Liability for Overflow from Private Sewer Line

QUESTION

The following question was distributed to members of NACWA's Legal Affairs Committee on June 18, 2008:

"We are writing to you as a member of NACWA's Legal Affairs Committee with a request for information. A NACWA member is seeking input regarding a situation in which a state is attempting to hold a municipality liable for sanitary sewer overflows (SSOs) emanating from privately owned sewer works (lines, lift stations, force mains). The municipality has been identified by the state as a liable party (along with the owner of a private sewer works) for an SSO that occurred entirely within the private sewer works. The state's position is that the city is partially responsible because the private sewer works connect to the city's public sewer system. The regulatory authority the state is citing is a provision in the NPDES regulations, 40 CFR 122.41(e), which is a typical condition in municipal NPDES permits:
"Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.

Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary."

The state is of the opinion that private sewer works are "appertenances" to the city's system. The municipality disagrees as it has not installed or used the private sewer works. Any information you can provide regarding application of the federal regulations to this type of situation, including any similar experiences you may have had or be familiar with, would be greatly appreciated. "

RESPONSES

The following responses were received from members of the Committee:

Response 1: I suggest that the authority negotiate a settlement with the state that would provide for establishing an enforceable permit in the nature of a pretreatment permit between the private system and public utility which would be recognized in the NPDES permit in an attempt to avoid an enforcement order and penalty. The negotiations should include the identification of the cause of the SSO in the private system. States have and exercise more flexibility in dealing with these situations.

Response 2: The State's 122.41(e) approach appears to be based upon OECA's draft "eureka" approach where they said that they didn't need an SSO rule after all since 122.41(e) and 122.41(d) (duty to mitigate) already provided the authority. When I teach the EPA/WEF NPDES permitting course with EPA, I specifically focus on the language of these regulations in discussing the potential applicability to SSOs and the importance of challenging such interpretation.

First of all, is there a "discharge?" Do the overflows enter waters of the US/State or do they (from a legal point of view) merely result in basement backups? When the issue was recently raised by a State AG's office in negotiating a consent decree, I told them they did not have the authority to regulate overflows that did not reach waters of the state. If there is a "discharge" (i.e., the overflows enter waters of the US/State), then the question would be who caused the discharge. Although the "discharge" may have emanated from a pipe that

the municipality does not own, there is some case law that one need not be the owner/operator of the discharging facility or the permittee to be held liable if you caused the underlying violation.
As to the appurtenenace language, it's been a while since I read the EPA June 1979 and May 1980 preamble from these regulations, but, if my memory serves me right, I do not believe it addresses this issue either way. Notwithstanding, I believe the focus should first be on the language "installed or used by the permittee to achieve compliance with the conditions of this permit." I argue that the sanitary sewer system is not installed to achieve compliance with the permit but, instead, is installed to convey sanitary sewage. I've seen states that have definitions of "separate sanitary sewer system" in their regulations that reflect such distinction.

Response 3: There was extensive discussion of this in the 2001 SSO rule, where the bottom line was going to be that basement backups caused by blockages in private laterals were excluded from the definition of SSO. This approach has been followed in most consent decrees I have seen (e.g. Cincinnati). However, the 2001 SSO rule did request comment on whether controlling I/I from private sewers should be made a responsibility of the POTWs. My guess is that someone is trying to stretch the law here for the same reasons contemplated (but never implemented) in the 2001 rule:

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The Agency requests comment on whether the legal authority for
controlling I/I should specify controlling I/I from private sources,
such as the privately owned portions of building laterals. Private
building sewer connections represent a large portion of the collection
system (e.g., typically about 50 percent of the total sewer length).
Many inflow connections are associated with these connections (e.g.,
foundation drains, area drains, downspouts), including connections that
are intentionally made to provide site drainage. Such connections are
typically considered illegal by local government agencies, although many
older connections were authorized at the time they were installed. A
recent WEF survey indicated that about 80 to 85 percent of municipal
sanitary sewer operators have enforceable regulations prohibiting
downspout, roof drain and area drain connections to their sanitary sewer
systems. A number of studies have shown that the overall effectiveness
of I/I removal efforts will be limited in many municipal collection
systems if private sources of I/I are not addressed.
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Response 4: Back in 2001, the Arizona department of Environmental Quality (ADEQ) issued an NOV to the City of Tempe for an SSO that occurred in an upstream satellite system owned and operated by Arizona State University. The SSO was not from a private service line, but from a public (university) satellite system. The NOV was issued to both ASU and Tempe for discharging without an aquifer protection permit in violation of Arizona's Aquifer Protection statute. Arizona did not receive NPDES primacy until 2002, so the NOV did not site NPDES violations.

Tempe appealed the NOV to the Arizona Office of Administrative Hearings, but ADEQ's Counsel responded by indicating that ADEQ did not interpret an NOV as an appealable action. After elevating the issue to a higher level at ADEQ, the agency backed off. It never admitted that Tempe was not responsible, but closed the NOV to Tempe without requiring any action from the City.

Response 5: Having worked as an engineer on jurisdictional issues of sanitary sewer systems in a variety of contexts, I am surprised that the State is pulling in the municipality if the SSO was caused AND occurred wholly within the private portion of the sewer (and you know this for sure). However, as always, the devil is in the details.

Other questions I would ask, and some considerations for possible answers, are as follows:

-- Is there any indication that the SSO could have, in any way, been *caused* by the public portion of the sewer line (e.g. a blockage downstream of the private portion of the sewer)? It sounds like probably not, but I would definitely ask a lot of questions here because sometimes there is more information than is first apparent. If there was a blockage downstream, then the State has justification to pull in the municipality.
-- Does the municipality own *any* portion of the lateral? (Sometimes, if they do, the jurisdictional boundaries can get blurred, and this can cause confusion and would lend itself to sloppy accusations.)
-- At what level was the case activated? Many, many, many times if it is a low level engineer at the State agency who is very green and doesn't understand how these things work (but isn't willing to admit it yet), the situation can be fairly easily remedied by going to a higher level.
-- What is the enforcement action being activated? A letter indicating a Notice of Violation? A phone call only? A court-ordered consent decree? A $100,000 penalty? Actions (only) to remedy the situation or prevent it from happening again? The nature of the enforcement action provides important details about deciding what to do about it.
-- Does the municipality have a record of other (substantive or not) grievances (from the State, or the private sewer owner) that would pull them into this situation as an adjunct to a larger issue? Sometimes, if you are able to solve the larger issue, it will make this seemingly ridiculous aspect of the complaint go away.
-- Is the municipality really (really) innocent? Sometimes the municipality does need to step up and do its part, depending on the situation.
-- Does the State think that the municipality is not properly enforcing its ordinance(s) against this particular property owner (and so is dragging it into the case also for that reason)? And/or is there any history around that issue that can be remedied easily in order to get the municipality dropped from the case (perhaps the involvement of the municipality in the case is an attempt at leverage on the part of the State, although this is not the usual and appropriate forum for that type of grievance).
-- Are there any other reasons that the State would do this? (trying to start a precedent?, one of the reasons mentioned in the above questions?, needs money for something else?)

Response 6: In response to your request for information on responsibility for SSOs from privately-owned sewer facilities, please see the paper titled, "District Liability for a Sewage Spill from a Private Lateral", http://www.nacwa.org/index.php?option=com_mediadownload&filename=2009-02-03liability.pdf. It focuses on laterals and California law, but may provide some useful information for other states as well.

Response 7: This memo is in response to the request from NACWA for comments about the interpretation of EPA's regulation at 40 CFR 122.41(e) on operation and maintenance of privately owned sewers which connect to a public system. The EPA regulation states: "The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit." I understand that some EPA staff are interpreting the parenthetical phrase "and related appurtenances" as a basis for requiring permittees to assume responsibility for the proper operation and maintenance of private sewers which connect to their public systems.

In Michigan, the NPDES language governing a permittee's O&M responsibility is typically found in Part II, Section D.3. Michigan's standardized permit language does not, however, include the parenthetical phrase referencing "and related appurtenances". The Michigan permits simply state "The permittee shall, at all times, properly operate and maintain all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of the permit. Proper operation and maintenance includes adequate laboratory controls and appropriate quality assurance procedures."

Obviously, removing the parenthetical phrase ensures that the question posed by NACWA is a non-issue in Michigan. Historically, Michigan regulatory staff have interpreted the proper operation and maintenance clause as a basis for differentiating the responsibility of permittees to properly run facilities which are needed to

stay in compliance, as distinct from those facilities which have no bearing on permit compliance. For example, DWSD owns and operates many suburban billing meters. Under MDEQ's interpretation of the regulations, the permit does not require proper operation and maintenance of billing meters since these facilities do not affect permit compliance.

To my knowledge, Michigan has never attempted to interpret the EPA regulations as requiring public agencies to properly operate and maintain privately owned sewers. Several studies have been conducted which show that privately owned house leads are a major contributor of infiltration and inflow. However, because house leads are privately owned they have been unable to secure SRF low interest loans for sewer rehabilitation. The SRF funds have been available only for rehabilitation of the publicly owned portions of the system.

Similarly, it is worth noting that EPA's draft regulation for CMOM (Capacity Management Operation and Maintenance) which was proposed in 2001 clearly distinguished the permittee's regulatory responsibilities as distinct from the "satellite systems" which connect into the permittee's system, but which are owned by another governmental unit. Under the draft CMOM regulations, EPA actually proposed issuing separate NPDES permits to satellite sewer systems, presumably because the agency felt there is no legal basis for requiring proper operation and maintenance of these systems under 40 CFR 122.41(e).

There have been several interesting court cases in Michigan which included consideration of the permittee's obligations as compared to upstream jurisdictions. In the early 1990's, EPA filed suit against Wayne County for alleged permit violations at the Wayne County Downriver wastewater treatment plant which serves 13 communities. Wayne County argued that it could not move forward with new capital improvements without the consent of the member communities in accordance with the 1962 Service Agreement between Wayne County and the 13 communities. The Justice Department agreed and withdrew the claim against Wayne County, and later re-filed the case against multiple co-defendants (Wayne County and the 13 contributing communities). This decision was based on the premise that the responsibility for upgrading these facilities did not rest solely with the permittee (Wayne County).

Judge Feikens also considered similar legal arguments with respect to the legal responsibility for combined sewer overflow discharges from a permit issued to Wayne County in the early 1990's. Wayne County argued that it could not design, finance and construct capital improvements for CSO control facilities since the flow to be treated originated in collection systems owned and operated by the upstream communities. Because of this argument, MDEQ, with EPA's consent, reissued the NPDES permits with Wayne County and the local communities being named as co-permittees. This was done to avoid a problem with placing responsibility solely on the permittee for sewers which that permittee did not own.

In summary, Michigan has never interpreted 40 CFR 122.41(e) to obligate a permittee to oversee the operation and maintenance of sewers which it does not own.

Response 8: Last year the state of California mandated a program to municipalities which was a step beyond the US EPA's Capacity Management Operations and Maintenance (CMOM) program. The state through the Regional Water Quality Control Board, established a program called Sewer System Management Plan (SSMP), which basically holds municipalities and small communities with collection systems responsible for the entire system, including all who discharge into it. However, as a part of the program, the municipality is obligated to also have the City Government pass ordinances which in force the private concerns discharging into the system responsible for the upkeep. The City is also committed to develop a plan for enforcement of the ordinances and have a dedicated city budget allocated for the program, which includes inspection, cleaning, replacement, etc.