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August 22, 2023 | Number 3151

Companies Face Increased Criminal Enforcement Risk From Aging Infrastructure-Related Disasters

Utilities and energy companies can implement strategies to mitigate risks from more frequent environmental disasters and infrastructure failures.

In the early morning of June 11, 2023, a tanker truck carrying gasoline up I-95 in Philadelphia crashed and caught fire, and the overpass above buckled and collapsed. The section of the highway is critical to the roughly 160,000 vehicles that cross it daily. The immediate cause of the collapse is believed to be either the heat from the flames or the impact of the explosion weakening the steel beams supporting the overpass. Some, however, identified a more fundamental problem: “the fragility of the state’s aging infrastructure.”¹

While the I-95 collapse presents a recent example of the significant risks associated with the US’s aging infrastructure, it is by no means unique. Many of the roads, bridges, dams, and electrical grids that keep the country running are decades old and often in need of repair. Infrastructure failures combined with environmental disasters can be catastrophic, and the consequences dire, for the public, the environment, and the utility or corporate entity potentially responsible for operating the failed infrastructure component. Moreover, a vicious cycle is often at work with respect to the environment and infrastructure failures in which, for example, extreme weather causes an infrastructure breakdown that in turn may result in environmental damage.

Utilities and energy companies have long faced potential liability in the form of civil monetary damages attributable to these environmental disasters, as each event is sure to spawn lawsuits by the affected communities. As these disasters become more frequent and more prominently occupy the public’s attention, state and federal authorities are increasingly seeking to impose criminal liability on corporations as well. This trend has drastically increased the exposure that companies face when they are alleged to have caused environmental disasters and, correspondingly, the risks to those companies posed by their own aging infrastructure.

This Client Alert illustrates these risks, discussing contemporary enforcement examples and offering strategies to mitigate harm and minimize risks.

Recent Enforcement Proceedings Involving Infrastructure-Related Disasters

Environmental disasters of all kinds allegedly caused by infrastructure failures have led to civil and criminal enforcement actions in recent years.

Large-scale water crises provide stark illustrations. The infamous Flint, Michigan, water crisis began in 2014 when the city of Flint switched its water supply from the Detroit system to the Flint River as a cost-saving measure.² Shortly thereafter, many Flint residents, including thousands of children, began getting sick. It was later revealed that these individuals were suffering from lead poisoning due to the large concentration of lead leaching out of aging pipes and into Flint's water supply.³ In 2021, a Michigan judge approved a \$626 million settlement between the State of Michigan and Flint residents afflicted by the crisis.⁴ Lead has proven to be an environmental scourge not only related to aging pipes, but also from a vast network of underground lead-covered cables related to telecommunications infrastructure that then leaks into soil and groundwater. A *Wall Street Journal* investigation found that hundreds of underwater lead-coated cables — relics from the Bell System's telecommunications network — are in a "source water protection area," designated by federal regulators as contributing to the drinking-water supply.⁵

More recently, equipment failures at water treatment plants following torrential rains in Jackson, Mississippi, left hundreds of thousands of people without access to safe drinking water.⁶ So many lives were at risk due to these failures that the Department of Justice (DOJ) threatened legal action against state and city officials if they did not engage in negotiations to fix the city's dilapidated water infrastructure.⁷

Oil spills serve as another prime example of the enormous, even criminal, penalties that can follow environmental disasters related in part to aging infrastructure. For example, Houston-based oil company Amplify Energy Corp. (along with two of its wholly owned subsidiaries) pleaded guilty in 2022 to federal charges that Amplify had violated the Clean Water Act. Amplify agreed to pay nearly \$13 million in fines in connection with the discharge of approximately 25,000 gallons of crude oil during an offshore leak in the 17-mile-long San Pedro Bay Pipeline.⁸ A Department of Transportation review of this leak found that the spill was likely caused by a ship's anchor hooking into the pipeline — a component of a drilling infrastructure system in the Pacific Ocean that was constructed as early as the 1960s.⁹ Once again, the findings suggest that corrosion of aging pipes may have made them vulnerable to rupture, and the oil company that operates them vulnerable to criminal penalties.

Just as the aging underground pipeline infrastructure leaves oil and gas industry players open to allegations of criminal liability, the aging overground electrical power grid puts electric and energy companies at risk. Most of the infrastructure that makes up the US's electrical grid was built several decades ago. In fact, a 2015 Department of Energy (DOE) report found that 70% of transmission lines are more than 25 years old and 60% of circuit breakers are more than 30 years old.¹⁰ "The age of these components degrades their ability to withstand physical stresses and can result in higher failure rates," the DOE wrote in its report.¹¹ Compounding the risks to companies that rely on aging infrastructure is the fact that many states have begun to roll out novel environmental requirements for components of such infrastructure. For example, in California, the insulating medium that has been used most frequently in circuit breakers (sulfur hexafluoride) is being phased out by the California Air Resources Board due to the potent greenhouse gas emissions that result from sulfur hexafluoride leaks when a switch fails.¹²

Wildfires, hurricanes, and other natural disasters — which are often exacerbated by climate change, and which we can expect to only be further exacerbated in the future — can easily disrupt this aging, fragile web of transmission technology that was built when the population and the voracious demand for electricity was substantially lower.

Lengthy power outages can result in both civil and criminal liability for energy companies held responsible for them. For example, in 2021 the New Orleans City Council launched an official investigation into Entergy New Orleans (ENO), a subsidiary of Entergy Corp., after Hurricane Ida knocked out electricity for hundreds of thousands of Louisiana residents.¹³ (The New Orleans City Council, which is charged with regulating ENO, had already fined ENO \$1 million in 2019 for failing to maintain electricity poles and transmission lines.) In February 2023, the New Orleans City Council established a new set of reliability standards for ENO that could lead to fines of up to \$3.7 million per year if the number of annual blackouts exceeds those standards.¹⁴ The New Orleans Power network was built in the 1970s, when superstorms like Hurricane Ida were uncommon. Accordingly, the components were engineered to withstand windspeeds of only 95 miles per hour — significantly slower than the up to 149-mile-per-hour winds that battered the city in 2021.¹⁵

Oil spills and electrical grid failures are just two examples of how companies can face civil and criminal liability due to harms attributed to aging infrastructure. Another potentially fatal and costly consequence of old equipment is the possibility of infrastructure collapses. Two such incidents occurred in tandem in Michigan in 2020, when heavy rainfall caused two dams to collapse, leading to record flooding and thousands of evacuations.¹⁶ The Edenville Dam and the Sanford Dam were nearly a century old at the time of the rainfall, having been built in 1924 and 1925, respectively. In connection with these collapses, the Federal Energy Regulatory Commission fined Boyce Hydro Power LLC, the owner of the dams, \$15 million for safety violations.¹⁷ In the wake of these incidents, some engineers and scientists have opined that the risks of aging infrastructure have been amplified by the effects of climate change.¹⁸

US Geological Survey project manager Daniel Swain said that California's dams, for example, are unprepared for extreme weather because flooding will worsen as the atmosphere warms and the amount of water vapor it can carry increases, and also because authorities underestimate how bad flooding can get.¹⁹ He noted that "[t]he peak of record is driving a lot of engineering decisions in the state," but "[a]lready, we are seeing several 100-year floods every 10 years."²⁰ Meanwhile, "[a]ll of this infrastructure is designed for a climate that no longer exists."²¹

Another example of this kind of infrastructure failure is the 2019 collapse of the Brumadinho dam in Brazil. This collapse caused 270 deaths and led to a Securities and Exchange Commission (SEC) inquiry in which US officials investigated whether Vale S.A., a publicly traded Brazilian mining company, made materially misleading and false statements about the safety of its dams.²² In publicizing its investigation, which recently settled for \$55.9 million,²³ the SEC claimed that the dam collapse caused "immeasurable environmental and social harm" and "led to a loss of more than \$4 billion in Vale's market capitalization."²⁴

More recently, the 2021 collapse of the Champlain Towers South Condominium building in Surfside, Florida, killed 98 people.²⁵ Numerous civil suits have been filed, and the National Institute of Standards and Technology (NIST) is investigating the source of the collapse to attribute liability.²⁶ (Criminal charges have not yet been filed.) Preliminary investigative reporting suggests that aging infrastructure may have played a contributing factor. On June 15, 2023, NIST released its preliminary findings indicating that the weight of a pool deck, combined with the age of the 40-year-old building and ongoing corrosion, may have been critical factors leading to the collapse.²⁷ As *The New York Times* noted in its own investigation, right before the collapse "[t]he building was just entering the recertification process for aging structures that have endured the punishment of coastal Florida's hurricanes, storm surges and the corrosive salty air that can penetrate concrete and rust the rebar and steel beams inside."²⁸

Enforcement Trends Suggest Increased Scrutiny of Disasters Caused by Infrastructure Failures

The government agencies responsible for investigating and prosecuting corporations for environmental damage have increased their enforcement efforts related to these issues. State and federal prosecutors have shown an increasing interest in pursuing criminal charges related to such environmental disasters, with an eye toward preventing harms like those in Flint and Jackson.

At the federal level, the Biden Administration has made environmental justice enforcement a top priority and has accordingly tasked all US Attorneys with increasing their efforts to prosecute environmental offenders across their districts.²⁹ In Executive Order 14008, “Tackling the Climate Crisis at Home and Abroad” (issued January 27, 2021), the president instructed his attorney general to “ensure comprehensive attention to environmental justice throughout the Department of Justice” and, more specifically, to “develop a comprehensive environmental justice enforcement strategy, which shall seek to provide timely remedies for systemic environmental violations and contaminations, and injury to natural resources.”³⁰ The Biden Administration doubled down on this prioritization of environmental enforcement on April 21, 2023, when it issued Executive Order 14096, “Revitalizing Our Nation’s Commitment to Environmental Justice for All.” This order extends the administration’s commitment to environmental justice by directing agencies to address environmental justice issues, mandating the development of strategic plans and assessments to track environmental justice implementation, and enabling more executive branch oversight of federal environmental justice efforts.³¹

In accordance with this policy agenda, Associate Attorney General Vanita Gupta sent an eight-page memorandum to all DOJ employees, titled “Comprehensive Environmental Justice Enforcement Strategy,” which “provides a set of principles and actions to continue our work to advance environmental justice through the enforcement of federal laws.”³² In line with this goal, Attorney General Merrick Garland and Environmental Protection Agency (EPA) Administrator Michael Regan announced in May 2022 plans to set up a new Office of Environmental Justice to spearhead the administration’s focus on environmental enforcement.³³

In a press release on May 5, 2023, on the one-year anniversary of the inception of the Office of Environmental Justice, Attorney General Garland and Associate Attorney General Gupta both made statements reiterating DOJ’s commitment to prosecuting environmental crimes. Attorney General Garland stated: “In the year since I announced the creation of the Justice Department’s first Office of Environmental Justice, the Department has taken important actions across the country to advance environmental justice for all Americans ... We will continue to seek justice for and protect communities that are disproportionately burdened by environmental harms.”³⁴ In a similar vein, Associate Attorney General Gupta noted: “Our accomplishments over the past year confirm that advancing environmental justice is core to the Justice Department’s mission.”³⁵ Shortly thereafter, on May 11, 2023, DOJ announced that it was launching a Puerto Rico and U.S. Virgin Islands Environmental Crimes Task Force in order “to investigate and prosecute violations of federal law harming the environment, wildlife and human health, and associated fraud, waste and abuse in the region.”³⁶

Local US Attorney’s Offices have made similar pronouncements. For example, the US Attorney’s Office for the Central District of California — which has for years stood out for devoting an entire section within its criminal division to prosecute environmental and community safety crimes — recently announced the creation of an Environmental Justice Coordinator. The coordinator’s role is to focus on the “Enforcement of Laws Designed to Combat Pollution and Protect Communities Affected by Environmental Hazards” by “protecting the rights of district residents who are disproportionately burdened by environmental and health hazards, including those affected by illegal dumping, soil contamination and child lead exposure.”

The announcement underscores the US Attorney's emphasis on environmental crimes and indicates that it will likely increase its enforcement actions related to foreseeable infrastructure breakdowns resulting in environmental impacts.

DOJ is not alone in prioritizing environmental enforcement; the SEC also has focused on environmental, social, and governance (ESG) disclosures. For example, it proposed rules that would require registered and exempt investment advisers as well as investment companies to provide standardized disclosures regarding greenhouse gas emissions and any climate-related risks to their operations to their investors and the SEC.³⁷ The SEC initially suggested that the rule would be published in December 2022, but then pushed that date back to April 2023 and later to the fall of 2023 to address feedback it received during its extended comment period.³⁸

In its press release on the Brumadinho dam collapse, the SEC noted that its complaint against Vale was, in part, due to misleading statements and manipulative behavior relating to Vale's ESG disclosures. "Many investors rely on ESG disclosures like those contained in Vale's annual Sustainability Reports and other public filings to make informed investment decisions," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "By allegedly manipulating those disclosures, Vale compounded the social and environmental harm caused by the Brumadinho dam's tragic collapse and undermined investors' ability to evaluate the risks posed by Vale's securities."³⁹

The proposed ESG guidance clarifies that the Biden Administration's focus on environmental enforcement is being taken seriously across departments and agencies. Corporations and their directors should be aware of the increased appetite for environmental enforcement and prepare themselves to minimize exposure to this kind of liability.

Mitigation Strategies Available to Power Utilities and Corporations

Utilities and energy companies can implement certain strategies to mitigate the increasing risks of environmental disasters. These strategies can not only help companies avoid future disasters, but also put them in the best possible position with government regulators if and when disasters occur.

The most important strategy that companies can employ to help mitigate risk is to proactively invest in upgrading aging infrastructure. To determine when and where to upgrade aging infrastructure, companies should consider developing consistent policies and practices of conducting properly funded, independent audits of existing infrastructure. By employing disinterested third parties to perform neutral analyses, companies can gain valuable insight into what aspects of their infrastructure systems may be susceptible to failure and establish a record of independent advice on their infrastructure that can help defend them from liability if that infrastructure later fails. To maximize the effectiveness of these audits, companies can install corporate managers responsible for overseeing these audits.

Companies should also consider engaging counsel to develop and appropriately implement self-disclosure policies designed to provide transparency and early cooperation with regulatory agencies. In fact, the more lenient treatment of corporations that engage in voluntary self-disclosure has become a hallmark of the DOJ's approach to corporate crime in general.⁴⁰ As Deputy Attorney General Lisa Monaco announced in a September 15, 2022, memorandum, "I am directing each Department of Justice component that prosecutes corporate crime to review its policies on corporate voluntary self-disclosure, and if the component lacks a formal, written policy to incentivize such."⁴¹ The EPA has announced a similar self-reporting policy that if regulated entities come forward and promptly correct environmental violations, the agency will reduce penalties, generally decline to recommend criminal prosecution, and refrain from using its extensive information gathering authority to request a company's audit reports. By

having and following an established corporate policy of self-disclosure, a company facing an investigation has demonstrated its commitment to self-disclosure and transparency and is more likely to receive leniency from the investigating agencies.

Maintaining open lines of communication between corporations and the government agencies that regulate them can also help mitigate the risk of prosecution for environmental damage. Accordingly, corporations should check in periodically with appropriate agency contacts to ensure that they are complying with agency priorities and expectations.

Companies might also consider reviewing the relevant risks to ensure they are adequately insured. Beyond having appropriate commercial general liability insurance, companies should seek coverage for pollution legal liability, property damage, business interruption, additional expenses, workers compensation, and director and officer insurance — though of course, companies should always review their insurance policies for carve-outs.

Drafting a clear crisis management plan and identifying a disaster response team can also be helpful. An effective crisis management plan should designate a response team (and team leader with authority to make quick decisions when time is of the essence) and focus on problem solving and record preservation. The crisis response team could include a public relationship firm, counsel, cause and origin experts, products experts, industrial hygienists, toxicologists, environmental consultants, and crisis management experts, depending on the nature of the disaster at issue.

Natural disasters will continue to occur and will likely be more frequent and severe. Companies that operate in the power utilities and energy sectors will undoubtedly be impacted, but with forethought and planning, they can effectively mitigate the harm from such events.

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