

Lessons Learned from Recent Federal Enforcement Actions

**Paul Calamita
AquaLaw, PLC
NACWA Law Conference 2007**

New Developments in Outside Counsel Billing of NACWA Members

- **E-mail with NACWA member attachment intended to go to DOJ/EPA**
 - **Attachment omitted late at night**
- **Client notices error in his attachment – urgently asks if attachment was sent**
- **Attachment was accidentally not sent....**

New Developments in Outside Counsel Billing of NACWA Members

- **Lawyer:**
I am taking credit for instinctively failing to attach because I subconsciously sensed there was a problem.... I am sure you will agree that is a very high level of legal service.
- **Client: “I love it when your incompetence has unintended positive benefits”**

New Developments in Outside Counsel Billing of NACWA Members

Client Deputy:

- **I'm sure we'll see a separate line item in the next billing statement for subconscious services.....**
- **Just think, you invented a way for all lawyers to double bill their time now.**
- **With your multiple personalities you should really be raking it in.....**

A Frolic and Detour

- **Your Business is only as good as your people**
- **Your people need to enjoy their work – particularly the more stressful it (you) is....**
- **Wisdom from Qantas Airline Mechanics**

The Corporate Set Up

- College degree to fly airplanes
- HS degree to perform maintenance
- Pilot GRIPE sheets (P)
- Solutions by mechanics documented (S)
- Subsequent pilots review both
 - This is what takes so long to push back

Actual Gripe Sheet Comments and Mechanics' Solutions

P: Left inside main tire almost needs replacement.

S: Almost replaced left inside main tire.

P: Test flight OK, except auto-land very rough.

S: Auto-land not installed on this aircraft.

P: Something loose in cockpit.

S: Something tightened in cockpit.

Actual Gripe Sheet Comments and Mechanics' Solutions

P: Dead bugs on windshield.

S: Live bugs on back-order.

**P: Autopilot in altitude-hold mode produces a
200 feet per minute descent.**

S: Cannot reproduce problem on ground.

Quantas Wisdom

P: Evidence of leak on right main landing gear.

S: Evidence removed.

P: DME volume unbelievably loud.

S: DME volume set to more believable level

P: Friction locks cause throttle levers to stick.

S: That's what friction locks are for.

Quantas Wisdom

P: IFF inoperative in F mode.

S: IFF always inoperative in OFF mode.

P: Suspected crack in windshield.

S: Suspect you're right.

Quantas Wisdom....

P: Number 3 engine missing.

S: Engine found on right wing after brief search.

P: Aircraft handles funny.

S: Aircraft warned to: straighten up, fly right, and be serious.

P: Target radar hums.

S: Reprogrammed target radar with lyrics.

Quantas Wisdom....

P: Mouse in cockpit.

S: Cat installed.

**P: Noise coming from under instrument panel.
Sounds like a midget Pounding on something
with a hammer.**

S: Took hammer away from midget

Quantas Airlines

- **Only major carrier never to have a crash....**

Lessons Learned from Federal Enforcement Actions

Lesson 1: Avoid Federal Involvement in Your Programs

- **My view is that federal enforcement:**
 - **Rarely adds any value (unless it is the only way to secure adequate funding)**
 - **Significantly restricts flexibility**
 - **Imposes higher transaction costs**
 - **Takes longer**
 - **Precludes opportunities for program integration with other community projects**

Lesson 2: Three keys to making your utility a hard target for federal enforcement

- **Excellent compliance record (use benchmark information, summaries of your early action projects/other progress to help make this case)**
- **Stay Close to your State agency**
- **Generate as much public support as possible for your program (do not surrender the moral high ground through inadequate public disclosure/participation)**

Lesson 3: State enforcement is key to keeping federal regulators at bay/managed

- **State enforcement has repeatedly been used to head off/manage the feds....**
 - **Richmond**
 - **Lynchburg**
 - **Wilmington**
 - **NYC**
 - **Omaha**
 - **Portland**
 - **Arlington**

Lesson 3: State enforcement is key to keeping federal regulators at bay/managed

- **If EPA appears on the horizon, get the State to initiate enforcement discussions – you should be able to out-hustle EPA and, thereby, possibly avoid a federal action; at worst you will end up with parallel enforcement**
- **Parallel enforcement sets up conflict that requires joint resolution (usually through federal consent decree) with hope that community and state are on the same page against any unreasonable EPA positions**

Lesson 4: Look before you leap into a consent decree

- **You have maximum leverage BEFORE you enter into a decree and really even decree negotiations**
 - **Get something in return for agreement to negotiate in good faith**
 - **Get something for tolling agreement**
 - **Tolling agreement undermines ability to walk away years later**

Lesson 4: Look before you leap into a consent decree

- **N.B.: EPA can unilaterally do the following:**
 - **308 information request**
 - **Physical inspection**
 - **309 administrative order (injunction & minor penalty)**
- **File judicial complaint – with DOJ concurrence**
 - **NB: Don't tell DOJ “no” – always “yes, but”**

Lesson 4: Look before you leap into a consent decree

- **Thereafter, EPA loses unilateral control**
- **DOJ is in charge – DOJ says nice things about EPA lawyers but DOJ management loudly believes they are the decision-makers....**
- **After EPA unleashes DOJ to file a complaint EPA needs DOJ's cooperation and either YOUR cooperation or that of the Court....**

Lesson 5: Resist “develop” decrees and other traps....

- **Instead, negotiate “implement” decree in parallel with developing your plan.**
 - **Gain substantive plan leverage by withholding CD execution**
 - **Relatively doable for plan development time frame of 2-3 years or less (lose slowly)**
- **Do not commit to CD before knowing your plan**

Lesson 5: Resist “develop” decrees and other traps....

**Refuse to crystal ball program
end dates**

**Just say “NO” to this aspect
of a CD**

Lesson 5: Resist “develop” decrees and other traps....

- **Be careful of absolute financial commitments upfront**
- **Schedule modifications typically limited to 60B unless EPA consents**
 - **60B is illusory – especially regarding negotiated and/or known issues/terms**

Lesson 5: Resist “develop” decrees and other traps....

- **Force Majeure notice requirement is unacceptable**
- **Recent decision denying FM claim for failure of written notice despite timely verbal notice**
- **Court would not even allow equitable consideration of FM event**

Lesson 5: Resist “develop” decrees and other traps....

- **Solution:**

(1) longer notice deadlines (tied to nature of likely event) and

(2) failure to notify within deadlines prohibits assertion of FM ONLY if delay prejudiced agency/ies ability to assess legitimacy/duration of the force majeure event.

Lesson 5: Resist “develop” decrees and other traps....

- **Dispute resolution for all disputes**
 - **CD should have court establish burdens of presentation and persuasion for disputes**
 - **Unless you like burden DOJ proposes (i.e., preponderance v. clear)**

Lesson 5: Resist “develop” decrees and other traps....

- **Other silliness:**
 - **Unqualified “Elimination” of SSOs and/or CSO DWOs;**
 - **Avoid “elimination” or tie it to MEP or minimization**
 - **Otherwise you have a CD termination problem**

Lesson 5: Resist “develop” decrees and other traps....

- **CD referencing only parts (rather than all) of your CSO LTCP**
 - **Trend by DOJ to attach only operative sections**
 - **BUT still reference entire LTCP to ensure development process endorsed by EPA/State upon motion for entry and the Court upon entry**

Lesson 6: Embrace Green Infrastructure opportunities within enforcement context

- **Political window of opportunity to incorporate green solutions**
- **NRDC/EPA/Other stakeholder support**
- **Achieve multiple benefits superior to gray**

Lesson 6: Embrace Green Infrastructure opportunities within enforcement context

- Opportunity for phasing
 - Defer/avoid gray solutions with diminishing returns
- Getting credit for green versus gray
 - Two NACWA members making GREAT strides
- Key challenge: green performance measures
- www.wetweatherpartnership.com
- <http://cfpub.epa.gov/npdes/greeninfrastructure/information.cfm>

Lesson 7: Use CSO percent capture by volume as your performance measure

- **CSO Policy: YOU choose between 3 presumptive options or the demonstration approach if you can't meet any of the three presumptive options.**
- **Some NACWA members have had their performance measures imposed by EPA/DOJ**
- **ALCOSAN decree lays out all three options!**
- **Go with percent capture (okay to loosely correlate to Frequency of Overflow but be clear percent capture is the performance measure)**

Lesson 8: Qualify SSO elimination language and private property release liability

- **Reject unqualified SSO elimination requirement**
- **Private Property Releases**
 - **NB: Distinction between NPDES and satellite only systems regarding collection system O&M requirement**
 - **POTW = collection system per PRETREATMENT regs (bootstrapping)**
 - **Proper O&M requirement NOT applicable to satellite-only systems or systems without pretreatment programs?**

Lesson 8: Qualify SSO elimination language and private property release liability

- **Resist/reject property backups as NPDES violation or you will own all cleanups**
- **Compromise with linkage to legal authority: private property backups only a CD violation if utility did not follow pre-approved private property backup response plan**

Lesson 9: A Federal Judge Can be a Beautiful Thing

- **Far too few cases have been brought before the courts**
- **Mayors cut their best deal and leave implementation for future administrations assuming agencies will be reasonable**
- **Hoping for the best.... (consider INDY)**
- **NACWA member experience: A federal judge “is a beautiful thing” compared to a bad consent decree deal.**

Lesson 10: Time to Work Together Regarding CD Approaches

- **DOJ will only change its ways by having a group of communities “just say no” to improper requirements**
- **Communities need also to try to work with DOJ management**
- **If this is not fruitful, go to Administration and Congress**

Thank You and Best of Luck!