

Environmental Law Monitor: Environmental Enforcement, Suspension and Debarment With Robert Wagman, Jason Hutt and Kevin Collins [PODCAST]

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On this episode of the Bracewell Environmental Law Monitor, host Daniel Pope talks with Kevin Collins, Jason Hutt and Robert Wagman about current trends and environmental and federal enforcement.

Kevin Collins is a partner in our Austin office. He is a former Assistant U.S. Attorney from the Eastern District of Texas, and he helps manage the problems that arise during government investigations.

Jason Hutt is a partner in our DC office and chair of the firm's environmental department. He advises and defends clients on the complex environmental and energy issues of our day.

Robert Wagman is a partner in our DC office and heads up the government contracts practice. He does a lot of government enforcement work.

What are you seeing generally these days from DOJ in the criminal enforcement context? What is the EPA doing on the civil side?

There's been a resurgence and activity at DOJ. I think they feel invigorated under the new administration. The stats support that feeling. The United States attorney's offices across the country

are up about 10 percent in their charges. They've charged roughly 5,500 individuals for white-collar related crimes. Environment Natural Resources Division, in particular, at DOJ has already indicted 11 companies and 34 individuals. Many of those individuals are senior executives. Budget wise, they're asking for a lot more money. So, there's definitely interest in going after bad actors, particularly individuals at companies to a certain extent.

We're still enforcing the same environmental laws, but the leniency factor or the posture factor is different. Part of the settlement expectations is increasingly a focus on protection of the community in which a facility or a violator operates. We are seeing increased expectations related to fence line monitoring demands and reparations or mitigation under a resolution that involves making things right, but in the community where the violation occurs or where the environmental damage associated with that violation occurs. Those are pieces that are seen as a posture shift in the government.

One of the terms that has come up a few times on this podcast already is the term suspension and debarment. Can you give us your quickest suspension and debarment for dummies course so that we can all be on the same page?

A lot of companies don't realize suspension debarment will impact them. It's not just for government contractors. A lot of times it'll apply to both procurement actions and what's called non-procurement actions. The term that's used in the regulations is cover transactions, which is essentially anything that's not exempted out. When government money is involved, chances are it's a covered transaction. This comes up a lot with federal leases. If you are a federal lessee, or if you are an oil field services company servicing federal lessees, suspension debarment can have a tremendous impact on your business. A lot of times this is companies, individuals. They don't think about suspension and debarment and the administrative remedy that could be associated with it. So, in broad strokes, suspension and debarment means you're excluded from doing business with the federal government for some period of time, usually three years. But it can vary. It usually follows criminal or civil enforcement, but it doesn't have to follow civil or criminal enforcement. It can come from any referrals.

What are some areas where suspension and debarment issues might be a higher risk than others?

Environmental because of the statutory debarment provisions. It's much more likely to hit the radar of the suspension and debarment official than other types of enforcement activities. If you are doing a lot of business with the government, you're more likely to end up on somebody's radar. Again, every agency has their own suspension and debarment official, so you could be facing debarment. It's not just an EPA thing or not just one particular agency. Any agency in theory could debar you. If you end up being debarred, it applies company-wide.

There's also a statutory debarment under several of the environmental statutes, but also there's an ability to find yourself in the criminal culpability realm based upon mere negligence. That's very different than most of these other statutes that we're talking about. It's the coupling those two things that gives rise to this being a heightened risk in the environmental world. In particular, when you have an incident or an accident, the notion of negligence is almost in the minds of enforcement folks because there was some significant amount of environmental damage or loss of human life that in their minds, and perhaps appropriately, that shouldn't happen.

What best practices can companies implement into their accountability systems to make sure they're looking at these kinds of issues and where their exposures are?

There really is no substitute for good corporate governance — all the types of things that say this is a trustworthy company the government can feel comfortable doing business with. It's going to help in your criminal enforcement, your civil enforcement and everything else that you're doing.

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