LOOK BEFORE YOU LEAP— DPAS, NPAS, AND THE ENVIRONMENTAL CRIMINAL CASE

Joseph G. Block
David L. Feinberg
Venable LLP
Washington, DC

In our profession, we aim to keep the client from being indicted in the first place. The aim becomes an imperative when defending a corporation. An indictment in an environmental criminal case means public embarrassment and reputational damage. In addition to steep monetary penalties and years of probation, it also may mean plummeting share price and suspension or termination of government contracts. With all these impacts in mind, the prospect of a Deferred Prosecution Agreement (DPA) or a Non-Prosecution Agreement (NPA) might simply be viewed as the next best thing to a declination. But these types of agreements—which have become increasingly prevalent—cannot be entered into lightly. For environmental criminal defense counsel weighing whether a DPA or NPA is in the corporate client's best interests, counsel must be forewarned that prosecutors wield great discretion in this realm, that the agreement might place onerous demands on the company, and that the agreement, while staying and avoiding prosecution, might nevertheless invite other substantial collateral consequences. That said, if vigorously negotiated and artfully drafted, a DPA or NPA can be an acceptable if unpalatable means with which to resolve a criminal case, if a declination of prosecution is not in the cards.

I. DPAs and NPAs—What They Are

DPAs and NPAs are species of federal pretrial diversion. Under a DPA, the prosecutor charges a corporation in a criminal information, but agrees to defer prosecution for a given period of time. If the corporation complies with the terms of the DPA, the prosecutor dismisses the charges. Under an NPA, no charging document is filed provided that the company adheres to the agreement. Other than the presence or absence of the charging document, DPAs and NPAs often do not differ in terms of their demands on the companies which sign them.

DPAs and NPAs have become a "standard method" of settling major federal corporate criminal investigations, a trend that most agree is tied to the issuance of the Thompson Memorandum. *See, e.g., Corporate Deferred, Non-Prosecution Agreements Up 70 Percent In 2007*, CORP. CRIME REP. (Jan. 8, 2008); Scott A. Resnik & Keir N. Dougall, *The Rise of Deferred Prosecution Agreements*, N.Y. L.J. (Dec. 18, 2006); F. Joseph Warin & Peter E. Jaffe, *The Deferred Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, 19 Andrews Litig. Ref. (Sept. 2005).

These agreements have been regarded as the key tool in the Department of Justice's (DOJ's) "bold new mission" to secure "structural corporate reform." Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 858 (2007). They also have been referred to as the prosecutor's "new weapon of choice." F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. In Brief 107, 107 (2007) [hereinafter "*A View from the Trenches*"].

As is explained in more detail below, no DOJ guidance governs either the availability or the terms of DPA/NPAs. The following provisions, however, have become common to these agreements:

- A recitation of allegedly illegal acts and/or an admission of wrongdoing.
- A continuing promise to cooperate with the prosecutor.
- A promise to operate lawfully.
- A waiver of any statute of limitations.
- A waiver of all rights to a speedy trial.
- An acknowledgment that the agreement does not bind any other federal agency.
- An acknowledgment that the agreement may be publicly disclosed.
- A provision stating that the company's employees or agents will not publicly contradict the agreement.
- A provision stating that, upon breach, the

From: *Environmental Enforcement and Crimes Committee Newsletter*, Vol. 9, No. 2 (April 2008)

company will be subject to prosecution, and that the agreement's statement of facts, which effectively establish the company's guilt, will be admissible.

DPAs and NPAs also often contain other, more onerous provisions, including community service, criminal monetary penalties, compliance monitoring, and, in some cases, agreements to waive privilege. It is these provisions that provide the bite of a DPA/NPA.

For example, on Jan. 20, 2006, the DOJ's Environmental Crimes Section (ECS) and the U.S. Attorney for the Northern District of Ohio jointly announced a DPA with the First Energy Nuclear Operating Company (FirstEnergy) for making false statements to the Nuclear Regulatory Commission (NRC) to persuade the NRC that one of its nuclear power plants was safe to operate. Under the DPA, FirstEnergy agreed to pay a $23 million penalty and $4.3 million in community service projects. The company also agreed to cooperate with the government's prosecution of FirstEnergy employees. News Release, U.S. Dep't of Justice, *Nuclear Operating Company To Pay $28 Million Relating to Operation of Davis-Besse Nuclear Power Station* (Jan. 20, 2006), *available at* http://www.usdoj.gov/usao/ohn/news/20January%202006.htm.

On Feb. 8, 2006, the U.S. Attorney for Connecticut announced a DPA with Operations Management International, Inc. (OMI)—a company in the business of operating municipal wastewater treatment plants—that settled allegations that OMI's New Haven and Norwalk facilities had violated the Clean Water Act. The allegations concerned "selective reporting," i.e., reporting to regulators only clean samples and burying dirty ones. OMI committed $6 million to a comprehensive overhaul of its compliance operations, donated $2 million in community service projects, and agreed to quarterly audits of its Connecticut facilities for a two-year period of time. News Release, U.S. Attorney's Office, District of Conn., *OMI and U.S. Enter into Deferred Prosecution Agreement* (Feb. 8, 2006), *available at* http://www.usdoj.gov/usao/ct/Press2006/20060208.html

II. Collateral Consequences of DPAs and NPAs

In addition to complying with the terms of the agreement, the company often must face collateral consequences, some quite significant, that flow from its execution.

A. Disclosure on Public Filings

If the client is a public company, entering into a DPA may trigger Securities and Exchange Commission (SEC) reporting requirements, assuming that the company has not already disclosed the government's investigation. For example, FirstEnergy and OMI's parent corporation, CH2M Hill, both disclosed their DPAs under the "Legal Proceedings" sections of their 10-Ks.

Item 103 of Regulation S-K governs the disclosure of legal proceedings. *See* 17 C.F.R. § 229.103 (2007). Generally, Item 103 requires disclosure of pending material legal proceedings that are not ordinary and routine to the business. Moreover, Item 103 contains specific language directed at administrative and legal proceedings (i) arising under any law that regulates the discharge of materials into the environment, or (ii) arising under any law enacted for the purpose of protecting the environment. *Id.* Those proceedings must be disclosed if the proceedings are material, primarily involve a claim for damages that exceeds 10 percent of the company's current assets, or if a governmental authority is a party and the proceedings involve potential monetary sanctions (unless the company reasonably believes that the proceedings will result in monetary sanctions of less than $100,000). *Id.*

Item 303 of Regulation S-K could also overlap to compel disclosure of a DPA. *See* 17 C.F.R. § 229.303 (2007). Item 303 specifies the requirements for the company's "Management and Discussion Analysis," a narrative explanation that accompanies the financial reports. The Item requires disclosure and discussion of any known "commitments" that will have a material effect on the firm's financial condition or results of operation. CH2M Hill disclosed the fact of its DPA under the "Commitment and Contingencies" section of its 10-K for 2006.

From: *Environmental Enforcement and Crimes Committee Newsletter*, Vol. 9, No. 2 (April 2008)

That a DPA/NPA may trigger SEC reporting requirements requires counsel to work closely with whomever prepares the client's public filings. This may include assisting the drafting of the disclosures themselves.

B. Subsequent Litigation

Put simply, DPA/NPAs may provide a perfect template for a civil complaint. This may be particularly true with respect to shareholder litigation, where a DPA/NPA could encourage a putative plaintiff to dig through the company's prior public filings in search of a cause of action. The agreement's statement of facts could be admissible as an admission. And any privileged information that the company provided to the government as part of the DPA/NPA likely renders that information discoverable by a plaintiff—by providing the information to the government, the company waives the privilege. *See, e.g., Westinghouse Elect. Corp. v. Republic of Philippines,* 951 F.2d 1414, 1424 (3d Cir. 1991).

C. Suspension and Debarment

For many clients—particularly those who do business with government—suspension and debarment are the most ruinous consequences that could potentially flow from a DPA/NPA. *See* 48 C.F.R. §§ 9.405(a); 9.407-2(b) (2007). While a DPA/NPA saves the client from **mandatory** statutory debarment, which ordinarily follows a Clean Water Act or Clean Air Act conviction, it may not protect against federal **discretionary** debarment or suspension.[1]

Discretionary debarment lies entirely within an agency's judgment, and is meted out in three general circumstances:

- Upon conviction or civil judgment for a listed offense (such as fraud, false statement, or embezzlement) or for any other offense that indicates a lack of "business integrity" or "business honesty." The Environmental Protection Agency (EPA) has held that "an environmental crime provides cause to debar 'where there is a reasonable connection between the misconduct and performance or business integrity' of the contractor." Jeff Eckland, William Roberts, *et al.*, 4 No.1 ABA Envt'l. Crimes & Enforcement Committee News. 11, 12-13 (Oct. 2002) (citation omitted).
- Upon willful failure, or a history of failure, to perform the terms of a government contract.
- Upon "any other cause so serious or compelling in nature that it affects the company's present responsibility." 48 C.F.R. § 9.406-2 (2007).

Taking only the first bullet-point, a DPA could qualify as a "conviction." Agencies use either the definition of "conviction" found under the Office of Management and Budget (OMB) Guidelines on Government-wide Suspension and Debarment or the narrower definition found under the Federal Acquisition Regulations (FAR). The OMB definition of "conviction," which includes "deferred prosecution," covers DPAs. 2 C.F.R. § 180.902 (a)-(b) (2007). The OMB definition also could sweep in NPAs if the agreement contains an admission of guilt. *See id.* The FAR definition likely does not cover either DPAs or NPAs. *See* 48 C.F.R. § 2.101 (2007).

Turning to discretionary suspension, an agency may suspend a contractor based on any "adequate evidence" of a cause for debarment. 48 C.F.R. § 9.407-2 (2007). These are limited to three general circumstances:

- Indictment for a listed offense or any other offense that indicates a lack of business integrity or business honesty that affects the company's present responsibility.
- Willful failure, or a history of failure, to perform the terms of a government contract.
- Any other cause so serious or compelling in nature that it affects the company's present responsibility.

Id.

Again taking only the first bullet-point, note well that indictment is "adequate evidence" for suspension. A zealous debarring official likely will consider the filing of a criminal information (which often accompanies the

From: *Environmental Enforcement and Crimes Committee Newsletter*, Vol. 9, No. 2 (April 2008)

filing of a DPA), as tantamount to the issuance of an indictment by a grand jury. Suspension proceedings could follow immediately thereafter.

To prevent suspension/debarment trouble from coming to pass, in some cases counsel have successfully approached debarring officials prior to signing a DPA or NPA to discuss whether the agreement will affect the client's status as a presently responsible contractor. Some DPAs and NPAs apparently memorialize the debarring official's conclusion that the DPA/NPA does not disturb the company's status as presently responsible. An example is the DPA between KPMG and U.S. Attorney's Office for Southern District of New York (¶ 21), *available at* http://www.corporatecrimereporter.com/documents/kpmgdeferred_000.pdf.

III. Negotiating and Drafting DPAs and NPAs

So nothing beats a declination. But when the prosecutor removes that option from the negotiating table, and when counsel believes that indictment of the company is likely, a DPA/NPA may present an acceptable resolution. The task is to convince the prosecutor that a DPA or NPA, rather than indictment and conviction, will best serve the interests of justice.

A. Prosecutorial Discretion

Prosecutors presently wield wide discretion with respect to the availability of, and the terms appropriate to, DPAs and NPAs.[2] A dearth of central guidance from DOJ leaves each of the department's divisions and the ninety-three Offices of the U.S. Attorney to develop their own policies on who receives the agreements.

The anecdotal evidence is that ECS has often turned a cold shoulder to such agreements, which, if true, can be unfortunate. In some cases (voluntary disclosure cases excluded), a DPA or NPA may represent a just resolution for a company willing to cooperate, reform, and remedy past misconduct, and for which an indictment could bring ruinous consequences. Furthermore, elements of DPA/NPAs can resemble the concessions that ECS seeks through traditional plea bargaining. For example, DPA or NPAs can contain moderate elements such as measured compliance reform, corrective action, and supplemental environmental projects. These are elements that often appear in ECS-obtained guilty pleas. *See generally* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: the Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1160-61 (Summer 2006). With DPA/NPAs, ECS could accomplish these same goals without indicting, which can pose a risk of harm to innocent shareholders and to employees. That ECS may not often consider DPA/NPAs is also inconsistent with other sections of the department that do enter into such agreements.

Counsel, then, will likely be pitching a DPA or NPA to a line prosecutor from one of the ninety-three U.S. Attorney's Offices, which handle 70 to 75 percent of all environmental criminal cases. *See* John F. Cooney, *Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach*, 96 J. CRIM. L. & CRIMINOLOGY 435, 438 (2006). These prosecutors operate with slim, insubstantial guidance on whether a case should be resolved through pretrial diversion, leading some practitioners to contend that prosecutors possess "unfettered discretion" in this realm, yielding inconsistent, even "random" application of pretrial diversion to otherwise similarly situated defendants. *See, e.g.,* Warin & Boutros, *A View from the Trenches*, *supra*, at 111. The McNulty Memorandum states only that "In some circumstances, granting a corporation...pretrial diversion may be considered in the course of the government's investigation." Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. The Memorandum does refer prosecutors to the "principles governing non-prosecution agreements" found in the United States Attorneys' Manual, but those principles govern obtaining quid-pro-quo testimony against individuals, a matter far different than whether pretrial diversion is appropriate for a cooperating company. *See, e.g.,* U.S. Attorneys' Manual, §§ 9-22.000; 9-27.220 ; 9-27.600. In sum,

From: *Environmental Enforcement and Crimes Committee Newsletter*, Vol. 9, No. 2 (April 2008)

prosecutors have few, if any, rules to guide their discretion. This lack of central guidance has yielded disparate prosecutions, super-sized monetary penalties, onerous compliance monitoring regimens, and provisions unrelated to the underlying behavior being condemned. *A View from the Trenches*, *supra,* at 107; 109-110.

B. Negotiating and Drafting the DPA/NPA

Given the great discretion reserved to prosecutors in this area, and factoring in the client's exposure, counsel may have limited leverage to argue for a DPA or NPA. Put colloquially, counsel will likely be on the "begging side of the table." And even if the DPA or NPA is successfully pitched, the negotiation process has really just begun. Counsel's task now is to hash out those terms that best exemplify the company as having cooperated in the past, being prepared to cooperate in the future, and as busily mending its ways for past misconduct. All this, while doing one's best to avoid overly oppressive conditions.

As Joe Warin has written, one of the most appealing aspects of both DPAs and NPAs "is the ability to tailor each one according to the specific needs of the respective parties, with both sides bargaining for what they most hold dear." Warin & Jaffe, *supra*, at 3. With respect to drafting DPAs and NPAs, the old saw "he who drafts, prevails" may not apply at its full force, but is still a sensible maxim by which to work.

Counsel should propose the first draft. Even if it is true that prosecutors have nearly "unbridled discretion" to make pretrial diversion as onerous as they please, it is also true that with defense-team drafting, counsel can better shape a favorable document, construe facts in a favorable fashion, and possibly eliminate some collateral consequences. Indeed, in some rare circumstances, counsel may be able to author a settlement in which the company acknowledges responsibility for its behavior but denies wrongdoing, settling only to "avoid the delay, uncertainty, inconvenience, and expense of protracted litigation." Such was the case in the September 2007 DPAs and NPA that the U.S. Attorney for New Jersey entered into with five manufacturers of orthopedic implants for the manufacturers' alleged violations of Medicare anti-kickback law. *See* Sue Reisinger, *Prosecution Agreements, Complete with Denials*, NAT'L L.J. (Jan. 7, 2008). In the DPAs and NPA the companies acknowledged responsibility for their behavior but denied any illegal misconduct in attached civil settlements.

Admittedly, such a result is rare and perhaps unprecedented. *Id.* But even if such a reward is uncommon, the high-stakes nature of the task always demands vigorous negotiation and painstaking, word-by-word draftsmanship. The agreement and its statement of facts section will be read by regulators and reporters alike.

IV. Conclusion

The great discretion reserved to prosecutors, ample precedent of onerous provisions, and real possibility of substantial collateral consequences can combine to make DPA/NPAs practically as harmful as a guilty plea or a conviction after trial. The agreements simply cannot be considered a panacea for every potential environmental criminal ill. For example, based on existing DOJ and EPA policies, it is difficult to imagine their appropriateness over an outright declination when the company has voluntarily disclosed and cooperated with the government's investigation. In sum, the agreements should likely be sought only in very limited circumstances: when a declination is unreachable, when a civil or administrative resolution cannot suffice, when the consequences of indictment are ruinous. In those limited circumstances, one might attempt to convince the environmental prosecutor that a DPA/NPA will best serve the interests of justice. If counsel wins that battle, the task is to keep that victory from becoming Pyrrhic.

Joseph G. (Jerry) Block *is the former chief of the Environmental Crimes Section of the U.S. Department of Justice from 1988-1991. He is a frequent author and commentator on environmental criminal issues and is a senior partner in Venable LLP's Environmental Group, which boasts one of the nation's pre-eminent environmental criminal defense practices.*
David L. (Dave) Feinberg *is an associate in the group.*

From: *Environmental Enforcement and Crimes Committee Newsletter*, Vol. 9, No. 2 (April 2008)

The authors wish to thank a number of colleagues for sharing their views on and experiences with DPAs and NPAs. Those colleague are: F. Joseph Warin of Gibson Dunn & Crutcher LLP (an acknowledged expert in the field); Thomas M. DiBiagio of Beverage & Diamond, PC; and William L. Gardner of Morgan, Lewis & Brockius. The authors also wish to thank Eric Hiser and Maria Uy for their assistance with the manuscript and with the editing process.

Notes:

1. Both the Clean Air Act and the Clean Water Act include statutory debarment provisions. *See* 42 U.S.C. § 7606(a) (Clean Air Act); 33 U.S.C. § 1368(a) (Clean Water Act). Both provisions are nearly identical to one another. Both provide for facility-specific debarment. The provisions prohibit federal agencies from contracting with any person convicted of a criminal violation of the Clean Air Act or Clean Water Act "if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person." *Id.* Under the Clean Air Act, however, EPA has the discretion to extend the debarment "to other facilities owned or operated by the convicted person." 42 U.S.C. § 7606(a). Under both the Clean Air Act and the Clean Water Act debarment lasts until EPA "certifies that the condition giving rise to such a conviction has been corrected." *Id.*; 33 U.S.C. § 1368(a).

2. Recently proposed legislation would remove some of that discretion. On Jan. 22, 2008, Rep. Frank Pallone, Jr. (D-NJ) introduced a bill in the U.S. House of Representatives that would require DOJ to issue specific guidance regarding DPAs, and to meet those guidelines, and to obtain judicial approval, before entering into a DPA with a corporation. The bill lists factors to be considered in determining whether a DPA is appropriate, including: (i) the potential harm to employees, shareholders, or other stakeholders of the corporation; (ii) the degree of cooperation by the corporation; (iii) any remedial action taken by the corporation; and (iv) the availability of sufficient alternative punishments or remedial actions. H.R. 5086, 110th Cong. § 1(b) (2008). In addition, the bill would require judicial review and approval of DPAs by a federal judge "to ensure that the agreement comports with public interest and all applicable laws and legal precedent." *Id.* § 2(c). Even more recently, on March 7, 2008, DOJ announced new guidelines to standardize the process of appointing corporate monitors. The guidelines include nine principles addressing a monitor's selection, scope of duties, and duration. *See* Memorandum from Craig S. Morford, Acting Deputy Attorney General, to Heads of Department Components, U.S. Attorneys (Mar.7, 2008) (on file with authors).

From: *Environmental Enforcement and Crimes Committee Newsletter*, Vol. 9, No. 2 (April 2008)

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

Eastern Water Resources
May 1-2, 2008
Charlotte, North Carolina

EPA Region 2 Conference
June 3, 2008
New York
(Cosponsored with EPA Region 2, New York State Bar Association, New Jersey State Bar Association, New York City Bar, and Fordham Law School)

Global Warming II: How the Law Can Best Address Climate Change (36th National Spring Conference on the Environment)
June 6, 2008
Baltimore
(Cosponsored with the ABA Standing Committee on Environmental Law)

16th Section Fall Meeting
Sept. 17-20, 2008
Phoenix