

# WHEN LAWYERS GET INVOLVED

A Disturbing Idea for Many  
(Most?)

# Reactions to This Phrase

- “When lawyers get involved, it generally tends to get ugly.”
- “Seldom does any good result when lawyers get involved.”
- “When lawyers get involved the only sure thing is that the lawyers make money.”
- “Let's look at the utter stupidity that happens when lawyers get involved.”
- “When lawyers get involved in something, it's no longer a fight between the parties. It's a fight between the lawyers.”
- “Our best advice is simple:  
When lawyers get involved, watch your !#@!\*\*\*”

# Goals for Today

- Actions you can take before lawyers get involved.
- When should you call the lawyer.
- Answer Some Common Questions.
- Understand that Not all lawyers are sharks:  
Just some.
- Your lawyer can really be:

# Your Pre- Lawyer Actions

- Conducting Inspections:
  - Follow same protocol each time:
    - Announced or Unannounced;
    - Process used;
    - Consistency.
  - Be professional:
    - Courteous;
    - Thorough;
    - Understanding;
    - Know when to fold 'em.

# Your Pre- Lawyer Actions

- Written record of inspection:
  - Record all phone calls in log;
  - Keep all documents (including e-data) in folder;
  - Communicate with supervisor if necessary;
  - Take pictures and/or videos;
  - Record details of visits/inspections.

# Your Pre- Lawyer Actions

- Subpar Written Report:

# Your Pre-Lawyer Actions

Went to Acme's Roadrunner destruction facility today.

Went to ISCO sampler.

Saw some employees. Looked like they were up to no good, as usual. Why do they have to work to kill roadrunners?

Noticed zero flow.

Noticed no bubbler tube connected to flume.

Spoke to employee.

Bubbler tube reconnected.

# Your Pre-Lawyer Actions

- Much Better Report

# Your Pre-Lawyer Actions



From: Mr. Superior Inspector

To: Acme, Inc., Roadrunner facility file

Re: Quarterly Inspection of discharge Pipe A

Date: September 18, 2007

Arrived at the Acme's Roadrunner destruction facility today at 11am to perform the quarterly inspection of flow of discharge Pipe A. I arrived unannounced and proceeded to Pipe A with my standard equipment. I encountered no employees on my way to Pipe A.

Arrived at Pipe A and set up my equipment. While setting up my equipment, I notice three employees about 50 feet away pointing at me and whispering to one another. I did not speak with them at this time.

After I finished setting up my equipment, I noticed that there was a zero flow reading on the Waste Water Meter. As there was flow being discharged from Pipe A, I looked for a reason as to the zero flow reading. After a few minutes of investigation, I noticed that the bubbler tube was not connected to the flume.

I reconnected the bubbler tube to the flume and it began providing accurate readings. The bubbler tube was not easy to reconnect and took some physical effort on my part.

While I was reconnecting the bubbler tube, an employee, not one of three mentioned earlier approached me and told me that he "was glad that I had come because another employee had disconnected the bubbler tube earlier." When I asked him if he could identify who had done it, he quickly walked away.

I proceeded with my sampling and called my supervisor to report what I had found with the bubbler tube.

I finished the sampling at 11:30 and left the facility property at 11:35.

*Superior Inspector*



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# Your Pre-Lawyer Actions

- Understand Your (Sewer Use) Ordinance
  - Know what obligations/rights your customer's have.
  - Know what obligations/rights you have.
  - If language is confusing, seek clarification.
  - Understand and be able to clearly present requirements/potential violations to customers.

# Your Pre-Lawyer Actions

- Carefully Read SUO Provisions

**Sec. 23-99. Protection from damage.**

No person shall maliciously or negligently damage, destroy or tamper with any equipment or materials belonging to CMU, including that left upon the premises of a user discharging wastewater into the POTW. The user shall be responsible for the safety of such equipment and may be held liable for any such damage.  
(Code 1985, § 23-68)

# Your Pre-Lawyer Actions

## **Sec. 23-100. Falsifying information; damages to monitoring equipment.**

Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to this article or the wastewater discharge permit, or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required under this article. shall, upon conviction, be punished by a fine of not more than \$500.00.

# Your Pre-Lawyer Actions

- Keep Lines of Communication Open & Working
  - When issues/problems arise or might arise, communicate with customer.
  - Follow through on follow up.
  - You be the one to take the next step.
  - Don't wait too long for their response.
  - Follow up phone calls with written response.

# Your Pre-Lawyer Actions

- Drafting Notices of Violations
  - Use a template, if possible;
  - Keep it simple, but complete;



## Crested Butte

September 18, 2007

Mr. Wile E. Coyote  
Acme Inc., Roadrunner Facility  
1 Big Rock Lane  
Crested Butte, Colorado

**Subject: Notice of Violation and Assessment of Civil Penalty to Acme, Inc. ("Acme")**

Dear Mr. Wild E.:

Crested Butte Utilities - System Protection ("CBU-SP") is issuing a Notice of Violation ("NOV") and civil penalty to Acme due to an incident that occurred during the CBU-SP sampling event performed at your facility January 1, 2007. Acme has been found to be in violation of Parts I. B. and D. 6. & 8. of Wastewater Discharge Permit #1013 ("Permit") and the Crested Butte's Sewer Use Ordinance ("SUO") Sections 23-86 (a). These violations are generally summarized as follows:  
**Wastewater Meter Failure.**

In accordance with Permit Part II. M. and SUO Sections 23-87(b)(3), 23-95 (a) & (g), a civil penalty in the amount of **\$2,500.00** is hereby assessed to Acme. **Payment of the penalty must be submitted to this office** within 30 days of receipt of this notice. If the penalties are not paid within 30 days, the City shall have such remedies for the collection of such assessment as the City has for the collection of other unpaid sewer charges.

These violations place Acme in Significant Non-Compliance (SNC) as defined in 40 C.F.R. Part 403.6(r)(2)(vii) for the January to June 2007 reporting period. ~~In accordance with 40 C.F.R. Part 403.6(r)(2)(vii),~~ Acme will be published in the Crested Butte Observer.

If Acme fails to return to compliance, then additional actions, including increased penalties or Crested Butte Wastewater Discharge Permit Revocation, ~~will be completed in accordance with the Sewer Use Ordinance.~~ Please be aware that the SUO gives the Director the authority to assess penalties of up to \$25,000 per day per violation.

The appeal of civil penalties is provided for in SUO Section 23-89. An appeal of penalties must be in a written format to the Environmental Compliance Manager, System Protection identifying the specific issues to be contested. The appeal must be received by CBU-SP within thirty (30) days of your receipt of this letter.

If you have any questions, please call your Compliance Specialist . . . .

Thank you for your cooperation.

Sincerely,

XXX

# Your Pre-Lawyer Actions

- Setting Civil Penalty Amount
  - In determining the amount of the civil penalty, the [POTW Director] shall consider the following:
    - (i) The degree and extent of the harm to the natural resources, to the public health, or to public or private property resulting from the violation;
    - (ii) The duration and gravity of the violation;
    - (iii) The effect on ground or surface water quantity or quality or on air quality;
    - (iv) The cost of rectifying the damage;
    - (v) The amount of money saved by noncompliance;
    - (vi) Whether the violation was committed willfully or intentionally;
    - (vii) The prior record of the violator in complying or failing to comply with the pretreatment program;
    - (viii) The costs of enforcement to the [Town].
  - Be prepared to address each.
  - Consider how many days: “may be fined up to twenty-five thousand dollars (\$25,000) per day per violation.”
  - Be consistent.

### Enforcement Guidance Table

Instructions: Using the violation categories and examples provided below, circle the offense in the right column that most closely corresponds with the violation.

Violation Category	Examples	Penalty
<b>Class I Violation</b> Minor unintentional/non-willful violation <u>not</u> resulting in any detrimental impacts to surface water quality	a) Improper disposal of yard waste b) Improper disposal of pet/animal waste c) Private vehicle leaking excessive fluids d) Private individual disposing of cooking oil on ground	<b>1<sup>st</sup> Offense</b> - Written NOV + Educational material + Restore the affected area - No penalty  <b>2<sup>nd</sup> Offense</b> - Written NOV/NRE + \$100.00/occurrence + Restore the affected area  <b>3<sup>rd</sup> Offense</b> - Written NOV/NRE + \$500.00/occurrence + Restore the affected area  <b>4<sup>th</sup> Offense and beyond</b> - Written NOV/NRE + Fine incrementally increases \$1,000/occurrence up to a maximum of \$10,000.00 + Restore the affected area
<b>Class II Violation</b> Minor intentional/willful violation <u>not</u> resulting in any detrimental impacts to surface water quality	a) Discharge from commercial car wash operation b) Discharge of chlorinated swimming pool water c) Improper disposal of latex paint waste d) Washing machine discharge	<b>1<sup>st</sup> Offense</b> - Written NOV + Educational material + Restore the affected area - No penalty  <b>2<sup>nd</sup> Offense</b> - Written NOV/NRE + \$500.00 fine/day + Restore the affected area  <b>3<sup>rd</sup> Offense</b> - Written NOV/NRE + \$1,000.00 fine/day + Restore the affected area  <b>4<sup>th</sup> Offense and beyond</b> - Written NOV/NRE + Fine incrementally increases \$1,000/day up to a maximum of \$10,000.00 + Restore the affected area
<b>Class III Violation</b> Unintentional/non-willful violation <u>resulting</u> in documented detrimental impacts to surface water quality (i.e. altering the normal water chemistry, damage to stream habitat and/or biology)	a) Leaking private sewage system b) Improper fertilizer/pesticide application c) Illicit connection to the storm sewer system or surface waters unknown to the responsible party d) Accidental discharge to storm drain system	<b>1<sup>st</sup> Offense</b> - Written NOV + Educational material + Restore the affected area - No penalty  <b>2<sup>nd</sup> Offense</b> - Written NOV/NRE + \$1,000.00 fine/day + Restore the affected area  <b>3<sup>rd</sup> Offense</b> - Written NOV/NRE + \$5,000.00 fine/day + Restore the affected area  <b>4<sup>th</sup> Offense and beyond</b> - Written NOV/NRE + \$10,000.00 fine/day + Restore the affected area
<b>Class IV Violation</b> Intentional violation <u>resulting</u> in documented detrimental impacts to surface waters (i.e. altering the normal water chemistry, damage to stream habitat and/or biology)	a) Willful discharge of harmful substances (i.e. chemicals, petroleum products, industrial wastes) b) Willful connection to the storm drain system or surface waters c) Willful dumping of waste materials directly to storm drain or surface waters.	<b>1<sup>st</sup> Offense</b> - Written NOV/NRE + Educational material + Restore the affected area + \$2,500.00 fine/day  <b>2<sup>nd</sup> Offense</b> - Written NOV/NRE + \$5,000.00 fine/day + Restore the affected area  <b>3<sup>rd</sup> Offense</b> - Written NOV/NRE + \$10,000.00 fine/day + Restore the affected area  <b>4<sup>th</sup> Offense and beyond</b> - Written NOV/NRE + \$10,000.00 fine/day + Restore the affected area

Total Penalty = 1 days x \$ 500.00 penalty per day = \$ 500.00

Signature of Authorized Person

Date

# When to Call Your Lawyer

- Interpretation of SUO.
- While drafting NOV and penalties.
- Once customer hires an attorney.
- Wait until appeal filed.

# When to Call Your Lawyer

- What to Expect from Either Lawyer
  - Scrutiny and Questions . . . of what?
    - Of violation language
    - Of supporting facts
    - Of your tactics
    - Of penalty
  - Attention to details.

# When to Call Your Lawyer

- More time Required:

# When to Call Your Lawyer

- Potentially Combative Environment

# When to Call Your Lawyer

- Possibly Need to Justify their bills:

# Common Questions

## ■ Search Warrants . . . Do You Need One?

### Inspection and Sampling

The [Town] will inspect the facilities of any user to ascertain whether the purpose of this ordinance is being met and all requirements are being complied with. Persons or occupants of premises where wastewater is created or discharged shall allow the [Town], approval authority and EPA or their representative ready access at all reasonable times to all parts of the premises for the purposes of inspection, sampling, records examination and copying or in the performance of any of their duties. The [Town], approval authority and EPA shall have the right to set up on the user's property such devices as are necessary to conduct sampling, inspection, compliance monitoring and/or metering operations. Where a user has security measures in force which would require proper identification and clearance before entry into their premises, the user shall make necessary arrangements with their security guards so that upon presentation of suitable identification, personnel from the [Town], approval authority and EPA will be permitted to enter, without delay, for the purposes of performing their specific responsibilities. Denial of the POTW Director's approval authority's, or EPA's access to the user's premises shall be a violation of this ordinance. Unreasonable delays may constitute denial of access.

# Common Questions

- **Search Warrants:**

If the [POTW Director], approval authority, or EPA has been refused access to a building, structure, or property, or any part thereof, and is able to demonstrate probable cause to believe that there may be a violation of this ordinance, or that there is a need to inspect and/or sample as part of a routine inspection and sampling program of the [Town] designed to verify compliance with this ordinance or any permit or order issued hereunder, or to protect the overall public health, safety and welfare of the community, then the [POTW Director], approval authority, or EPA may seek issuance of a search warrant from the court having jurisdiction within the [Town].

# Common Questions

## ■ Confidentiality Agreements When Inspecting?

Information and data on a user obtained from reports, questionnaires, permit applications, permits and monitoring programs and from inspections shall be available to the public or other governmental agency without restriction unless the user specifically requests and is able to demonstrate to the satisfaction of the POTW Director that the release of such information would divulge information, processes or methods of production entitled to protection as trade secrets of the user. Any such request must be asserted at the time of submission of the information or data.

When requested by the person furnishing a report, the portions of a report which might disclose trade secrets or secret processes shall not be made available for inspection by the public, but shall be made available upon written request to governmental agencies for uses related to this ordinance, the National Pollutant Discharge Elimination System (NPDES) Permit, Non-discharge permit and/or the pretreatment programs; provided, however, that such portions of a report shall be available for use by the State or any state agency in judicial review or enforcement proceedings involving the person furnishing the report. Wastewater constituents and characteristics will not be recognized as confidential information.

All records relating to compliance with Pretreatment Standards shall be made available to officials of the approval authority and EPA upon request.

Robert Phocas  
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