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A Clear Commitment to America's Waters

LEGAL PERSPECTIVES

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EPA's new enforcement chief recently announced plans to expand criminal enforcement and better integrate that program with civil enforcement priorities. Public utilities should be concerned—and recent cases in Mississippi and the Virgin Islands show why.

In April 2006, the United States will finish its prosecution in the longest running environmental crimes trial in history. *United States v. Atlantic States Cast Iron Pipe Co,* No. 03-852 (D. N.J. filed Dec. 11, 2003*)* involves allegations against a company and five individuals for a host of safety and environmental violations at the company's pipe manufacturing facility in Phillipsburg, New Jersey.

The pursuit of this case dovetails with the recent announcement by U.S. Environmental Protection Agency (EPA or Agency) Assistant Administrator for Enforcement, Grant Nakayama, that EPA plans to strengthen its criminal enforcement program. Nakayama wants to ensure that criminal enforcement no longer is considered a "poor stepchild" within the Agency. He indicated that EPA is planning to co-locate the criminal enforcement office within the civil enforcement offices, which have typically operated separately from each other.[i] EPA also announced plans to use an extra eight million dollars approved by Congress to hire new criminal investigators, buy new equipment, and transfer field agents.[ii]

Once the *Atlantic States* prosecution is complete, where might EPA's enforcement office look to start a new initiative or better utilize these additional criminal enforcement resources? One choice could be publicly owned treatment works (POTWs). This choice would make sense given that wet weather – more specifically, sanitary sewer and combined sewer overflows – remain among EPA's top civil enforcement priorities. Mr. Nakayama's stated intent of integrating civil and criminal enforcement would make this priority area a logical choice for greater scrutiny by criminal investigators.

Two recent examples demonstrate the broad "categories" of cases that EPA may target for future prosecutions. The first, in Mississippi, is a "quick hit" garden variety prosecution. The second, in the Virgin Islands, is an all-encompassing prosecution.

I. *United States v. Tollison*

In many parts of the United States, private developments outside of major cities are not connected to municipal sewage treatment facilities, but rather have their own small sewage treatment plants sometimes known as a "package plant." Typically, a homeowners' association will obtain a contract from a private utility company to operate and maintain its plant. The private utility companies are usually regulated by a public service commission (PSC) that insures the utility is properly licensed and charging competitive rates. In theory, the PSC provides a check and balance against unscrupulous companies who might choose to maximize profits at the expense of offering inferior service. In practice, some of these companies have learned how to manipulate the system and collect fees, while providing inferior

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service and operating under the regulator's radar screen. Environmental Utilities Services, Inc. (EUS) was a company that fit this mold.

EUS was under contract to operate and maintain package plants for approximately ten developments in Southern Mississippi. Unfortunately, EUS was light on the operation and maintenance aspect of its contract, and after many years of non-compliance at some of these plants, the Federal government finally caught up with it. In 2004, EUS's president and owner, Gordon T. Tollison, was charged in a 39-count indictment alleging Clean Water Act violations related to improper operation at four of the worst run plants from 1999 until 2002.[iii] Tollison, who is an engineer, was charged with exceeding limits for fecal coliform bacteria, failing to disinfect sewage and lying to investigators about the wastewater analysis he was required to perform and submit to the State of Mississippi. Facing these allegations, Mr. Tollison, not surprisingly, agreed to plead guilty to four counts in the indictment and on February 17, 2006, was sentenced to a $5,000 fine and a year and one day in prison.

Hopefully, the Mississippi residents now have a more reputable company servicing their package plants; however, the water reclamation company track record in the Southeast is less than stellar. In 2000, Johnson Properties, Inc. was fined $680,000 and its president was sentenced to a $500,000 fine and three years in prison for similar operation and maintenance problems at scores of package plants in rural Louisiana. Further in 1996, the President of Gateway Utilities, Inc. was fined $18,000 and sentenced to one year and one day in prison for falsifying data about the quality of wastewater being discharged from facilities Gateway was servicing in northeast Florida. These private utility companies face significant pressure to conceal operational deficiencies because they stand to lose their only source of income if their service contracts are not renewed.[iv] Continued focus on these inferior operators would help EPA level the playing field and could prevent localized health problems for communities exposed to untreated or partially treated wastewater.

The *Tollison* case focuses on what one might term a large problem in small communities, but what about large municipalities and their wastewater treatment facilities? One need only look at the consent decrees in several major U.S. cities to see that EPA is pursing cases against these larger entities. A close examination of these cases reveals that while the consent decrees were civil in nature, corruption lurked close behind in one and is alleged to have flawed the entire operations at another.

II. *U.S. v. Government of the Virgin Islands*

The United States Virgin Islands usually conjure up images of cruise ships and tropical paradise. That may be the image for some, but here is how the Honorable Judge Thomas K. Moore described the state of the St. Croix sewage system in a March 10, 2003 memorandum:

> A distinct odor emanates from the construction contract the Governor of the Virgin Islands, Charles Wesley Turnbull, signed with Global Resources Management, Inc. ["GRM"] on December 20, 2002, for emergency sewer repairs, and it is not the smell of sewage from the decrepit and failed St. Croix sewer system. It is the reek of politics and political influence and quite possibly of political corruption.[v]

This description was precipitated by a long running law suit filed in 1984 by the United States against the Government of the Virgin Islands to force it to bring its troubled sewer system into compliance with the Clean Water Act. The procedural history, of consent decrees and non-compliance from 1984 to present day,

makes for painful reading and demonstrates how civil enforcement remedies may be largely ineffective when corruption is at work. Suffice it to say that while the civil lawsuit did some good, Judge Moore's comments demonstrate that it did not do enough to correct a severe sewage problem on the Island of St. Croix.

Why was this law suit ineffective? The answer may come in early May, when five individuals, including a principal of Global Resources Management, Inc. (GRM), a former special assistant to the governor and a certified public accountant, are set to begin trial on a host of federal charges including conspiracy, wire fraud program fraud and bribery.[vi] While no Clean Water Act violations are alleged, a scheme to secure a no-bid contract for repair work to the St. Croix sewer system and fraudulent claims for expenses associated with attempts to secure that contract are described. As the United States Attorney for the Virgin Islands explained when the indictment was announced, "at a time when essential services to the people of the Virgin Islands are in jeopardy, it is critical that those who corruptly compromise those essential services and take advantage of urgent public need in an effort to gain personal enrichment need to be held accountable."[vii]

Managers of public wastewater utilities have pleaded guilty and been sentenced to cash restitution, fines, and jail time for involvement in schemes that defraud ratepayers.[viii] While such corrupt activities in many cases may have no impact on or relationship to the environmental performance of a treatment plant, as a result of the Virgin Islands case, EPA and state regulators may be paying closer attention when violations at municipal treatment plants are identified – to see if suspect relationships between a utility and a hired contractor may be involved. Questions EPA might want to ask include whether any of the public employees in charge of these utilities were chosen because of their expertise or because of their relationships with the mayor or county commissioner? Also, are the contractors providing services really arms length contractors, or perhaps a friend of somebody's brother-in-law?

When the answer to these questions is not clear and the utility is being mismanaged, EPA's civil side might want to alert one of EPA's new investigators and/or the FBI to take a closer look at the utility's operation. If a culture of corruption or non-compliance exists, a highly publicized prosecution could provide the extra protection and deterrence that EPA hopes to achieve through its newly invigorated criminal enforcement program.

Were EPA to further a criminal enforcement program centered on wet weather, the *Tollison* case provides an example of a "quick hit" that, with limited resources, could demonstrate EPA's commitment to the initiative. By contrast, the Virgin Islands criminal case provides an example of an all- encompassing prosecution similar to the *Atlantic States* case which would seek to highlight – and change – an identified culture of non-compliance and corruption at a utility. Together, these types of cases make a nice "one two punch" and would enhance EPA's criminal enforcement efforts.

III. What's A Utility to Do?

If EPA pursues such a course, what should utilities do to prepare? For starters, each utility should have an effective compliance program in place to prevent and detect violations of law. Such plans are mandatory for any organization having fifty or more employees that is placed on probation for any federal criminal offense.[ix] Utilities should not wait for a criminal conviction to implement such a plan.

Second, if a utility has such a plan in place, senior management should make sure that what is on paper is actually being implemented in the

field. A plan that is not implemented may be worse than no plan at all.

Third, if during the review, a corruption or a kick-back scheme is discovered, take immediate corrective action. A utility's failure to act on such information could lead to additional charges.

Finally, instill in employees the need for honesty. Often attempts to conceal can have worse ramifications than the underlying violation, and once an employee or manager lies, it will be very difficult to regain the government's trust, and the integrity of the entire utility suffers. Following these few tips will go a long way to keeping a utility in compliance – and out of the criminal justice system.

For additional information on the issues discussed in this article, please contact Bruce Pasfield, who recently joined NACWA Legal Affiliate Alston & Bird as a partner in the firm's environmental and land-use practice. Mr. Pasfield previously was the longest serving assistant chief at the U.S. Department of Justice's (DOJ's) environmental-crimes section. He is well-known for his work prosecuting a wide range of pollution crimes and for helping lead DOJ's initiatives on anti-CFC smuggling, worker endangerment and hazardous material transportation. Mr. Pasfield was assisted on this article by Jocelyn Steiner, an associate in Alston and Bird's white collar practice group. Mr. Pasfield can be reached by telephone at 202/756-5585 or via e-mail at *bruce.pasfield@alston.com*. Ms. Steiner can be reached at 202-756-3472 or via e-mail at *jocelyn.steiner@alston.com*

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Founded in 1970, NACWA represents over 300 of the nation's POTWs. NACWA members are environmental stewards, serving the majority of the U.S. sewered population, and collectively treating and reclaiming over 18 billion gallons of wastewater every day.

We welcome your comments on *Legal Perspectives*. Please contact Alexandra Dapolito Dunn, General Counsel, NACWA, by telephone at 202/533-1803 or via e-mail at *adunn@nacwa.org*.

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[i] *EPA Enforcement Chief Eyes Greater Role for Criminal Prosecutions,* INSIDE E.P.A. WEEKLY REPORT, Jan. 20, 2006, *available at* http://environmentalnewsstand.com.

[ii] *See* Patricia Ware, *EPA to Hire Three New Investigators With Extra Funds Provided by Congress*, 37(4) BNA ENV'T REP., Jan. 27, 2006, at 187.

[iii] *United States v. Gordon T. Tollison,* No. 3:04-00158 (N.D. Miss. filed Oct. 21, 2004).

[iv] Many smaller towns and cities have public utility companies whose managers commit knowing violations of the Clean Water Act. For an excellent survey of those cases, *see* Martin Harrell, *Criminal Prosecution at POTWs and the Environmental Regulatory Partnership: Effective Deterrence But at a Cost*, NAT'L ENV'T ENFORCEMENT J., Dec. 1999-Jan. 2000, at 3-9; Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C.L. REV. 1197 (1994).

[v] *United States v. Government of the Virgin Islands,* Civ. No. 84-104, Mar. 10, 2003 (D. V.I.)

[vi] *U.S. v. Ashley Andrews,* No. 04-0038 (D. V.I. filed Feb. 20, 2004).

[vii] Press Release, United States Department of Justice (Feb. 20, 2004).

[viii] *See*, *e.g.*, *U.S. v. Jackson*, No. 8:04-00126 (D. Md. 2004) and *U.S. v. Agarwal*, No. 8:04-00125 (D. Md. 2004) (in which a utility manager and contractor engaged in an illegal kickback scheme involving computer services provided to a wastewater utility).

[ix] *See* U.S. Sentencing Guidelines Manual § 8D1.1 (2005).