

**ENVIRONMENT AND NATURAL RESOURCES DIVISION
DIRECTIVE 2008-02**

PARALLEL PROCEEDINGS POLICY¹

I. INTRODUCTION

This Directive sets forth the policy of the Environment and Natural Resources Division (ENRD) for coordinated enforcement of the criminal and civil provisions of statutes under its purview.² The Environmental Crimes Section (ECS), Environmental Enforcement Section (EES), Environmental Defense Section (EDS), and Wildlife and Marine Resources Section (WMRS) routinely work with statutes that authorize both civil and criminal enforcement. To optimize effective enforcement of these statutes, the Division may sometimes pursue both civil and criminal enforcement actions against the same or related defendants for the same or related conduct.

Nevertheless, legal requirements prohibit or control some kinds of cooperation between prosecutors and civil attorneys working on overlapping cases. This Directive sets forth restrictions to ensure compliance with those requirements and to avoid unnecessary litigation. In some cases, these restrictions exceed what the law requires. All of the restrictions set forth in this Directive must be followed unless the Assistant Attorney General (AAG) or his or her designee directs otherwise in a particular case.

This Policy is primarily directed at those sections involved in the enforcement of laws designed to address pollution problems and wildlife protection: ECS, EDS, EES and WMRS. Other sections may be covered by this Policy in individual circumstances. Section IV does not apply when the Division is defending a civil lawsuit and pursuing a criminal investigation or prosecution involving the same or related matters. In such cases, the AAG may issue instructions appropriate for the circumstances.

In cases where the parallel proceeding is being handled by a U.S. Attorney's Office, another Division, or another agency, ENRD attorneys should exchange parallel proceedings policies with their counterparts. If the policies differ in any substantial way, ENRD attorneys should consult with their supervisor regarding the appropriate course of action. It may be appropriate to prepare a memorandum setting forth the policies and practices that will apply to a

¹ This action is taken pursuant to the authority set forth at 28 C.F.R. § 0.65.

² Pursuant to the Attorney General's memorandum of July 28, 1997, United States Attorneys' Offices and Department Litigating Divisions are directed to establish a system for coordinating criminal, civil, and administrative law enforcement. This memorandum provides guidelines for Environment and Natural Resources Division attorneys and is written to be consistent with the Attorney General's memorandum.

particular case or cases. Unless otherwise directed, ENRD attorneys should follow the direction contained in this Policy.

This Policy supersedes Directive 99-21, Integrated Enforcement Policy, dated April 20, 1999.

II. DEFINITIONS

For the purposes of this document, parallel proceedings means overlapping criminal and civil or administrative enforcement activities with respect to the same or related parties and that deal with the same or a related course of conduct. The overlapping activities may be undertaken simultaneously or sequentially. These activities include enforcement actions brought to obtain criminal sanctions, civil penalties, injunctive relief, compliance orders, or cost recovery, as well as pre-filing activities directed at enforcement, including investigative efforts.

III. GENERAL PRINCIPLES GOVERNING PARALLEL PROCEEDINGS

Division attorneys shall follow the principles set forth below in exercising their enforcement discretion. Some of the following limitations may not be required by law and are established as a matter of policy to avoid unnecessary litigation issues. Within the boundaries of these requirements, Division civil and criminal attorneys should coordinate investigations and cases as necessary to protect human health, the environment, and other interests of the United States, and to obtain just results.

1. ECS, EDS, EES, and WMRS shall evaluate their cases to determine whether civil or criminal enforcement, or both, is appropriate. The type of enforcement assigned the case by the originating agency should be given careful consideration, and section managers should consult with the agency in making this determination.
2. When it appears that a parallel proceeding may be appropriate, civil and criminal attorneys should exchange information and evidence received from agencies as early as possible in the process, conduct joint investigations where appropriate, and consult together on an ongoing basis, subject to legal and ethical constraints, including those discussed in this Policy.
3. Attorneys may only conduct civil and administrative discovery when justified by genuine civil or administrative case purposes. The administrative and civil discovery process may not be used as a pretext to obtain information for a criminal investigation.
4. Notwithstanding the above limitations, any information obtained as the result of legitimate civil and administrative discovery may be freely shared with criminal

enforcement attorneys.

5. Civil attorneys shall neither confirm nor deny the existence of a criminal investigation to any person outside the Department. Civil attorneys should report any such inquiries to their supervisor, and coordinate with ECS regarding whether any additional steps are necessary.
6. Federal Rule of Criminal Procedure 6(e) (“Rule 6(e)”), governing the disclosure of information related to grand jury proceedings, must be complied with at all times.
7. After a grand jury has been convened in an investigation, ECS attorneys shall not share with civil attorneys information obtained from the criminal investigation unless the information is part of the pre-grand jury record and the fact that it is part of the pre-grand jury record is documented, or there has been court authorization to do so. However, when appropriate, and in accordance with the procedures set forth in Part IV.E. below, ECS supervisors may authorize disclosure of information collected after a grand jury has been convened if it is documented that disclosure of the information will not reveal a matter occurring before the grand jury.
8. Civil and criminal attorneys should consult with each other on legal issues to ensure that the Division takes consistent positions on the interpretation of regulations and statutes.
9. Although the availability of civil relief may be considered in making criminal charging decisions, see United States Attorneys Manual § 9-27.250, criminal prosecution shall not be used as a threat to obtain civil settlement. Conversely, civil enforcement shall not be used as a threat to resolve a criminal matter. See Directive 99-20, Global Settlement Policy.
10. Civil and/or criminal sanctions may be appropriate in any given case. However, once a decision has been made that criminal sanctions are appropriate, Division attorneys shall not permit a defendant to trade civil relief in exchange for a reduction in criminal penalties.
11. At the Section level, decisions about the initiation, conduct, and conclusion of cases shall be made solely by criminal attorneys and their supervisors with respect to criminal cases, and by civil attorneys and their supervisors with respect to civil cases. Unless directed to the contrary by the AAG, criminal plea agreements and civil settlements shall be negotiated separately, and must separately satisfy the appropriate criminal and civil criteria.

IV. PROCEDURES

In conjunction with the general principles outlined above, the following guidelines and procedures should be followed:

A. Cross-Referrals

Civil attorneys should consider the possibility that their civil case may include criminal conduct, and should remain alert for information indicating criminality. For example, a civil case yielding evidence of falsification of data, concealment of evidence, or repeated violations despite prior enforcement efforts should alert the trial attorney to potential criminal liability. If a referral package received from an agency includes evidence of potential criminal violations, or if such evidence emerges at any time during the course of a civil proceeding, the attorney handling the matter should consult with section management and the matter should be brought to the attention of ECS.

Similarly, ECS attorneys must be alert to situations in which civil enforcement may be appropriate; for example, when it appears that an injunction to halt ongoing unlawful activity or remedial action is necessary, or when an investigation reveals a violation of law, but there is insufficient evidence of criminal mental state. ECS shall adopt procedures to ensure that, when appropriate, matters that ECS declines for criminal prosecution are referred to EES, EDS or WMRS. ECS attorneys shall not include in the materials sent to civil attorneys grand jury material subject to Rule 6(e), unless a court order has been obtained.

ECS, EDS, EES, and WMRS Section Chiefs shall establish procedures for submitting the facts of appropriate cases to other sections for review, as well as for tracking and reporting the progress and outcome of other sections' review.

B. Consultations

As appropriate, criminal and civil attorneys should consult about cases (including sharing information), subject to requirements set forth in Section IV.E., including Rule 6(e). Further, Division attorneys should coordinate positions regarding legal issues to ensure that the Division takes consistent positions on the interpretation of regulations and statutes. They also should notify their counterparts in other sections of milestones in a case of interest, such as seeking an indictment, filing a complaint, seeking injunctive relief, setting discovery deadlines, setting trial dates, and beginning or ending settlement negotiations. Information about ENRD's litigation plans is confidential information and must not be shared outside the Department.

C. Joint Investigations

When a case may be appropriate for both criminal and civil enforcement, the Division encourages joint investigations prior to initiating the grand jury process. Civil and criminal

attorneys jointly investigating a matter may together undertake fact-finding activities such as interviewing witnesses and gathering documents. The circumstances of each case will dictate the extent to which the investigation should be undertaken jointly. Once the grand jury process has begun, joint investigative activity shall not be initiated or continued without the approval of the AAG.

In any joint investigation, civil and criminal attorneys each must have a good faith basis for every information-gathering action taken, independent of the investigatory needs of their counterpart. The administrative and civil discovery process may not be used as a pretext to obtain information for a criminal investigation. However, any information obtained as the result of legitimate civil and administrative discovery may be freely shared with criminal enforcement attorneys. Civil attorneys should ensure that criminal attorneys are aware of any protective orders or other restrictions on the use of the information. Information obtained in a criminal investigation may be shared with civil attorneys, subject to the requirements that: (a) the information was obtained for a criminal enforcement purpose, and (b) the disclosure of such information does not violate Rule 6(e) or the policies described in Parts III or IV of this document. Civil attorneys also shall observe any confidentiality requirements, such as those protecting informant identity and the criminal investigatory process. Civil and criminal attorneys should also coordinate their selection of expert witnesses, as further discussed in Section IV.E. below.

When a joint investigation has been undertaken prior to the commencement of the grand jury process, civil and criminal attorneys should create a record of what information has been gathered through means other than the grand jury process. When there is a parallel proceeding, ECS attorneys are encouraged to consider whether there are alternatives to the use of a grand jury subpoena for obtaining needed information.

It may be appropriate for civil and criminal attorneys to prepare a joint memorandum to their respective Section Chiefs outlining a plan for a joint investigation. Under any circumstances, civil and criminal attorneys should ensure that supervisors are kept informed of the progress of a joint investigation, including any parallel proceedings issues that have arisen.

D. Charging and Litigation Decisions

Decisions about civil cases shall be made only by civil attorneys and their supervisors. Decisions about criminal cases shall be made only by criminal attorneys and their supervisors. The AAG has responsibility for related civil and criminal cases handled by the Division. The DAAGs may, as directed by the AAG, supervise related civil and criminal cases or coordinate among themselves in the supervision of such cases.

Criminal attorneys should carefully consider the timing of bringing a case before a grand jury, and generally should not do so until the benefits of this action outweigh the disadvantages to both the criminal and civil proceedings. Attorneys should consider developing as much

evidence as possible before the grand jury is used.

When proceeding with both criminal and civil enforcement, the Division generally will delay the civil case until criminal proceedings are resolved.³ However, the Division will assess the circumstances of each matter, and may decide to proceed in some other fashion. Factors that may weigh in favor of not delaying the civil proceeding include:

- (1) the civil violations present a threat to public health or the environment such that injunctive relief should not be delayed;
- (2) the defendant's assets are in danger of dissipation;
- (3) there is an imminent statute of limitations or bankruptcy deadline for the civil claim;
- (4) there is only a marginal relationship between the civil and criminal violations; and
- (5) civil proceedings are in an advanced stage when the potential criminal liability is brought to light.

When a civil complaint is to be filed before resolution of a criminal matter, the civil and criminal attorneys and their supervisors should consult and consider various case management tools that may serve to minimize the likelihood that defendants may attempt to use the civil discovery process to undermine the criminal investigation.

E. Parallel Proceedings and Compliance with Grand Jury Rules

Subject to certain exceptions, Rule 6(e) prohibits government attorneys from disclosing "a matter occurring before the grand jury."⁴ Rule 6(e) must be complied with at all times.

³ Criminal proceedings typically precede civil actions because of Speedy Trial Act considerations, the more substantial deterrent and punitive effect of criminal sanctions, and because results in criminal cases can be used as collateral estoppel in favor of the government in subsequent civil cases on the same issues.

⁴ For example, there is an exception to this rule for forfeiture actions under 18 U.S.C. § 3322(a). In a civil forfeiture case, a prosecutor can disclose grand jury information to a Department civil forfeiture attorney for use in a complaint, restraining order, or other pleading filed, as well as at trial, without a disclosure order. However, without first obtaining a judicial order, neither a prosecutor nor a Department civil forfeiture attorney may disclose grand jury information to a seizing agency's attorneys for use in an administrative forfeiture proceeding or to government contract employees who may be assisting in the preparation of the civil forfeiture

Except as otherwise provided in this Policy, after a grand jury has begun to conduct an investigation, ECS attorneys should not share with civil attorneys information obtained from the criminal investigation unless the information is part of the pre-grand jury record and the fact that it is part of the pre-grand jury record is documented, or there has been court authorization to do so. This requirement exceeds the legal requirements imposed by Rule 6(e) and is established by the Division as a matter of policy and to avoid unnecessary litigation.

If an attorney believes that an exception to this general requirement is warranted with respect to a particular piece of non-grand jury information,⁵ the attorney should consult with the appropriate ECS supervisor, who may authorize the disclosure of the information. Any authorization of the disclosure of such information must be documented in writing, and should include an analysis specific to the circuit where the case is pending of why the disclosure of the information does not fall within the prohibitions of Rule 6(e). If the disclosure is to be made by a person other than a DOJ attorney, the authorization by the DOJ attorney to that person to disclose the information must be in writing, and shall include a description of the information to be shared, the source of that information, and who may receive it. Attorneys may also consult with ECS management about seeking a court order under Rule 6(e) allowing the disclosure of grand jury information.

After commencement of a grand jury proceeding, civil attorneys may continue to obtain information through the civil discovery process, so long as they have a good faith basis for seeking the information for the civil case. ECS attorneys shall not direct civil discovery strategy. Subject to that requirement, once information is obtained by a civil attorney it may be freely provided to criminal enforcement attorneys.

To the extent possible, civil and criminal attorneys should coordinate their selection of expert witnesses. Division attorneys should consider whether a particular expert witness would be better used for the civil or criminal case, balancing such factors as the likely pace of each proceeding, the respective needs of each case, and the availability of alternative experts. When

case.

Where this or other exceptions to Rule 6(e) clearly apply, Division attorneys are not subject to the information sharing restrictions set forth in this subsection, but should instead look to the law governing each particular case. In such instances, Division attorneys should coordinate closely with section management to ensure compliance with all applicable legal requirements.

⁵ For example, an exception to this general rule may be warranted when a particular piece of information was not obtained through the grand jury process or presented to the grand jury, and these facts are documented; or when grand jury subpoenas have been served, but a prosecutor receives information apart from the grand jury process while responses to the grand jury subpoenas are pending.

civil attorneys have used expert witnesses in developing the civil case, these experts may be made available to the criminal attorneys. Criminal attorneys shall not provide to these experts information obtained after commencement of the grand jury process, except as otherwise provided above. However, if the civil case has concluded, including all possible appeals, this policy does not restrict ECS attorneys from providing information subject to Rule 6(e) to a former civil case expert who may be useful to the criminal prosecution. Criminal case expert witnesses sometimes may be made available for use in civil cases, to be determined on a case-by-case basis and subject to the limitations of this policy and Rule 6(e).

V. CASE RESOLUTION

The negotiated resolution of civil and criminal proceedings is governed by the Division's policy on global settlements. See Directive 99-20, Global Settlement Policy. In general, criminal plea agreements and civil settlements shall be negotiated separately, must separately satisfy the appropriate criminal and civil criteria, and must be embodied in separate documents. Those documents should make clear that the criminal plea does not resolve the civil case, and the civil settlement does not resolve the criminal case. Criminal prosecution shall not be used as a threat to obtain civil settlement. Conversely, the Division shall not use civil enforcement as a threat to resolve a criminal matter. Division attorneys shall not permit a defendant to trade civil relief in exchange for a reduction in criminal penalties.

Attorneys should be aware that, under Hudson v. United States, 522 U.S. 93 (1997), neither the imposition of a civil penalty nor a criminal disposition will bar subsequent proceedings under the other option against the same entity for the same violations. However, it is possible that a civil penalty or sanction could be so punitive as to be deemed a criminal penalty and, in such circumstances, successive civil and criminal proceedings might be barred as a violation of the Double Jeopardy Clause. Thus, attorneys should be aware of anticipated fines or penalties in a parallel proceeding to avoid any unintended consequences leading to the barring of other relief.

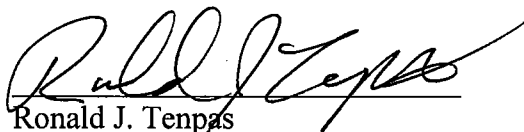
VI. TRAINING

The Division will continue to provide training to its attorneys about criminal and civil cases, the benefits of integrated enforcement, important issues that arise in the two types of cases, and implementation of this Policy. For example, ECS will help train civil attorneys to identify potential criminal liability in civil cases, to recognize Fourth and Fifth Amendment concerns that may arise when there is a parallel criminal proceeding, and to understand the criminal process. Civil attorneys will help educate ECS attorneys about civil process, civil remedies and the elements of a civil case so they will be able to determine when an ECS matter should be submitted to a civil section and when a case slated to remain on ECS's docket should be reviewed by civil attorneys due to issues such as injunctive relief or limitations.

VII. EFFECT OF THIS POLICY

This policy provides only internal guidelines for the Environment and Natural Resources Division of the Justice Department. The policy 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 Justice Department.

Date: 12 December 2000

A handwritten signature in black ink, appearing to read "Ronald J. Tenpas", written over a horizontal line.

Ronald J. Tenpas
Assistant Attorney General
Environment & Natural Resources Division