

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,) No. 20-CR-4081-LTS
)
 vs.)
)
 JAY EARNEST NIDAY,)
)
 Defendant.)

SENTENCING MEMORANDUM

Witnesses:

None

Exhibits:

1. IDNR Certified Wastewater Operator Requirements
2. Excerpt from March 2013 Draft Master Plan Concerning Disinfection Problems
- 2A. March 8, 2013 Email Delivering Draft Master Plan to Defendant
3. March 16, 2015 Agreement to Not Finalize Draft Master Plan

Issues:¹

1. Whether an adjustment for aggravated role is appropriate, pursuant to USSG §3B1.1(a)?

¹ Defendant recently moved for a downward variance. *See* Docs. 20-21. The government will review and respond to the motion in the normal course.

2. Whether an adjustment for abuse of position of trust, or use of special skill, is appropriate, pursuant to USSG §3B1.3?
3. Whether defendant should repay court-appointed counsel fees?

TABLE OF CONTENTS

I. BACKGROUND FACTS.....2

II. AN AGGRAVATING ROLE ADJUSTMENT IS APPROPRIATE10

III. DEFENDANT ABUSED A POSITION OF TRUST AND USED A SPECIAL SKILL13

IV. ATTORNEY FEES14

V. CONCLUSION.....15

I. BACKGROUND FACTS

A. Introduction

At all relevant times, defendant Jay Niday was the Superintendent of the City of Sioux City’s (“City”) Wastewater Treatment Plant (“WWTP”). PSR ¶ 41. The WWTP is a large regional sewage treatment facility that treats wastewater before discharging its final product (“effluent”) into the nearby Missouri River under the terms of a Clean Water Act permit issued by the Iowa Department of Natural Resources (IDNR). PSR ¶¶ 17-19, 41. The WWTP treats high-strength wastewater from at least 20 significant industrial users throughout “Siouxland,” a three-state geographic region whose industrial base consists largely of agricultural and food-based processors. PSR ¶¶ 14-18.

In light of the heavy recreational use of the Missouri River in the area, proper disinfection is a critical part of the WWTP's treatment process. PSR ¶ 20.

Disinfection of the WWTP's wastewater helps to ensure a healthy aquatic environment. *Id.* If insufficiently disinfected, the WWTP's wastewater may expose recreational users of the Missouri River to various pathogens, including bacteria, viruses, and protozoa. *Id.*

As a condition for permission to discharge effluent into the Missouri River, the IDNR requires the City to disinfect the WWTP's effluent from March 15 through November 15 of each calendar year. PSR ¶ 21. During this "disinfection season," the Missouri River is warmer, and the level of the public's recreational use of the Missouri River is higher. *Id.*² The WWTP was required to disinfect its effluent with liquid chlorine³ and then take certain tests during the disinfection season in order to ensure the Missouri River is safe for recreational use and wildlife. *Id.*

As described in more detail below, no later than about 2012, defendant and other Sioux City officials and employees discovered that the WWTP did not work properly and could not consistently disinfect the millions of gallons of wastewater that

² IDNR classifies the Missouri River as a "Class A1" surface water because of heavy local recreational use. PSR ¶ 18. The IDNR also has classified the Missouri River as an "impaired water" because of pollution. *Id.*

³ The WWTP uses a sodium hypochlorite solution ("liquid chlorine") to disinfect its wastewater stream. PSR ¶ 25. Because liquid chlorine is toxic to fish and other aquatic life, proper disinfection practices require the subsequent addition of sodium bisulfite to the wastewater stream to reduce the total residual chlorine ("TRC") in the WWTP's effluent. *Id.* Sodium bisulfite neutralizes sodium hypochlorite after the sodium hypochlorite destroys pathogens. *Id.* The WWTP's permit thus included limites on TRC, in order to protect the environment. *Id.*

the WWTP was discharging into the Missouri River each day. Rather than alert the Iowa Department of Natural Resources (IDNR) to this serious problem, however, defendant betrayed the trust of the public and conspired with others, most notably his subordinate shift supervisor Patrick Schwarte, to cheat on the WWTP's required environmental testing. Defendant and his coconspirators employed a fraudulent testing procedure that ensured that the City's WWTP would always pass its effluent tests for fecal coliform, *E. coli*, and total residual chlorine (TRC).⁴

The criminal conspiracy continued until a whistleblower conducted the whistleblower's own testing of the WWTP's effluent, discovered "that the WWTP was in significant violation of its effluent limits," and reported the whistleblower's findings to the IDNR. PSR ¶¶ 76-77.⁵ In June 2015, the City terminated defendant's employment. *Id.*

B. The WWTP Does Not Work

In 2011, defendant had a very serious problem—the WWTP did not work as designed and could not consistently disinfect wastewater. At the same time high-ranking city officials were touting the effectiveness of the WWTP's new "MLE process"

⁴ *E. coli* is a species of fecal coliform bacteria that is specific to fecal material from humans and other warm-blooded animals; its presence tends to indicate fecal contamination of the water. Monitoring is typically for fecal coliform or *E. coli*, as opposed to various individual pathogens of human disease, because there are many different pathogens; pathogens are more difficult to measure; the presence of one pathogen does not necessarily predict the presence of another pathogen; and a specific pathogen may not be present at the time of testing. PSR ¶ 22.

⁵ In about October 2014, the whistleblower called an IDNR official and reported the whistleblower's suspicions to that official. PSR ¶ 76. In November 2014, near the end of that year's disinfection season, the IDNR official asked the defendant if the City was disinfecting with liquid chlorine every day, and the defendant lied and said the City was doing so. *Id.*

to the IDNR in an attempt to convince the IDNR to re-rate the WWTP to increase its treatment capacity,⁶ defendant and one such official had “discovered serious, ongoing disinfection problems at the WWTP.” PSR ¶ 47.

Beginning no later than 2011, and continuing until at least June 2015, defendant and others knowingly withheld from the IDNR serious problems with the MLE process, specifically impacts on disinfection at the WWTP. PSR ¶ 46. In contrast to its advertisements to the IDNR that the MLE process was a success, and requests to the IDNR that the WWTP’s rated capacity should be increased, significant problems with disinfection became apparent shortly after the MLE process came online. *Id.* Defendant and others concealed this fundamental problem with the MLE process from the IDNR and an engineering firm that the City had hired to assist with the re-rating process, because exposure of the WWTP’s disinfection problems would halt the City’s efforts to re-rate the WWTP absent significant capital investment in the WWTP. *Id.*⁷

No later than May 1, 2012, however, defendant notified the engineering firm that the City had hired to oversee construction at the WWTP, CDM Smith, Inc. (“CDM”) about the City’s disinfection problems.” PSR ¶ 49. Defendant reported to

⁶ The City has long sought to recruit and retain industries with high-strength wastewater. PSR ¶ 17. The City uses the purported capacity of the WWTP to attract such industries in an ever-present economic development competition with other municipalities in Iowa and elsewhere. *Id.* Cheating on required environmental tests gave the City an unfair advantage in this competition among municipalities.

⁷ Doing so would also call into question the federal loan disbursements that the City was receiving throughout this timeframe. PSR ¶ 49. The City has received no less than \$16,548,890.91 in federally subsidized loan funds since January 3, 2011. *Id.*

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.