

What's Going on Here?

By David Branham

Local officials are almost always those considered ultimately responsible for the success or failure of the water and wastewater systems operated by their communities. Skillful management protects public health and the environment, as well as the very considerable investments by communities in infrastructure and staffing. With this being said, I will give a brief overview of federal and state regulations and legal liability for violations.

OVERVIEW OF THE LAWS

One of the biggest challenges local officials face is learning to navigate the maze of regulations governing the operations of their water and wastewater treatment works, regulations which impact the day-to-day operations and financing needs of the public utilities. It is **critical** to understand the legal setting and ensure that the superintendents and operators are complying fully with applicable laws. In fact, a community's chief elected local official is likely to be the person those laws ultimately will hold responsible for ensuring compliance and protection of the environment and public health. For those of you that know me, I am sure that you have often heard me say **never, I repeat never falsify any records or reports!!**

Let's break it down and see what the Delegation of Regulatory Authority looks like.

Congress enacts laws → EPA publishes regulations to implement those federal laws → States adopt and enforce regulations that are at least as stringent as those promulgated by EPA → Local officials sometimes are charged with monitoring drinking water and wastewater regulation and compliance for public water and wastewater systems that serve the public.

State agencies and Indian tribes generally receive primary enforcement responsibility, or "primacy," for the regulations governing drinking water treatment and distribution. They also receive "delegation" of authority for enforcing wastewater discharge standards.

States must adopt regulations that are at least as stringent as the federal regulations. States assume responsibility for making sure that plants comply with federal and state requirements.

A complex system of permitting and monitoring require treatment techniques, technologies, and best management practices, reporting, inspection, and auditing to determine compliance with the regulations.

In case of non-compliance, enforcement agencies may issue administrative orders that require facilities to correct violations, and those agencies may assess monetary or other penalties. The law also allows EPA and state agencies to pursue civil and criminal actions that may include mandatory injunctions and penalties, as well as jail sentences for persons found willfully violating requirements and endangering the public health and welfare as well as the environment.

It is of utmost importance to remember that wastewater facility monitoring reports are public documents, and therefore the general public has the legal right to review. If a citizen believes that a facility is violating its permit, and if that citizen can establish "standing," then he or she can independently initiate a legal proceeding, unless EPA or the state regulatory agency has already taken an enforcement action.

The considerable public attention received by water and sewer systems is rivaled only by their close monitoring from regulatory agencies. According to EPA, sewer systems receive the most inspections of any local government operation. Most enforcement actions against local government are taken under the Clean Water Act and if the state fails to enforce regulations, EPA will step in to make sure the environment and public health are protected. Penalties and fines are levied based on consideration of a variety of factors, including seriousness of the violation, culpability- including gross negligence and willful misconduct, efforts to mitigate damage, history of prior violations, and any economic benefit gained because of the violation. With that being said, lets examine the Clean Water Act (CWA).

THE CLEAN WATER ACT

Congress enacted the CWA in 1972. It is the primary federal law that protects U.S. waters, including lakes, rivers, aquifers, and coastal areas.

The CWA provides comprehensive standards, technical tools, and financial assistance to address the cause of pollution and poor water quality, including public and industrial wastewater discharges, polluted runoff from urban areas, and habitat destruction. For example, the CWA:

- requires industries to meet performance standards for pollution control;
- charges states and tribes with setting specific criteria for their waters and developing control programs to meet them;
- provides funding to states and communities to help them meet their clean water infrastructure needs and;
- protects wetlands and other aquatic habitats through a permitting process that ensures development and other activities are carried out in an environmentally sound manner.

SYSTEM COMPLIANCE WITH THE LAW

As described earlier, states generally are responsible for enforcing environmental laws. In most states environmental laws are implemented and enforced by a state environmental regulatory agency. For Oregon it is the Department of Environmental Quality (DEQ).

Systems demonstrate compliance by detailed and accurate monitoring and reporting, and they maintain compliance through effective system operation and maintenance by qualified (certified) operators and proper management by superintendents and local officials.

CLEAN WATER ACT IMPLEMENTATION

The CWA requires a National Pollutant Discharge Elimination System (NPDES) permit for discharge from a point source into the waters of the United States. The permit contains limits on what may be discharged, monitoring and reporting requirements,

and other provisions to ensure that the discharge does not endanger water quality. In general, NPDES permits specify both maximum allowable concentrations of specific pollutants in milligram per liter (mg/L) and maximum allowable loadings of these pollutants in pounds per day and /or pounds per month. Some permits, however, specify generic “best management practices” for the protection of water quality.

States issue permits for discharges to surface water and groundwater from both industrial and public facilities. Permits may be “individual” (site specific), or they may be “general” (developed for a group of facilities or similar types of discharges). Monthly operating reports and discharge monitoring reports, which provide documentation of compliance (or non-compliance) with the NPDES permit governing the plant, are basically self-monitoring instruments. Data must be recorded accurately and truthfully. State regulatory agencies also send inspectors to determine if systems are in compliance with the discharge parameters imposed under their permit.

A wastewater treatment facility’s NPDES permit is likely to address management of effluent, biosolids, combined sewer overflows (CSO), stormwater management, and industrial pretreatment as well as oil spill prevention and control.

To meet CWA requirements, states are currently identifying waters that are impaired by pollution. For those waters, the state must establish a total maximum daily load (TMDL) of pollutants, which is the maximum allowable pollutant loading that allows the waters to remain safe for fishing and swimming.

When a TMDL is ready for implementation, the public, affected dischargers, regional agencies, and local governments will be involved in the TMDL process of determining which pollution sources should bear the treatment and /or control burdens needed to reach allowable loading levels. *It is important that each local government have a TMDL contact person to work with the agencies responsible for implementing TMDL strategies.*

I can’t stress this enough--- It is important for local officials to recognize that TMDLs may result in

additional and more stringent pollutant limits for their system. Wastewater treatment plants may require new technologies to meet stricter permits that may be issued for point sources.

LEGAL RESPONSIBILITIES

NOTE; the information contained in this article is not and should not be considered legal advice for a particular local government or elected official. It is general information that is deemed reliable. For specific legal advice about a particular legal problem, counsel should be consulted.

Legal liability is an inescapable issue in our society. Elected officials must be aware of their responsibilities as elected officials and be sensitive to potentially litigious situations. Water and wastewater treatment facilities are highly regulated and health-critical fields, and ongoing education and attention to liability are recommended.

If the law says that the board, council, or commission on which an official serves owns the water or wastewater works, then the courts and the regulatory agencies will look to that official as a member of that local governing body to protect public health and be legally responsible for the operation of that system. In addition the manner in which water and wastewater is treated by the waterworks can directly and significantly affect the lives, health, and property interests of the voters in an elected official's jurisdiction, as well as the use of the fiscal resources of their governing body. To understand the legal responsibilities, consider this overview of the area of water and wastewater liability.

STAKEHOLDERS AND CONSTITUENCY GROUPS

There are stakeholders and constituency groups *to* whom elected officials are accountable, and there are stakeholders and constituency groups *for* whom elected officials are accountable.

The groups that local elected officials are accountable *to* include:

- state regulators—usually the state environmental regulatory agency;

- federal agencies charged with pollution and natural resource issues—usually the EPA , Department of Interior, Department of Agriculture and possibly the National Oceanographic and Atmospheric Administration; and
- the citizens who elected the officials.

When elected officials fail or refuse to comply with or disregard the requirements imposed by the regulators and the community to whom they are accountable and responsible, they may be held legally liable. As a rule, accountability to state agencies is through state statutes and regulations that are adopted pursuant to these statutes. Similarly, accountability to the federal agencies is through federal statutes and regulations that are adopted, in most instances, by EPA.

The stakeholders and constituency groups that elected officials are accountable *for* are:

- officers, agents, and employees of the water and wastewater utilities,
- departments in which these utilities are placed,
- safe and effective operations of the utilities, and
- consumers and businesses and institutions that use products of the utilities in their lives and occupations.

In the case of the wastewater facility, the product of the plant is effluent that meets water quality standards and effluent limitations that are imposed by federal and state law and regulation. When elected officials fail or refuse to protect the health, safety, and welfare of their utilities, employees, or their public, then liability may arise from these sources.

Local officials' legal accountability to local government employees and to the users of the product of those employees may come from "third party" suits brought under statutes or from suits brought under common law, or judge-made case law such as nuisance or negligence.

RESPONSIBILITY OF LOCAL OFFICIALS

It can be difficult to know whose actions a local official may be held liable. Is an official of a municipality responsible for the acts or omissions of the Director of the Department of Public Works, the Division Head for Water and Wastewater, the Bureau Chief for Wastewater, the Supervisor of the night shift, the superintendent who initials the monthly operating report, and the operator who fills out the daily monitoring report and certifies that he/she has taken grab and composite samples? What about the contract laboratory which certifies

that it has followed the appropriate test protocols? Is the local official responsible for the actions of all these officials, employees, and agents? How far down the line does his or her responsibility extend? And on and on it goes but I think you may have gotten a small taste of the legality of the operation and running of our water and wastewater facilities. Much more information is involved and, of course, more can and is said about this subject, but with this I must close due to lack of space in our magazine.

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