



LEGAL RAMIFICATIONS OF NON-COMPLIANCE – THE GIFT THAT KEEPS ON GIVING

2007 AWMA Southern Section

D. Bart Turner
bturner@maynardcooper.com

CIVIL AND ADMINISTRATIVE ENFORCEMENT

Glowsticks and More, Inc.

- Individual NPDES Permit for separate stormwater and process water outfalls that discharge to tributary of Black Warrior River
- Voice mail from ADEM regulator—local stormwater management authority received complaint from citizen—“last night tributary was glowing green!”
- Pictures of a glowing green tributary being run on the local news station.
- ADEM and EPA inspectors with sample kits in hand are already on site asking your assistant to show them your stormwater outfall.
- Assistant never got around to completing the containment dike around Jonny Glow green aboveground tanks

“JONNY GLOW”



ENFORCEMENT TRENDS

EPA 2003 Storm Water Compliance and Enforcement Strategy

(Aug. 14, 2003)

Headline: U.S. Announces Major Clean Water Act Settlement with Retail Giant Wal-Mart: \$3.1 Million Penalty Is Largest for Storm Water Violations at Construction Sites (May 2004)

- **In Fiscal Year 2004, EPA initiated 455 civil investigations collection \$149 million in civil penalties and obtained a record number of SEPs valued at \$48 million.**

ADMINISTRATIVE COMPLIANCE ORDERS AND INFORMATION REQUESTS

- While large penalties are typically assessed in federal court cases, most of EPA's enforcement is done administratively.
- CWA § 308 gives EPA authority to request information from a person or entity who may be discharging pollutants to waters of the United States.

CRIMINAL ENFORCEMENT

Glowsticks and More, Inc.

- While talking to the ADEM and EPA inspectors, your assistant starts bawling crying and blurts out that he took about half of the facility's stormwater samples from the breakroom drinking water fountain.
- Yet, you signed all the DMRs!

SWPPP CERTIFICATION

- "I certify under penalty of law that I have read and understand the Part 1.2 eligibility requirements for coverage under the multi-sector storm water general permit including those requirements relating to the protection of endangered or threatened species or critical habitat. To the best of my knowledge the storm water and allowable non-storm discharges authorized by this permit (and discharged related activities), pose no jeopardy to endangered or threatened species or critical habitat, or are otherwise eligible for coverage under Part 1.2.3.6 of the permit."
- And assistant now tells you that the Jonny Glow Green aboveground tank was always leaking and overflowing and rather than slow production, he just siphoned it down the storm drain.

ENFORCEMENT TRENDS

- In 2004, EPA referred 265 civil enforcement actions to DOJ for criminal prosecution (approx. 20% were CWA matters)
- Out of the total 425 criminal investigations in 2004, 293 defendants were indicted resulting in 77 total years in prison and fines and restitution of \$47,000,000.

CRIMINAL HEADLINES FROM ALABAMA

- **Koppers Industries Inc., Sentenced to Pay \$3 Million, Serve Probation for Violations of Clean Water Act Related to Stormwater Discharges (May 2003)**
- **McWane, Inc. and Officers Convicted:**
 - On June 10, 2005 a federal district court jury in the Northern District of Alabama convicted McWane, Inc. and three executives of the company of several Clean Water Act felonies, including illegal discharges, conspiracy to violate the CWA and false statements related to CWA reporting requirements.
- **Bay Minette Waste Water Treatment Plant Manager Sentenced for Clean Water Act Violation:**
 - On Thursday, March 3, 2005, the former manager of the Bay Minette, Waste Water Treatment Plant, was ordered to pay a \$3,000 fine and serve a year on probation for filing a false report to Alabama Department of Environmental Management (ADEM).

CITIZEN SUITS AND TOXIC TORTS

Glowsticks and More, Inc.

- One week after DOJ issues indictment, local Riverkeepers issues a 60-day notice letter because DOJ, EPA, and ADEM are not diligently prosecuting—Day Glow Orange discharges from process water outfall.
 - **ALABAMA HEADLINE: Mobile Baywatch, Inc./ Mobile BayKeeper** filed a notice on February 13, 2004 of its intention to file a \$45 million federal Clean Water Act lawsuit against the City of Prichard to clean its sewer system.

TOXIC TORTS

- Two weeks later, local Plaintiffs' counsel files mass tort claim alleging personal injuries and property damage—local gardens are full of glowing green and orange tomatoes and cucumbers.
 - **Eleventh Circuit Upholds Punitive Damages Award of \$4.35 Million for Stormwater Discharges from Kyanite Mine in Georgia** (*Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 329 (1999)).
 - ✓ Jury had originally awarded \$45 million.

MINIMIZING LIABILITY

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*"As a mitigating circumstance, may I say that
my client's getaway car was a hybrid."*

AVOIDING ENVIRONMENTAL PROSECUTION OR AGENCY ACTION

- Properly Designed and Documented Environmental Compliance Program
 - Sentencing Guidelines recommend that organizations develop standards and procedures to prevent and detect criminal conduct
- Document Funding for Environmental Compliance Efforts
 - Provide adequate resources to environmental management effort
- Environmental Audit Action Items: Follow Through or Explain Yourself
- Internal Investigations Initiated on Evidence of Corporate Misconduct Should be Independent
- Self-Disclosure is Hallmark of Cooperation (as is potential attorney-client and work product waivers)

BE WARY OF THE NEXT ROUND

- The Double-Edged Sword of Cooperation and Regulatory Compliance
 - Self-reporting of violations and DMRs establish tort liability.
 - A consent decree can be negligence per se.
 - Allegations of agency being in backpocket of industry.
 - Cheaper to pay fines than fix problem.
 - Remedy approved by agency is cheaper and less effective than most aggressive remedy.

CONTROL BAD PR

- Hire experienced experts to help you.
- Develop protocol for press inquiries.
 - No Comment is the worst thing you can say
 - Get your story out
- Insure accuracy in statements to media.

MAINTAIN DOCUMENT CONTROL

- Know your regulatory files
- Avoid drafting bad documents
 - Drafts
 - “Treatment A is more cost effective than Treatment B”
- Manage your documents on front end (E-hold)

Questions? Ask now or feel free to contact me by email

➤ **bturner@maynardcooper.com**

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*"And, if you don't have an attorney,
we have millions of them."*