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Liability of Municipalities and Municipal Officials for Drinking Water Contamination

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DISCLAIMER: This is an outline of issues and potential issues and is not intended as legal advice; this presentation is no substitute for legal advice and analysis from experienced counsel for your municipality.

Overview of Municipal Liability

- Potential Civil Liability
 - Federal Safe Drinking Water Act
 - N.Y. Public Health Law
 - NYSDOH Regulations
- Potential Criminal Liability
 - Federal Law
 - N.Y. Penal Law

Overview of Municipal Liability

- Safe Drinking Water Act
 - Enforcement scheme
 - 42 U.S.C. § 300g-2: States have primary enforcement responsibility for public water systems as long as EPA certifies that their drinking water regulations meet certain requirements
 - The EPA has delegated primary enforcement of the SWDA in NY to the NYS Department of Health

Overview of Municipal Liability

- Safe Drinking Water Act
 - Enforcement scheme
 - EPA still retains enforcement authority over certain standards and in certain situations
 - For example, if EPA gives notice of a violation to a state for enforcement, and the state does not act to enforce SWDA standard within 30 days, the EPA may do so. 42 U.S.C. § 300g-3

Municipal Liability

- U.S. v. City of North Adams, Mass. (777 F. Supp 61 D. Mass. 1991)
 - EPA notified Massachusetts and the City of North Adams that the City's water supply contained levels of coliform bacteria in excess of permitted levels
 - State did not act to enforce the SWDA requirements within 30 days of EPA notice, but filed suit in Mass. state court thereafter
 - Court held EPA action, seeking different and more extensive relief against the City, including injunction and civil penalties, was not barred by the 30-day wait period under the SWDA

Overview of Municipal Liability

- NYSDOH enforcement of SDWA
 - Public Health Law provides enforcement mechanisms to ensure safe drinking water
 - Section 12: Civil penalty not to exceed \$2,000 per violation of NYSDOH regulations, disregard of notices of violation, administrative orders; up to \$5,000 for subsequent violations
 - Section 229: Violations of State Sanitary Code, which includes NY's SDWA provisions, punishable by fines up to \$250 per violation, 15 days imprisonment or both

Overview of Municipal Liability

- NYSDOH enforcement of SDWA
 - Public Health Law provides enforcement mechanisms to ensure safe drinking water
 - Sections 1102 and 1103: NYSDOH may seek injunctive relief and civil penalties for contamination of drinking water specifically
 - May also refer matters to NY Attorney General for civil or criminal prosecution

Overview of Municipal Liability

- NYSDOH enforcement of SDWA
 - Calendar year 2013 (latest available data from NYSDOH)
 - Most violations are monitoring and reporting violations (5,342 violations)
 - Exceedance of maximum contaminant level violations (410 violations, 221 of which are from community water systems run by municipalities and like entities)
 - In response to violations, NYSDOH primarily issues notices of violations, and approximately 75% were resolved in 2013 without corrective action being necessary, 23% had some corrective action taken

Overview of Municipal Liability

- NYSDOH enforcement of SDWA
 - Between 2003 and 2013, NYSDOH referrals for civil or criminal prosecution:
 - 109 violations referred to the NY Attorney General (0 from 2007 to 2013, 9 in 2006, 0 in 2005, 100 in 2004, 0 in 2003)
 - 32 violations referred to the EPA (0 from 2006 to 2013, 1 in 2005, 13 in 2004, 18 in 2003)

Municipal Liability

- U.S. v. County of Westchester, N.Y.
 - EPA brought SDWA action against Westchester County for failing to timely upgrade its water treatment facilities to treat for Cryptosporidium
 - EPA sent SDWA request to Westchester County requesting certification that the County would comply with April 1, 2012 deadline to upgrade facilities
 - When first request was returned as “unclaimed,” EPA sent a second request. Westchester County responded that it would not be able to meet deadline

Municipal Liability

- U.S. v. County of Westchester, N.Y.
 - August 2013, US Attorney commenced action against Westchester County on behalf of EPA
 - EPA sought injunctive relief and monetary penalties, including civil penalties up to \$37,500 per day from April 1, 2012
 - After motions to dismiss and for summary judgment, Westchester County settled the case with the EPA

Municipal Liability

- U.S. v. County of Westchester, N.Y.
 - Consent Decree
 - Civil penalties of \$1,108,771, and stipulated penalties if County does not meet any of required deadlines
 - Construction of 2 Local UV Treatment Systems and begin operations by March 2018
 - Weekly monitoring of water supply for Cryptosporidium
 - Implement supplemental environmental projects, including enhanced pharmaceutical and household hazardous chemical collection and rain barrel distribution to residents (estimated total cost of \$691,229)

Municipal Liability

- Class Action Lawsuits
 - Mays v. Governor Rick Snyder
 - Class action by families in Flint, Michigan, which named the City of Flint as a defendant
 - Alleges violations of 42 U.S.C. § 1983
 - Substantive due process violation for deliberately exposing Flint families to toxic water, or doing so with deliberate indifference to the serious medical risks

Municipal Official Liability

- Municipal Officials face potential individual civil and criminal liability
 - In re: Rocky Well Services, Inc. and Edward J. Klockenkemper (U.S.E.P.A. Env't'l Appeals Bd., Docket No. SDWA-05-2001-002, March 30, 2010)
 - Responsibility of SWDA compliance extends to government and corporate officials

Municipal Official Liability

- Rocky Well Services, Inc. and Edward J. Klockenkemper
 - Individual operators of water systems may be individually liable
 - Edward Klockenkemper was the president of Rocky Well and conducted day-to-day operations and maintenance of wells
 - Allegations that Rocky Well and Klockenkemper failed to perform mechanical integrity testing required under the SWDA

Municipal Official Liability

- Rocky Well Services, Inc. and Edward J. Klockenkemper
 - Klockenkemper argued that SWDA, and state implementing regulations, only applied to “permittees” not to individuals, and thus he could not be individually liable for SWDA violations
 - EPA Appeals Board resoundingly rejected that no individual liability could be imposed

Municipal Official Liability

- Rocky Well Services, Inc. and Edward J. Klockenkemper
 - EPA Appeals Board found that SWDA enforcement provisions apply to “any person” who violates the underground injection control program
 - The SWDA defines “person” to mean “an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency)”
42 U.S.C. § 300(f)(12)

Municipal Official Liability

- Rocky Well Services, Inc. and Edward J. Klockenkemper
 - EPA Appeals Board found Klockenkemper personally liable for the SWDA violations because he was responsible for ensuring compliance and actively participated in the management and maintenance of the affected wells
 - Board found Rocky Well and Klockenkemper jointly liable for civil penalties in the amount of \$105,590

Municipal Official Liability

- Criminal Prosecution of Municipal Officials
 - Federal Prosecution
 - Prosecutions handled by the US Attorney's Office on behalf of the EPA
 - 18 U.S.C. § 1001 (making false statements or representations/falsifying official records)

Municipal Official Liability

- Federal Prosecution of Municipal Officials, An Example
 - Nicholas Miritello was an employee of the New York City Department of Environmental Protection in 2007
 - Responsible for monitoring for turbidity (cloudiness) at the Catskill Lower Effluent Chamber in four-hour intervals and recording the results in a DEP log book (6 tests per day)

Municipal Official Liability

- Federal Prosecution of Municipal Officials, An Example
 - Miritello was charged with four counts of making false entries in the DEP log book purporting to reflect numerical results yielded by the testing, when in fact he had not performed those processes
 - Miritello faced up to 5 years imprisonment for violations

Municipal Official Liability

- Federal Prosecution of Municipal Officials, An Example
 - Miritello accepted a plea deal and was ultimately sentenced to 24 months probation and ordered to pay a \$100 special assessment fee

Municipal Official Liability

- Criminal Prosecution of Municipal Officials
 - Public Health Law § 1103, which prescribes penalties for violations of the NYSDOH SWDA regulations, also applies to a “person or entity”
 - For a willful violation, liable to prosecution for a misdemeanor; penalty is “a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both”
 - For a non-willful violation, civil penalty is “two hundred dollars for every such violation or noncompliance”

Municipal Official Liability

- State Prosecution of SWDA Violations
 - An example from Flint, Michigan
 - During a financial state of emergency in Flint, Michigan took budgetary control and switched Flint's water supply from Lake Huron (purchased from the City of Detroit) to the Flint River
 - Flint River water was highly corrosive, and began to corrode Flint's water supply pipes
 - Introduced lead and iron into the Flint water supply
 - Michigan's Department of Environmental Quality ("DEQ") did not treat the Flint River water with an anti-corrosive agent, as required by SWDA

Municipal Official Liability

- State Prosecution of SWDA Violations
 - Michigan Attorney General launched investigation, and alleges that three government officials willfully and knowingly misled the EPA and the Genesee County Health Department concerning the leaching of lead into the water system

Municipal Official Liability

- State Prosecution of SWDA Violations
 - The Flint Cover Up
 - Employees allegedly manipulated monitoring reports given to the EPA
 - Told EPA that Flint plant was using “optimized corrosion control,” when it was not using any
 - Employees allegedly removed test samples that showed lead contamination above 15 parts per billion standard
 - Told residents to “pre-flush” taps before taking water samples, which skewed results

Municipal Official Liability

- The Flint Criminal Indictment
 - As a result of the alteration of reports and false statements made to the EPA and local health officials, three government employees were criminally charged
 - Michael Prysby, a Michigan DEQ official
 - Stephen Busch, the Lansing district coordinator for the DEQ's Office of Drinking Water and Municipal Assistance
 - Michael Glasgow, Flint's laboratory and water quality supervisor

Municipal Official Liability

- The Flint Criminal Indictment
 - 6 Criminal Charges Filed against Michael Prysby
 - Two charges of misconduct in office (one of which was for granting permit when knowing that facility could not treat water properly)
 - Conspiracy to tamper with evidence
 - Tampering with evidence
 - Engaging in a treatment violation that violates the Michigan Safe Drinking Water Act
 - Engaging in a monitoring violation that violates the Michigan Safe Drinking Water Act

Municipal Official Liability

- The Flint Criminal Indictment
 - 5 Criminal Charges Filed against Stephen Busch
 - Misconduct in office
 - Conspiracy to tamper with evidence
 - Tampering with evidence
 - Engaging in a treatment violation that violates the Michigan Safe Drinking Water Act
 - Engaging in a monitoring violation that violates the Michigan Safe Drinking Water Act

Municipal Official Liability

- The Flint Criminal Indictment
 - 2 Criminal Charges against Michael Glasgow
 - Tampering with evidence
 - Willful neglect of office

Municipal Official Liability

- The Flint Criminal Indictment
 - In May, Glasgow, the supervisor at the Flint treatment plant, agreed to a plea deal and pled no contest to willful neglect of duty, a misdemeanor
 - Felony tampering with evidence charge was dismissed
 - Plea will be held for one year contingent on his cooperation as a witness in the investigation

Municipal Official Liability

- New York's Criminal Analogue
 - Penal Law § 195.00 (Official Misconduct)

A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.

Municipal Official Liability

- New York's Criminal Analogue
 - Penal Law § 215.40 (Tampering with physical evidence)

A person is guilty of tampering with physical evidence when:

1. With intent that it be used or introduced in an official proceeding or a prospective official proceeding, he (a) knowingly makes, devises or prepares false physical evidence, or (b) produces or offers such evidence at such a proceeding knowing it to be false; or
2. Believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.

Tampering with physical evidence is a class E felony.

Municipal Official Liability

- Whistleblower Protection
 - 42 U.S.C. § 300j-9(i)(1): Employers may not discriminate against any employee that brings forward a complaint concerning compliance with the SWDA, testified in a SWDA proceeding, or assisted in a SWDA proceeding
 - 42 U.S.C. § 300j-9(i)(6): “Paragraph (1) shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this subchapter”

Comments or Questions?

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