



U.S. Department of Justice

Environment and Natural Resource Division

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

DIRECTIVE No. 2016-12

Title: Parallel Proceedings Policy

Authority: This directive is issued pursuant to the authority vested in me as Assistant Attorney General (AAG) of the Environment and Natural Resources Division (ENRD) at 28 C.F.R. § 0.65.

Purpose: The purpose of this directive is to update the ENRD Parallel Proceedings Policy. This policy addresses coordinated enforcement of the criminal and civil provisions of statutes under ENRD's purview. This directive aligns ENRD policy with the January 30, 2012 Attorney General Memorandum on Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings, and is consistent with the September 9, 2015 Deputy Attorney General Memorandum on Individual Accountability for Corporate Wrongdoing. It is updated to better address information-sharing between civil attorneys and prosecutors and to describe how litigation holds are to be managed. It also eliminates the presumption against sharing of information after a grand jury has been called. Instead, prosecutors should, consistent with their obligations under Federal Rule of Criminal Procedure 6(e), keep track of information sources so that non-grand jury information can be shared with civil or administrative teams.

Relationship to Other Directives: ENRD Directive No. 2016-12 entitled "Parallel Proceedings Policy" shall replace and supersede ENRD Directive No. 2008-02, also entitled "Parallel Proceedings Policy."

Effective Date: This directive shall become effective upon approval.

Action:

I. INTRODUCTION

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 protect the government's interest and secure its full range of remedies, the Division may sometimes pursue overlapping civil and criminal enforcement actions against the same or related defendants for the

same or related conduct, through what are known as “parallel proceedings.”¹ Parallel proceedings may be undertaken simultaneously or sequentially and may include investigations and enforcement actions brought to obtain criminal sanctions, civil penalties, injunctive relief, compliance orders, and/or cost recovery.

The foundation of this policy is that Division prosecutors and civil trial attorneys should timely communicate, coordinate and cooperate with one another and with agency attorneys to the fullest extent appropriate to the case and permissible by law whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, and/or agency administrative parallel proceedings. Nevertheless, because legal requirements prohibit or control some kinds of cooperation between prosecutors and civil attorneys working on parallel proceedings, this directive sets forth restrictions to ensure compliance with those requirements and to avoid unnecessary litigation.

In cases where part of a parallel proceeding is being handled by a U.S. Attorney's Office, another division, or another agency, Division attorneys should exchange parallel proceedings policies with their counterparts. If the policies differ in any substantial way, Division attorneys, in consultation with a supervisor, should reconcile those differences as early as practicable. It may be appropriate to prepare a memorandum setting forth the policies and practices that will apply to a particular case or cases. Unless otherwise authorized by an appropriate supervisor, Division attorneys should follow the direction contained in this directive.

II. OVERVIEW

Division attorneys shall follow the procedures and guidelines set forth in Sections III and IV below in exercising their enforcement discretion to protect human health, the environment, and other interests of the United States, and to obtain just results. The following is a summary of key precepts that shall be followed during the course of a parallel proceeding:

1. When it appears that a parallel proceeding may be appropriate, the Division's civil attorneys and prosecutors should exchange information and evidence received from agencies as early as possible in the process, conduct joint investigations where appropriate, and consult together about common issues that may impact each case on an ongoing basis, subject to legal and ethical constraints, including those discussed in this directive. They should work to allow information to be shared to the fullest extent appropriate to the case and permissible by law.
2. 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.

¹ This directive 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 Assistant Attorney General may issue instructions appropriate for the circumstances.

3. Notwithstanding the above limitations, any information obtained as the result of legitimate civil and administrative discovery may be freely shared with criminal enforcement attorneys.
4. 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.
5. 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.
6. Consistent with their obligations under Rule 6(e), ECS attorneys should keep careful track of the sources of information obtained so that grand jury material is identifiable and non-grand jury information can be shared with the civil or administrative teams.
7. Civil attorneys and prosecutors should consult with each other on legal issues to ensure that the Division takes consistent positions on the interpretation of regulations and statutes.
8. 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 No. 2016-11, Global Settlement Policy.
9. 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.
10. At the Section level, decisions about the initiation, conduct, and conclusion of cases shall be made solely by prosecutors 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.
11. There shall be no releases or waivers of civil claims by prosecutors, nor any releases or waivers of criminal charges by civil attorneys.

III. PROCEDURES AND GUIDELINES

At every point between case intake and final resolution (e.g., declination, complaint, indictment, settlement, plea, and sentencing), Division attorneys should assess the potential

impact on any parallel proceeding of each action they take.²

A. Intake

ECS, EDS, EES, and WMRS shall evaluate their cases to determine whether criminal or civil enforcement, or both, is appropriate.³ 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.⁴

Civil attorneys should consider the possibility that their 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, regardless of the status of the civil case.

Similarly, ECS attorneys must be alert to situations when civil enforcement may be appropriate. Examples include situations where it appears that an injunction to halt ongoing unlawful activity or remedial action is necessary (or desirable) or when an investigation establishes a violation of law, but there is insufficient evidence of criminal mental state. ECS attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to individual civil liability, even if criminal liability continues to be sought. If there is a decision not to pursue a criminal action or if it becomes apparent that criminal prosecution is unlikely, ECS attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes. This consultation should occur at the earliest appropriate time so that potential civil claims are protected from timing impediments such as staleness of evidence or statutes of limitation.

B. Investigations

² For example, prosecutors, when considering a plea agreement, should also consider the impact the charge used as a basis for the plea agreement and the facts set forth in support of the plea agreement could have on a subsequent civil case (e.g., collateral estoppel, res judicata) and/or debarment.

³ ECS and EES have implemented Cross-Referral Procedures which are posted on the ENRDnet.

⁴ Although the Attorney General's January 30, 2012 Memorandum states that a case referral from any source is a referral for all purposes, civil environmental enforcement actions may be brought only after a referral from the agency with primary responsibility for the relevant environmental or natural resource claim. Accordingly, where criminal prosecutors believe that a civil enforcement action may be appropriate, they should coordinate with the regional civil component within the agency and with EES, EDS, or WMRS as appropriate.

In the event of a parallel proceeding, consideration must be given to investigative strategies that maximize the government's ability to share information among criminal, civil, and agency administrative teams to the fullest extent appropriate to the case and permissible by law. The Division encourages joint investigations prior to initiating the grand jury process because it facilitates sharing and serves the goals of this policy. Thus, prosecutors should consider using investigative means other than grand jury subpoenas for documents or witness testimony. At the same time, the Division does not want its prosecutors to forgo use of the grand jury if doing so is likely to significantly reduce the chance of bringing a criminal to justice. These interests can sometimes be in conflict, which means that the teams working in parallel need to talk to each other to find the right balance. Sometimes these questions will need to be elevated to the Division's senior leadership, who are better positioned to balance the totality of the United States' interests.

Civil attorneys and prosecutors jointly investigating a matter may undertake fact-finding activities together such as interviewing witnesses and gathering documents through voluntary productions. The circumstances of each case will dictate the extent to which the investigation should be undertaken jointly. In any joint investigation, prosecutors and civil attorneys each must have a good faith basis for every information-gathering action taken, independent of the investigatory needs of their counterparts. The administrative and civil discovery process may not be used as a pretext to obtain information for a criminal investigation, and prosecutors shall not direct civil discovery strategy. Subject to that requirement, civil attorneys and prosecutors may discuss the kinds of information that could be useful to either investigation.

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

1. Information-sharing considerations: Civil to Criminal

Once information is obtained by civil attorneys, it may be provided to prosecuting attorneys. That said, the ways the information might be dispersed beyond the prosecution team should be addressed jointly, before the information is shared. If the information may be subject to privileges, a special regulatory status (like confidential business information), protective orders, or other restrictions on its use, the teams working in parallel need to decide together how those restrictions will be honored once the information is shared.⁵

Sharing information with a prosecuting attorney happens against the backdrop of his or

⁵ For example, the teams should consider (1) the timing and manner of review necessary to identify information subject to such restrictions, (2) whether prosecutors will review the restricted information for discoverability prior to production to a criminal defendant (to minimize the amount of restricted information that may be produced), and (3) whether an appropriate protective order can be put in place to address such restrictions prior to production of that information to any criminal defendant.

her discovery obligations, which are detailed elsewhere in Department and Division policies.⁶ Civil attorneys and prosecutors should have a common understanding of these policies when they discuss how and when material will be shared. As the policies explain, prosecutors have affirmative discovery obligations, largely independent of a defendant's demands or requests. Thus, material that may assist the defense, that is exculpatory, or that impeaches other evidence is routinely turned over to a charged criminal defendant, even if it is not requested by his or her lawyer.⁷

Once information is shared with prosecuting attorneys, they should consult with their civil counterparts before releasing the information outside of the Division, or making commitments to do so, to ensure that the understandings reached when the information was shared have not been overtaken by events and to ensure that any practical limitations on the timing of production are addressed. Any disagreements between Sections with respect to the proposed release need to be promptly elevated to appropriate managers.

2. Information-sharing considerations: Criminal to Civil

Information obtained in a criminal investigation may be shared with civil attorneys, so long as the disclosure of such information does not violate Rule 6(e). Prosecutors shall ensure that civil attorneys are aware of, and civil attorneys shall observe, any confidentiality requirements, such as those protecting informant identity and the criminal investigatory process.⁸ 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.

Rule 6(e) prohibits government attorneys from disclosing "a matter occurring before the grand jury."⁹ Once the grand jury process has begun, joint investigative activity shall not be

⁶ For more information regarding criminal-discovery obligations, see USABook Federal Criminal Discovery Collection at <https://dojnet.doj.gov/usao/eousa/ole/usabook/disc/index.htm> and ENRD Criminal Discovery Policy and Guidance, http://enrdnet.enrd.doj.gov/ECS/ECS_Files/Files/ECS_Discovery_Policy_and_Guidance_Final_Oct_15_version.pdf.

⁷ Even in a situation without a declared parallel proceeding or a joint investigation, a prosecutor's obligations may require him or her to seek information subject to criminal discovery from civil counterparts and, depending on the nature of that information, produce it to the defense.

⁸ For example, criminal investigations are generally secret, as dictated by law enforcement practice, Rule 6(e) of the Federal Rules of Criminal Procedure, and Rules 1.6 and 3.8(f) of the Model Rules of Professional Conduct (MRPC). Similarly, Rule 1.6 imposes an obligation of confidentiality on attorneys working on any matter, and so Division prosecutors shall maintain confidentiality regarding the Division's civil work, unless disclosures are made in compliance with Rule 1.6 of the MRPC.

⁹ There may be exceptions to this rule, including, for example, forfeiture actions under 18 U.S.C. § 3322(a). In a civil forfeiture case, a prosecutor can disclose grand jury information to a Department

initiated or continued without the approval of the AAG. During criminal investigations, prosecutors must document the sources of all information so that grand jury material is identifiable and non-grand jury information can be shared with the civil or administrative teams. After commencement of a grand jury investigation, Division prosecutors may share non-grand jury information with civil, regulatory, and administrative enforcement teams with supervisory approval. The prosecutor should prepare a memo for the case file describing the shared information and its source, as well as a brief analysis specific to the circuit where the case is pending as to why the disclosure of the information does not fall within the prohibitions of Rule 6(e).

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. There may be circumstances where a target, defendant, or a witness objects to similar demands for information stemming from both the civil process and the grand jury process because they appear to be redundant. That kind of redundancy is a product of Rule 6(e) secrecy and necessary limitations on coordination between civil attorneys and prosecutors. Thus, the person or entity receiving the demand will have to request coordination and lead the effort to do so.¹⁰

Pursuant to Rule 6(e)(3)(E), a court may authorize disclosure of a grand-jury matter. Although the circumstances for such disclosure are extremely limited, civil and agency attorneys may consult with ECS management about seeking such a court order.

3. Witnesses

To the extent possible, prosecutors and civil 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. Expert witnesses used by civil attorneys in development of the civil case may not be used by prosecutors without prior agreement of the civil attorneys, and vice versa. If experts are being shared by

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 case. Where this or other exceptions to Rule 6(e) clearly apply, Division attorneys should coordinate closely with Section management to ensure compliance with all applicable legal requirements.

¹⁰ A grand jury witness does not have secrecy obligations under Rule 6(e). Rule 6(e)(2)(A)&(B). Thus, if the person receiving a grand jury subpoena wishes to coordinate with prosecutors and civil attorneys, he or she may attempt to do so. That said, such a person should not be heard to complain about lack of coordination within the government where the lack of coordination results from proper application of the secrecy rule.

prosecutors and civil attorneys during a joint investigation, prosecutors shall not provide to these experts information obtained after commencement of the grand jury process, except in conformance with Rule 6(e) and after notice to the civil attorneys.

Prosecutors and civil attorneys shall consult with each other regarding the timing and use of fact witnesses in depositions and at trial, taking into account the needs of each case.

4. Order of Proceedings

When proceeding with both criminal and civil enforcement, the Division generally will delay the civil case until criminal proceedings are resolved.¹¹ However, the Division will assess the circumstances of each matter to determine whether to delay the civil case. Factors that may weigh in favor of allowing the civil case to proceed before the resolution of the criminal matter include:

- (1) the 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 a timing concern in light of a statute of limitations or bankruptcy deadline for the civil claim, or other potential statutory bar;
- (4) there is only a marginal relationship between the civil and criminal violations; and
- (5) civil case development is in an advanced stage when the potential criminal liability is brought to light.

Civil attorneys and prosecutors should consult with each other and both Sections' management when any of these factors tilt the scale in favor of bringing a civil case before substantial resolution of the criminal matter. When a civil complaint is to be filed before resolution of a criminal case, civil attorneys, prosecutors, and their supervisors should consult and consider various case management tools (e.g., stays) to minimize use of the civil discovery process by defendants to undermine the criminal investigation.

Prosecutors and civil attorneys should provide adequate, advance notice to each other of anticipated milestones in their respective matters. "Adequate" here means enough time to allow for timely deliberation over and resolution of any dispute between the prosecutors and civil attorneys and their managers before the date of the anticipated milestone. To provide adequate notice, prosecutors and civil attorneys should notify their counterparts as soon as they

¹¹ Criminal proceedings typically precede civil actions because of Speedy Trial Act considerations, the generally more substantial punitive and deterrent effects 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.

contemplate undertaking such actions. Examples of milestones on the civil side include: issuance of post-referral information requests, decision to seek an approved complaint, issuance of an Executive Order demand or other demand for any kind of relief, commencement or recommencement of settlement negotiations, filing of a complaint, and proposing schedules and terms of discovery, pre-trial, or trial activities. On the criminal side, examples include: execution of a search warrant, resort to grand jury tools, planning for indictment, prosecution reviews, commencement or recommencement of settlement negotiations, preparation of factual allocutions, and proposing schedules and terms of discovery, pre-trial, or trial activities. Prosecutors may not be able to provide detail about the anticipated event, but can still alert their counterparts that it is coming. For instance, Rule 6(e) prevents a prosecutor from identifying a grand jury witness, but the fact that an investigative phase of grand jury witness testimony is likely to start could be revealed. Prosecutors and civil attorneys should also hold routine, periodic status calls to facilitate communication.

C. Resolution

The AAG has responsibility for related criminal and civil cases handled by the Division. The Deputy AAGs may, as directed by the AAG, supervise related criminal and civil cases or coordinate among themselves in the supervision of such cases. At the Section level, decisions about the initiation, conduct, and conclusion of cases shall be made solely by prosecutors and their supervisors with respect to criminal cases, and solely by civil attorneys and their supervisors with respect to civil cases.¹² There shall be no releases or waivers of civil claims by prosecutors, nor any releases or waivers of criminal charges by civil attorneys.

The negotiated resolution of civil and criminal proceedings is governed by the Division's policy on global settlements. *See* Directive No. 2016-11, 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.

IV. LITIGATION HOLDS

In civil cases, the United States may have an obligation to institute a litigation hold that

¹² 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.

may encompass records in the possession of the prosecution team. To respect confidentiality issues that arise once a grand jury is convened, as well as to avoid interfering with the progress of the criminal investigation or altering the production obligations in any resulting criminal prosecution, civil teams that institute a litigation hold should not communicate directly with prosecution team members. Rather, using the current sample communication posted on the Division's e-discovery intranet page, the civil attorney imposing the litigation hold should communicate the preservation obligation to the attorney leading the prosecution team who will bear responsibility for communicating and supervising the preservation of appropriate materials.

V. 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 the 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.

VI. REVOCATION OF DIRECTIVE NO. 2008-02

ENRD Directive No. 2008-02 is hereby revoked and replaced by this directive.

Consultation and Distribution:

This directive was developed in consultation with Chiefs of all ENRD Sections and all ENRD Deputy Assistant Attorneys General. I hereby direct that this directive be distributed by LPS to all ENRD Sections; that Section managers inform attorneys and other employees, as appropriate, of this new directive; and that the Executive Office make a copy of the original of this directive available to all Division attorneys and other employees via user-friendly software technology such that it is indexed, searchable and accessible (e.g., PDF format).

This directive relates only to internal procedures and management of ENRD. It does not create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, officers, or any other person.

Date:

December 20, 2016


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Environmental & Natural Resources Division