

Phase II Liabilities: A Municipal Perspective

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Conference

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Potential Liabilities and Level of Effort Associated with Phase II

*This presentation is based upon questions posed
by Phase II permittees over the past few years.*



Potential Liabilities for Phase II's

\$ Lawsuits filed against a city:

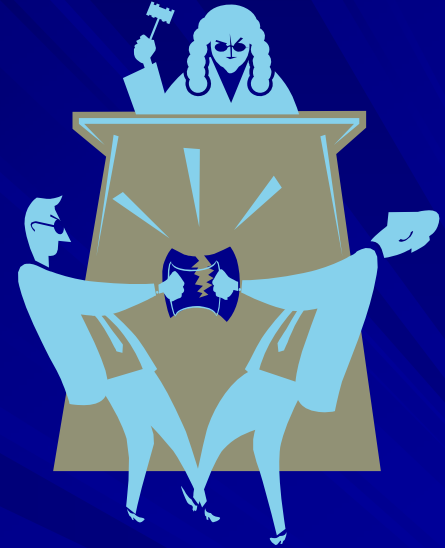
\$ *Citizens*

\$ *Commercial, industrial*

\$ *Environmental or conservation groups*

\$ Employee claims against a city.

\$ EPA or State DEQ enforcement against city.



Additional Concerns

- \$ Legal aspects of conducting inspections.
- \$ Legal aspects of local enforcement.
- \$ City insurance coverage and rates.
- \$ Consultants and contractors acting for the city.



Lawsuit / Liability Triggers

\$ Failure to perform program requirements.

\$ Personal injury.



\$ Property damage.

\$ Ineffective program to meet CWA goals or protect environment.



\$ Unnecessary or erroneous enforcement actions.

1. Lawsuits Filed Against the City

- \$ Local violator challenges enforcement action – claiming city has no case, acted improperly.*
- \$ Citizen sues city for not enforcing codes – claiming city unresponsive, health problems.*
- \$ Citizen sues for personal injury or property damage – auto accident because sampling truck was not properly flagged, tire tracks in yard.*



2. *Employee Relations with the City*



- \$ Workers Comp – *injury on the job, failure to properly train and equip.*
- \$ Professional Registrations – *specialized training, credentials, associations, seminars, certifications.*
- \$ Promotions, Salary – *additional responsibilities require more compensation?*

3. DEQ / EPA Enforcement Against City

- \$ Phase II is a Point Source Permit – with the same regulations that apply to the city's WWTP.*
- \$ City Failure to Comply* – State DEQ can issue Notice of Violation (NOV), Consent Order (CO).*
- \$ Full Range of Penalties – civil, administrative, criminal and fraud.*

** MEP = Maximum Extent Practicable, the EPA required level of effort to fulfill permit obligations.*

TMDL Compliance and MEP

- \$ MEP is a “technology-based limit” concept.
- \$ Technology limits are standardized limits that are assumed to protect water quality unless site-specific studies show stricter limits are needed.
- \$ TMDLs can establish stricter “water quality-based limits” that go beyond MEP.
- \$ MEP is not an absolute threshold, beyond which Phase II’s do not have to go.

OKR04 Penalties for Non-Compliance

PENALTY TYPE	PROVISION	AMOUNT	PERIOD	PROVISION	MAX.	PRISON
Civil	Not to exceed	\$10,000	Per day	For each violation	--	--
Admin	Not to exceed	\$10,000	Per Day	Per violation	\$125,000	--
Criminal Action	Not less than	\$2,500	Per day	Of violation	\$2 million	30 year
Permit Fraud	Not more than	\$20,000	Per day	Of violation	\$20,000	4 years

4. *Legal Aspects of Inspections*

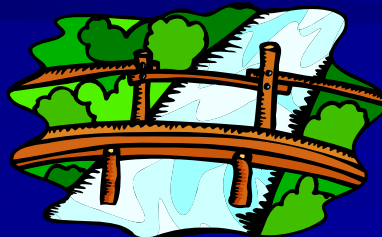
- \$ Private Property Entry – *know your options if entry is refused.*
- \$ Entry Refusal – *if negotiations fail, may need a search warrant from local municipal court and police – your ordinance needs this provision.*

*Don't force a confrontation.
Diplomacy and patience
are called for.*



4. *Legal Aspects of Inspections (cont.)*

- \$ “Walking the Creek” – *know your State’s laws on private property versus public right-of-way.*
- \$ Creeks on Private Property – *local codes can grant you permission to walk the creek, i.e. enter private property – best to still get permission.*
- \$ Local Ordinances Grant Authority – *crews should possess documentation and identification at all times.*

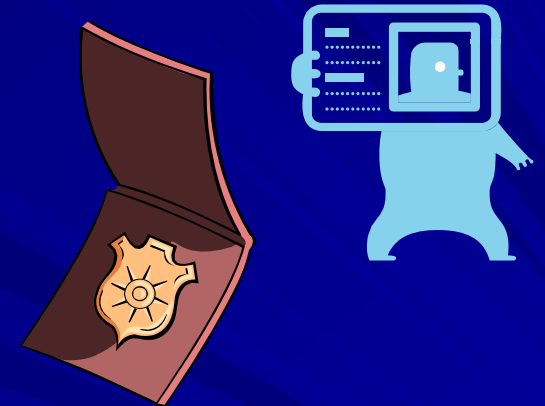


5. *Criminal versus Civil Enforcement*

\$ Civil Code versus Criminal Code – *each requires a different level of accountability.*

\$ Identification, Badges, Authority – *what is needed by inspectors?*

\$ Focus on Civil Codes – *building a criminal case requires the expertise of police departments.*



5. *Enforcement (cont.)*

\$ Inspectors Will Lack Skills - *inspectors will not be trained to perform criminal investigations.*



\$ Criminal Investigations – *the State DEQ should be contacted, perhaps local police if necessary.*

Contact the State’s “Environmental Crimes Task Force” for criminal investigations.

\$ Criminal Code Provisions – *local codes will have criminal provisions, but investigations should be the State’s DEQ.*

6. *City Insurance Rates*

\$ Concern has been expressed over how insurance will be affected:



\$ Workers comp insurance rates;

\$ Liability insurance rates (from increased chance of lawsuits);

\$ Auto insurance rates (more off-road use of vehicles);

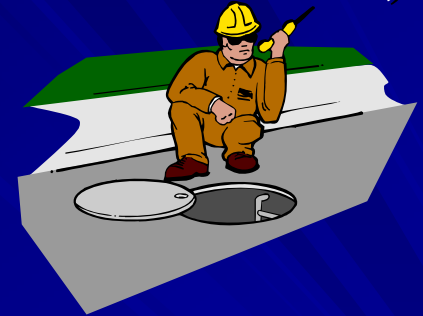
These are only concerns, and perhaps unfounded, but worth considering when setting program budgets.

7. Contractors Working on Behalf of City

- \$ Legal Entry During Inspections – ensure that your contracts give contract inspectors the same rights and authority as city inspectors.*
- \$ Performance Failures – will you be protected from lawsuit if your contractor causes damage or injury?*
- \$ Ambassador Status – stormwater contractors will have much more contact with citizens and businesses than a traditional construction crew.*

Record-Keeping is Critical

\$ Inspections – *date, time, place, who, observations, follow-up to closure of event.*



\$ Enforcement Actions – *full documentation of each event from start to closure.*

\$ Training, Certifications – *keep for all stormwater employees, use centralized records if possible.*



\$ BMP Implementation – *all Phase II activities must be reported in the Annual Report.*

End Users Drive Data Collection Methods

- Data that must be reported in Oklahoma's Annual Report:

- “...status of your compliance...”

from OKR04

- “...assessment of...appropriateness of...BMPs...”

- “...progress towards achieving the...goal of reducing the discharge of pollutants...”

- “...progress toward achieving...measurable goals...”

- “Results of information collected and analyzed... including monitoring data...”

- “...the number of active construction sites...”

- “...the number of construction projects that were started...and completed...[and] reached final stabilization.”

