

The Sewage Pollution Right to Know Act: Another Regulatory Requirement for POTW Operators

By Michael J. Lesser

Introduction

The Town of East Greenbush recently faced the consequences of neglecting its sewer treatment system. That system was recently described in the *Albany Times Union* variously as “over-used,” “overwhelmed,” “leaky” and as having “fouled the Hudson River for more than a decade.”¹

The state sanctions for these transgressions included a hefty penalty and an economically devastating moratorium on future system hook-ups unless the offending leaks were remedied by costly system upgrades.² Unfortunately, East Greenbush is not alone among state municipalities operating decrepit sewage treatment systems (which are commonly known by the acronym “POTW,” short for Publicly Operated Treatment Works) on tight budgets. To compound these costly operating expenses and liabilities, New York has enacted new and more stringent sewage spill reporting requirements that may entail additional costs for the operation of leaky POTW.

A recent report issued by the New York State Department of Environmental Conservation (“NYSDEC”) identified approximately 642 permitted POTW operating statewide.³ Human exposure to even small amounts of raw sewage can lead to serious illnesses, especially for children, the elderly and people with compromised immune systems. Furthermore, the United States Environmental Protection Agency estimates that at a minimum 1.8 million Americans become ill annually from contact with sewage in recreational waters.⁴

To compound the potential for water quality and human health impacts, most if not all of New York’s POTW are operating beyond their life expectancy and are prone to release untreated sewage to the waterways of New York for various reasons. Many have also been constructed to operate as combined sewage overflows (“CSO”) that allow for the automatic release of mixed untreated or partially treated sewage and storm drain water if the system cannot handle the increased water volume created by too much rain or snow.⁵ Given the likelihood of unauthorized sewage discharges, it behooves the savvy municipal counsel to be aware of the regulatory burdens and likely failures inherent in most local sewer treatment systems. Therefore, it is the purpose of this brief article to familiarize counsel for



POTW operators about the requirements of this new law and related legal issues.

The Sewage Spill Right to Know Act

The “Sewage Spill Right to Know Act,” A.10585A/S.6268D (the “Act”) was signed by Governor Cuomo on August 9, 2012, and became effective on May 1, 2013. The Act amends the current conservation law by adding a new ECL § 17-0826-a, to the New York State Environmental Conservation Law (the “ECL”). The primary purpose of this newly enacted law is to alert the public about potentially harmful releases of untreated sewage⁶ into New York’s waterways.⁷ The Act will also serve to raise awareness in New York about the shortcomings of the State’s sewage treatment infrastructure. These goals will be accomplished by expanding the requirements for reporting sewage releases to include the public and local government.⁸

To enhance the knowledge and response of state government regarding such releases, the Act also imposes additional record keeping and regulatory requirements on the NYSDEC. The current laws and regulations merely require the reporting of certain types of releases to specific state and local agencies and not the general public at large.⁹

Specifically, the Act provides that effective May 1, 2013, all sewage discharges, including CSO discharges, must be reported to DEC and the local department of health (or the state department of health if there is no local health department) within two hours of their discovery.¹⁰

To the extent possible, this report must include the following information:

- the volume of the discharge and the extent, if any, of its treatment;
- the expected duration of the discharge;
- the steps being taken to contain the discharge (unless it results from a combined sewer overflow);
- the location of the discharge;
- and the reason for the discharge.¹¹

Most importantly, the Act then requires the POTW operator to give notice to the general public and the chief elected officials (or their designated representative) of the municipality where the discharge occurred and any other municipalities that may be affected *within four hours of discovery of the discharge* (emphasis added).¹²

NYSDEC will also be required to promulgate new regulations specifying the form of this notice "through appropriate electronic media."¹³ The new regulations, however, are only to require public notice of sewage discharges that may affect public health.¹⁴

NYSDEC will also be required to post notice of sewage discharges on its website and to compile an annual report on sewage discharges, which must include details on their location, duration, volume, and any measures taken to mitigate impacts or avoid future releases of sewage.¹⁵

Obviously, these broad mandates will provide NYSDEC with some latitude in the establishment of sewage discharge reporting thresholds and notice procedures via the administrative rulemaking process mandated by the new law.

Existing POTW Discharge Reporting Requirements

A comprehensive review of all of the potential state and federal discharge, spill and release reporting requirements that may apply to New York's POTW is beyond the scope of this article. However, there are several important state reporting requirements and procedures that remain unchanged by the new ACT and are likely to be applicable to POTW facilities. These include the broad reporting requirements for liquid bulk storage facility operators and the existing POTW permit requirements. The practitioner should also note that New York's definition of a state waterway also includes ground waters.¹⁶

It is also good to recall that the new law does not supersede or revoke the old reporting law which requires notification by the NYSDEC within 14 days of all "public water purveyors" within three miles of the discharging SPDES facility. However, this notice requirement is restricted only to discharges in areas designated as a sole source aquifer. Furthermore, notice shall be made only if the violation (including unauthorized discharges) "could have a significant impact on the water resources of the area."¹⁷ Of course, even this rather limited notice requirement assumes that the discharging POTW offender complies with the other state reporting requirements by alerting the government oversight agencies in the first place.

A POTW facility would also likely be classified as a bulk storage facility for discharge reporting purposes. Regarding bulk storage facility owners, the ECL provides in relevant part that the "owner of or in actual or constructive possession or control of more than one thousand one hundred gallons, in bulk, of any liquid, which, if discharged, would be likely to pollute the lands or waters of the state including the ground waters thereof shall, as soon as he has knowledge of the discharge, to immediately notify the department [NYSDEC]."¹⁸ Note that this requirement applies to

owners, rather than operators. In addition, the "constructive possession" element of this law potentially broadens the scope of the reporting obligation.¹⁹ A failure to provide notice under this provision is subject to a criminal fine of up to \$2,500.00, and up to one year imprisonment or both.²⁰

To add further confusion, the NYSDEC permit regulations add additional and redundant discharge reporting requirements. The applicable NYSDEC permit regulations for POTW operators mandate five additional categories of potential sewage discharge reporting obligations.²¹ By state and federal law, each POTW operator must also hold a state pollution discharge elimination system or "SPDES" permit. All of these reports by SPDES permittees must be made to the NYSDEC Regional Water Engineer with the information and format specified unless otherwise noted.²² These POTW permit discharge reporting categories include:

- Anticipated noncompliance that requires at least 45 days advance notice to the NYSDEC Regional Water Engineer of any changes that would occur as part of a construction project, as part of routine maintenance program, or 60 days if very likely or certain to result in a bypass or other noncompliance with permit requirements;²³
- Two-hour oral reporting of a bypass, upset or other incident for discharges that would affect bathing areas (in season), shell fishing or public drinking water intakes;²⁴
- Twenty-four hour oral reporting of a bypass, upset or other incident for other categories of discharge incidents;²⁵
- Five-day written reports to follow for any of the oral reports;²⁶ and,
- The permittee shall additionally report all instances of noncompliance with permit conditions with each submitted copy of its discharge monitoring reports ("DMR") until such noncompliance ceases.²⁷

Hopefully, when promulgating new regulations NYSDEC will use the opportunity to consolidate and simplify some of these redundant reporting requirements.

Enforcement, Sanctions and Miscellaneous Obligations

It is notable that the Act does not specify a new or revised enforcement provision for violations. Therefore, the existing sanctions for all violations of ECL Article 17, Title 8, of the ECL and any derivative rules, regulations and permit conditions will apply to violations of the new reporting law.

The standard civil sanction for any person who violates this section of the ECL is a penalty not to exceed

\$37,500.00, per day for each violation.²⁸ The ECL also provides for injunctive relief against violators that can be commenced by the Attorney General on the request of the NYSDEC Commissioner²⁹ and a series of criminal violations which escalate in severity and fines depending upon the category of culpable mental state of the violator.³⁰ However, as a defense, the ECL does include a force majeure clause for an “act of God, war, strike, riot or other catastrophe” where negligence or willful misconduct was not a proximate cause.³¹ Therefore, it is easy for a single unreported multi-day sewage discharge to accrue potential fines or penalties upwards of six or even seven figures. Of course, these penalties or fines would be added to any already accrued for the underlying legal violations related to the actual discharge.

While the new Act does not specifically provide for state cost recovery, the ECL does allow the state to recover from owners the actual costs incurred for discharges derived from the bulk storage of liquids that are “likely to pollute the lands or waters of the state,” subject to certain conditions.³²

Finally, while beyond the scope of this article, those counseling POTW operators should also be aware that the new reporting law may ease the ability of private plaintiff’s to file suits using the citizen’s suit authority of various federal environmental and public health laws such as the Clean Water Act and Safe Drinking Water Act.³³ The new record keeping requirements imposed on NYSDEC will make concise and comprehensive POTW discharge information publicly available via an annual report or as posted on the agency’s website. Therefore, the NYSDEC will be conveniently performing much of a private party’s pre-suit discovery as a by-product of the agency’s compliance with the new law.

Conclusion

The New York Legislature, with the support of Governor Andrew Cuomo, has chosen to impose additional layers of legal obligations upon POTW operators via this new law to raise awareness of the threat of unauthorized sewage releases. Given the potential for increased public accountability and severe state penalties, POTW operators and their counsel must ensure that their facilities comply with the new law or face both an angry public as well as the financial losses associated with the failure to report unauthorized sewage discharges.

Endnotes

1. Nearing, *DEC to Town: Fix the Sewers*, Albany Times Union, July 29, 2012, at A-1.
2. *Id.*
3. *Biosolids Management in New York State*, New York State Department of Environmental Conservation, Division of Materials Management, June 2011, at 4.
4. Seiler, *Law Forces Sewage Alerts*, Albany Times Union, August 10, 2012, at A-3.

5. *Id.*
6. ECL § 71-0105(4) defines sewage as “the water-carried human or animal wastes from residences, buildings, industrial establishments or other places, together with such ground water infiltration and surface water as may be present. The admixture with sewage as above defined of industrial wastes or other wastes as hereafter defined, shall also be considered “sewage” within the meaning of this article.”
7. *Governor Cuomo Signs Bill to Protect Public Health by Requiring Sewage Plants to Notify Public When Discharge Occurs*, Press Release, Office of Governor Andrew Cuomo, Albany, N.Y., August 9, 2012.
8. *Id.*
9. *Id.*
10. *Id.*
11. ECL § 17-0826-a. For the complete text of this law, see the New York State Legislative website at [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$ENV17-0826-A\\$\\$@TXENV017-0826-A+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=33431938+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$ENV17-0826-A$$@TXENV017-0826-A+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=33431938+&TARGET=VIEW).
12. ECL § 17-0826-a(1).
13. ECL § 17-0826-a(2).
14. ECL § 17-0826-a(4).
15. *Id.*
16. ECL § 17-0826-a(3).
17. ECL § 17-0105(2) defines a waterway of the state for purposes of ECL Article 17, to include “lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction.”
18. ECL § 17-0826.
19. ECL § 17-1743.
20. ECL § 71-1943.
21. Title 6, New York Code of Rules and Regulations, Part 750-2.7 (6 NYCRR Part 750-2.7).
22. NYSDEC designates a supervising Regional Water Engineer to each of the nine NYSDEC Regional offices. To contact the NYSDEC Regional offices, see the agency’s contact web page at: <http://www.dec.ny.gov/about/558.html>.
23. 6 NYCRR Part 750-2.7(a).
24. 6 NYCRR Part 750-2.7(b).
25. 6 NYCRR Part 750-2.7(c).
26. 6 NYCRR Part 750-2.7(d).
27. 6 NYCRR Part 750-2.7(e).
28. ECL § 71-1929.
29. ECL § 71-1931.
30. ECL § 71-1933.
31. ECL § 71-1935.
32. ECL § 71-1941.
33. 33 U.S.C § 1365 and 42 U.S.C § 300j-8, respectively.

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