and Procedures
- ✓Internal Controls
- ✓Training & Communication
- ✓Audits & Updates
- ✓Action & Accountability
- ✓Includes Managing Third-Party Relationships

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PANEL DISCUSSION

Questions?