

SEVEN THINGS EVERY WASTEWATER TREATMENT PLANT MANAGER SHOULD DO TO PREPARE

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Wastewater treatment plant managers have been put on notice - EPA will "intensify vigorous civil and criminal enforcement against traditional end-of-pipe pollution." EPA's new Clean Water Act Enforcement Action Plan (the 'Enforcement Plan') and National Enforcement Initiatives for Fiscal Years 2011 through 2013 (the 'Enforcement Initiatives') are warning alarms to wastewater treatment plant managers and the facilities they operate. The purpose of this article is to describe EPA's Enforcement Plan and Enforcement Initiatives and provide seven steps that every POTW wastewater treatment plant manager should take to ensure that he or she is not the target of an enforcement action.

On October 15, 2009, EPA announced its Enforcement Plan. With

the number of NPDES permit regulated sources exploding from 100,000 in 1972, when the NPDES permit program began, to nearly 1,000,000 regulated sources today, EPA decided that it needed a more focused enforcement strategy. EPA's new plan has three main components: targeted enforcement of the most significant pollution problems that impact public health and the environment, strengthened enforcement performance at state and federal levels, and improved transparency and accountability by providing the public with access to better data on water quality in their communities.

EPA chose to focus on these areas because of the patterns observed in its data on significant noncompliance. Even with increased focus on NPDES permittees, EPA noted that the rate

of significant noncompliance at these facilities is 24%, meaning that one out of four had significant violations. However, even this figure is likely low, because wet-weather events data were missing, which would likely reflect additional violations. EPA's 2008 data showed that of the facilities designated as being in significant noncompliance:

- 46% had effluent violations or exceedances for multiple months;
- 11% were in violation of a compliance order and thus had a violation related to exceedances of permit levels; and
- 41% were in noncompliance because EPA did not receive their DMRs in a timely fashion.

State and EPA data further showed that in 2008, formal actions were taken against only 26% of the facilities in significant noncompliance.

EPA will begin targeted enforcement by analyzing information on pollutant loadings and toxicity against a discharger's compliance history and watershed impairment information to identify facilities that require additional compliance monitoring or civil or criminal enforcement attention. EPA's strategy here is simple – focus on the known polluters in impaired watersheds.

EPA will strengthen its oversight of Clean Water Act (CWA) enforcement performance by setting performance metrics for permitting and enforcement, and developing a standard set of expectations for negotiating consistent enforcement agreements with each state. Specifically, its Enforcement Plan states that "EPA will disapprove permits that are not protective of water quality and initiate enforcement actions against dischargers to address serious violations and protect public health and the environment." Additionally, EPA will examine certain aspects of "citizen suits." A citizen suit is a lawsuit by a private citizen, most often an environmental group, to enforce the CWA. The CWA authorizes a court to award injunctive relief and attorney fees and

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costs in favor of the private citizen and against a POTW. Before a private citizen can file a citizen suit, IDEM must be given a 60-day notice of intent to sue. The 60-day period is meant to provide the POTW an opportunity to achieve compliance. Some environmental groups have argued that state agencies file their own lawsuits against POTWs in the 60-day period to prevent citizen suits, but fail to achieve compliance. EPA will examine these instances to determine whether federal enforcement action is necessary.

Finally, EPA will seek to improve transparency and accountability. Specifically, EPA will implement electronic reporting of discharge monitoring reports (DMRs) to regulatory agencies, and explore requiring a compliance certification by regulated facilities that do not have reporting requirements. It will then make all of this additional data that is not enforcement confidential available to the public, thereby increasing the transparency of the enforcement program.

On February 22, 2010, EPA announced its Enforcement Initiatives for Fiscal Years 2011 through 2013. Of particular importance to wastewater treatment plant managers and the facilities they operate, EPA listed it first priority as "Keeping raw sewage and contaminated stormwater out of our nation's waters." To that end, EPA will build on its National Enforcement Initiatives for Fiscal Years 2008 through 2010, which included municipal combined sewer and sanitary sewer overflows and storm water. The new Enforcement Initiatives will focus on reducing discharges from combined sewer overflows (CSOs), sanitary sewer overflows (SSOs), and municipal separate storm sewer systems (MS4s). EPA described the focus on MS4s as arising because "stormwater runoff from urban streets and construction sites carries sediment, metal, oil and grease, acid, chemicals, toxic materials and industrial waste into surface waters. The [CWA] requires municipalities to treat sewage before it is discharged and to control contaminated stormwater discharges, but many municipalities are not complying with these requirements."

EPA's Enforcement Initiatives continue the focus on reducing discharges

of raw sewage (and the pathogens and bacteria it carries) and contaminated stormwater into the nation's rivers, streams, and lakes. Aging sewer systems not designed to handle heavy rainfall and snowfall will be required to be replaced. While EPA hopes to achieve these goals by obtaining cities' commitments to implement timely, affordable solutions to these problems, including increased use of green infrastructure, and other innovative approaches, it still has the civil and criminal enforcement hammer to mandate compliance.

So, what is a wastewater plant manager to do in response to EPA's Enforcement Plan and Enforcement Initiatives? While there are many things which could be done, the following seven steps should be considered as your first priority:

1. Review your documents. Read your NPDES permit, facility management plans, spill control plans, and other documents to make sure they still accurately describe your plant's operations, contain accurate contact information and chemicals used in your operations, and are generally up to date.

2. Review and document your operations and contingency plans. Are you employing best management practices to efficiently and effectively comply with the plant's NPDES permit requirements, or does your plant operate on the historic knowledge of a few seasoned veterans who have not reduced their practices and procedures to writing? The latter doesn't go far when responding to a formal enforcement action. Document your procedures and practice them. Can you observe any patterns as far as exceedances or difficulty treating wastewater at certain times during the month that need to be investigated? Are lab personnel, operators, and maintenance personnel accurately filling out bench sheets, logs, and maintenance sheets so that if you had to recreate for IDEM or EPA investigators what happened on a particular night during the weekend to cause you to have an exceedance, you could do so? Are you skimping on chemicals because of budget constraints? Compliance is only as good as the weakest link and a well-managed plant has to

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be operated properly. Added chemical costs are a minor expense compared to the costs to defend an enforcement action. If you find something that should be disclosed to IDEM, seek legal advice on performing a voluntary audit and the costs and benefits of self-disclosure. Lastly, never, ever change lab data sheets or reported performance to keep your plant in compliance, or to make yourself look good.

3. Review your industrial and pretreatment inspection and compliance programs. Is your program formalized? When was the last time you visited industrial and pretreatment facilities in your system? Do you have an inspection policy that allows for unannounced visits from the utility? Find out what types of contaminants these facilities typically treat and the timing of their discharges so that if you have a spike, you can begin to narrow your search for a potential cause. If the plant receives a slug load that causes or threatens to cause the plant to violate its NPDES permit limits, document the event fully (e.g. videotaping, and extra sampling) to show what efforts were taken to identify the pollutant, the source, and the plant's efforts, time, and expense incurred in responding to such incidents. This information will be required to both advise IDEM, and to seek contribution for the costs incurred against the responsible party. This information may go a long way when responding to a permit violation. Sometimes even the best-run industrial facilities have a hiccup and accidentally and unknowingly discharge pollutants that exceed their pretreatment permit levels. Responsible industrial facilities often rely on pretreatment compliance inspectors and managers for help as the first people they reach out to in times of difficulties. In other cases, a facility with a history of noncompliance may operate without reasonable and ordinary care and may require increased monitoring inspections, and enforcement. As EPA stated in its Enforcement Plan, "Effective enforcement programs create incentives for

compliance by penalizing those who do not follow the law. They establish a level playing field between those members of the regulated community who comply and those that do not." Industrial dischargers want to be responsible, comply with the law, and be seen as good stewards of the environment by their employees, customers, community, and investors.

4. Respond to problems quickly. Respond to problems before they grow outside of your control. If you are having periodic problems treating wastewater and can't determine the source of the problem, seek help and advice from other managers in your local association, or from outside consultants. The last thing any wastewater treatment plant manager wants is to have to answer to IDEM or EPA for exceedances caused by poor operating practices or toxic industrial discharges to your plant. Tackle your problems before they take you down.

5. Consider cost-recovery actions against polluters. Have you had instances where historic contamination (from old gasoline stations, dry cleaners, or other sources) enters into sewer lines through openings and hydrostatic pressure and causes treatment problems and exceedances? You can pursue cost-recovery actions against the original polluters and property owners from where the pollution emanates to recover costs to clean up the contamination, your investigation costs, and attorney fees and expenses to prosecute your case. Indiana has very favorable insurance coverage laws, which will allow your plant to recover insurance dollars, even when an insurance policy has an absolute pollution exclusion that might otherwise preclude coverage. Always think about recovering your costs, especially in times of limited budgets.

6. Conduct benchmark studies. Benchmark studies help you make sure your plant is not falling behind in its renewal and replacement of assets such as structures, piping and valves, pumps, blowers, etc. These benchmark studies are based on the practices of other well-run

utilities of similar size and location. AWWA and WEF have benchmarking publications that can provide you with guidance. The CWA is one of the few statutes that provides for criminal prosecution for negligent conduct rather than knowing, intentional, or reckless violations. In the last decade, EPA pursued the City of New Orleans, Louisiana for CWA violations resulting from negligently failing to renew and replace worn out and antiquated assets. Benchmark studies allow you to focus on how your facility compares with like-sized plants in like geographical areas. As an example, a plant that invests more of its available assets in expansion of service may not be spending enough in the renewal and replacement of assets, such as antiquated sewer lines and lift stations. A benchmark study may also provide you with a basis to justify a rate increase to make sure your plant remains in compliance.

7. Treat citizen suits and notices of intent to sue seriously and respond accordingly. With the advent of greater transparency and information, there will likely be more citizen suits where an environmental group claims that the regulatory agency is not fully responding to exceedances. There are many defenses available to citizen suits and the 60-day notice of intent to sue provides an opportunity to achieve compliance. Seek legal advice and don't let this time expire without acting.

Wastewater treatment plant managers are charged with the public trust, meaning as licensed managers you are expected to comply with the law. By following these seven steps, getting continuing education, and turning for help when you have a problem rather than ignoring it, you will be able to avoid finding yourself in the crosshairs of an EPA civil or criminal enforcement action. ■

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