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Preparing for the Scrutiny of Uncle Sam: Federal Clean Water Act Enforcement – Coming to a City Near You!

by Nathan Vassar

For many, a surprise visit by a distant relative not seen in years is a welcome event. For others, however, an unexpected visit can prove frustrating, or even imposing – especially if that certain uncle decides to stay awhile, and immediately begins critiquing everything from the cabinets and furniture to certain child-rearing strategies. For many communities facing Clean Water Act ("CWA") enforcement, that imposing visitor is none other than Uncle Sam – a well-intentioned, but expensive and often meddling house guest. And as cities and political subdivisions across Texas and the United States are finding out, preparing for his visit in advance can prove much less costly than addressing his demands after he pulls into the driveway.

While communities across the United States have long-faced CWA enforcement efforts, many utility directors will attest that the federal government's enforcement strategies in recent years have focused on complete and comprehensive scrutiny of cities' systems, plants, and assets, as well as their operational procedures and training. The result of such federal interest has involved unexpected investments to the tune of hundreds of millions (and sometimes billions) of dollars in infrastructure upgrades, capital projects, staffing increases, and amended operating procedures – all required under a federally enforceable court order.

Wastewater enforcement of sanitary sewer overflows ("SSOs"), while representing a single piece of EPA's enforcement efforts, is an illustrative example of Uncle Sam's approach, and offers opportunities for communities to consider ways to limit long term costs. In recent years, the U.S. Environmental Protection Agency ("EPA") has initiated dozens of enforcement actions against municipalities across the nation under the CWA, seeking the "elimination" of

SSOs. EPA's SSO Enforcement Guidelines provide guidance as to the cities that may be on the EPA's "short list" (cities with wastewater service populations greater than 300,000; average daily flow of wastewater system greater than or equal to 100 million gallons/day; etc.), but as the administration's second term agenda is underway under new EPA Administrator Gina McCarthy, even smaller cities falling outside of EPA's criteria – including many Texas cities – are finding themselves targets of federal SSO investigation and enforcement.

SSOs are relatively common occurrences in any wastewater system, and are caused by a variety of factors – capacity limitations, debris buildup, grease related blockages, root intrusion, and rainwater infiltration and inflow, among others. However, while SSOs are often seen as a "fact of life" by seasoned wastewater departments, EPA takes a different view, using its enforcement authority to demand the elimination of *all* SSOs, without acknowledging the impracticality of such an approach. The resulting effects can be expensive and far-reaching, as federal authorities seek the implementation of a variety of projects that impact wastewater department operations, from large-scale system upgrades to collections inspection procedures and new protocols for restaurant inspections. Often, these projects and the costs they drive also have long-term implications to Capital Improvement Plans ("CIPs") that will impact a city's commitment to other priorities, including streets/transportation, housing, and other infrastructure projects. Although SSOs get Uncle Sam's foot in the door, once inside, it is not long before he finds his way to the family checkbook as well as blueprints for planned home upgrades/repairs, and begins dictating where to spend money and how much to spend.

EPA's SSO enforcement method typically takes the form of a negotiated Consent Decree that identifies projects, studies, modeling work, and reporting guidelines that will, in part, result in new wastewater system upgrades, repairs, and documentation procedures. Consent Decrees

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also include stipulated penalties for SSOs and effluent violations along with a one-time civil penalty. While EPA is involved in the negotiation of all such Consent Decrees, the U.S. Department of Justice ("DOJ") assumes a lead role in the process. DOJ and EPA typically rely on violations of permit conditions as well as the CWA prohibition on "unpermitted discharges" to the "waters of the United States," as the basis for enforcement, and as leverage in negotiating Consent Decree obligations.

Because of the varying causes of SSOs, EPA- and DOJ-proposed remedies are often both comprehensive and expensive. Once EPA and DOJ initiate enforcement, in most cases a utility's entire wastewater operation system is placed under the federal microscope, including its Capacity, Management, Operation & Maintenance ("CMOM") program, inspection procedures, cleaning practices, capacity limitations, emergency response protocol, and its SSO response and reporting protocol, among others. Further, effluent violations and wastewater treatment plant operations are also frequent subjects of federal investigation and resulting upgrades. As a result, the "fixes" recommended or required by EPA and DOJ have cost cities hundreds of millions of dollars (spent over varying periods, but generally between 10-25 years), and in some cases much more. As noted, the resulting wastewater projects and costs directly impact CIPs, and the related costs fall to citizens and ratepayers.

In order to prepare for the possibility of EPA and DOJ enforcement, cities operating wastewater collection systems should consider ways to plan ahead, in anticipation of the federal demands seen in enforcement actions across the United States. Such planning should include an overarching evaluation of potential CWA liability, examining permit and regulatory violations and trends, capturing and documenting existing CIP projects, reviewing asset improvements, updating training techniques, and conducting a comprehensive analysis of best practices. Cities

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may also wish to audit their existing standard operating procedures, reporting mechanisms, and tracking protocols. Such audits, when privileged, represent a relatively safe method to identify potential liability and can enable a deliberate approach to address a variety of technical challenges across a collections system and treatment plants. Additionally, TCEQ's Sanitary Sewer Overflow Initiative ("SSOI") is a state-run compliance mechanism to address SSOs proactively and to set SSO abatement goals. In addition to these methods, cities should consider their water, stormwater, and wastewater investments collectively, in order to present a coordinated affordability and prioritization plan to EPA, using the EPA's recent "Integrated Planning" framework. Throughout this process, a city and its consultants can evaluate alternatives and potential liabilities, negotiate with enforcement representatives, and shield confidential analysis documents from discovery, should formal CWA enforcement commence.

In light of the significant financial costs to cities resulting from EPA's CWA enforcement, municipalities operating wastewater collection systems should recognize and prepare for this real and significant threat. As identified above, there are a variety of proactive planning tools available to cities that can help them limit enforcement costs and liability exposure on the front end, while developing operational and investment plans that most cities would agree represent best practices. By proactively taking preventative steps, communities may, in effect, be better positioned to showcase their "home" to that visiting uncle, rather than appearing in a defensive posture when he arrives with his checklist and lofty expectations.

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