

Managing Legal Challenges for Water and Sewer Utilities

OTCO October 2023 Compliance
Workshop

Presented by Matthew A. Dooley



Areas Where Risk is Ever- Present

Regulatory Compliance and Cybersecurity

Competitive Bidding and Construction

Board Governance

Labor and Employment

Property Acquisition



Regulatory Issues



TMDL Rulemaking

A TMDL is the calculation of the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will meet and continue to meet water quality standards.

Pollutant sources are characterized as either point sources that receive a wasteload allocation (WLA), or nonpoint sources that receive a load allocation (LA).

For purposes of assigning WLAs, point sources include all sources subject to regulation under the NPDES program, e.g. wastewater treatment facilities and some stormwater discharges.

TMDLs must also account for seasonal variations in water quality and include a margin of safety (MOS) to account for uncertainty in predicting how well pollutant reductions will result in meeting water quality standards.

Each pollutant causing a waterbody to be impaired or threatened is referred to as a waterbody/pollutant combination, and typically a TMDL is developed for each waterbody/pollutant combination.

Section 208 Plans – Rural Areas Left Out

Local governments typically conduct planning to meet the sewage disposal needs of the community, mostly in urban areas.

Ohio EPA has established guidelines for planning that are useful in the context of Section 208 and the State WQM plan.

Local governments that follow these guidelines are more likely to have the results of their planning work incorporated into the state 208 plan prepared by Ohio EPA.

PFAS Class Action

DuPont and 3M agreed to pay more than \$12 billion to settle claims by water utilities related to PFAS contamination.

Utilities must submit a claim form to receive benefits.

3M Deadlines

Deadline Description	Deadline Date
Deadline to Object	11/11/2023
Deadline to Opt Out	12/11/2023
Court's Final Fairness Hearing	2/2/2024 at 10:00 a.m. EST
Phase One Public Water System Claims Form	60 Days after the Effective Date
Phase One Special Needs Claims Form	45 Days after the Phase One Public Water System Claims Form Deadline
Phase Two Testing Compensation Claims Form	1/1/2026
Phase Two Action Fund Claims Form	7/31/2026
Phase Two Special Needs Claims Form	8/1/2026
Phase One Supplemental Fund Claims Form	12/31/2030
Phase Two Supplemental Fund Claims Form	12/31/2030



DuPont Deadlines

Deadline Description	Deadline Date
Deadline to submit Objections	11/4/2023
Deadline to submit Requests for Exclusion	12/4/2023
Court's Final Fairness Hearing	12/14/2023 at 10:00 AM EST
Phase One Public Water System Claims Form	60 Days after the Effective Date
Phase One Special Needs Claims Form	45 Days after the Phase One Public Water System Claims Form Deadline
Phase Two Testing Claims Form	1/1/2026
Phase Two Public Water System Claims Form	6/30/2026
Phase Two Special Needs Claims Form	8/1/2026
Phase One Supplemental Fund Claims Form	12/31/2030
Phase Two Supplemental Fund Claims Form	12/31/2030



Estimated 3M Allocation Table

		Adjusted Flow Rate (gpm)											
		0	100	250	500	1,000	1,500	5,000	10,000	25,000	50,000	100,000	300,000
PFAS SCORE	2	\$36,240	\$70,013	\$115,244	\$189,694	\$253,898	\$603,369	\$993,106	\$1,918,881	\$3,157,910	\$5,196,296	\$11,436,561	
	4	\$145,785	\$281,723	\$463,713	\$763,253	\$1,021,550	\$2,427,216	\$3,994,261	\$7,714,149	\$12,687,352	\$20,855,641	\$45,758,953	
	10	\$148,252	\$286,489	\$471,559	\$776,166	\$1,038,832	\$2,468,269	\$4,061,800	\$7,844,507	\$12,901,569	\$21,207,290	\$46,527,259	
	50	\$164,724	\$318,320	\$523,950	\$862,394	\$1,154,236	\$2,742,397	\$4,512,775	\$8,714,863	\$14,331,681	\$23,554,481	\$51,652,815	
	100	\$185,313	\$358,108	\$589,437	\$970,176	\$1,298,484	\$3,085,022	\$5,076,399	\$9,802,456	\$16,118,368	\$26,485,901	\$58,047,466	
	250	\$247,082	\$477,467	\$785,890	\$1,293,499	\$1,731,188	\$4,112,663	\$6,766,639	\$13,062,886	\$21,472,088	\$35,263,074	\$77,149,868	
	500	\$350,027	\$676,390	\$1,113,285	\$1,832,294	\$2,452,225	\$5,824,623	\$9,581,606	\$18,489,120	\$30,373,873	\$49,834,987	\$108,717,963*	
	750	\$452,968	\$875,299	\$1,440,643	\$2,370,993	\$3,173,089	\$7,535,613	\$12,393,952	\$23,905,608	\$39,249,406	\$64,336,461*	\$139,954,105*	
	1000	\$555,906	\$1,074,195	\$1,767,967	\$2,909,596	\$3,893,781	\$9,245,635	\$15,203,680	\$29,312,376	\$48,098,804*	\$78,768,005*	\$170,863,503*	



Estimated DuPont Allocation Table

		Adjusted Flow Rate (gpm)											
		0	100	250	500	1,000	1,500	5,000	10,000	25,000	50,000	100,000	300,000
PFAS SCORE	2	\$3,477	\$6,718	\$11,059	\$18,203	\$24,363	\$57,898	\$95,296	\$184,131	\$303,025	\$498,624	\$1,097,427	
	4	\$13,985	\$27,025	\$44,483	\$73,217	\$97,995	\$232,837	\$383,160	\$740,001	\$1,217,072	\$2,000,647	\$4,389,631	
	10	\$14,814	\$27,483	\$45,237	\$74,458	\$99,655	\$236,782	\$389,650	\$752,527	\$1,237,656	\$2,034,438	\$4,647,953	
	50	\$15,802	\$30,536	\$50,263	\$82,730	\$110,726	\$263,079	\$432,912	\$836,021	\$1,374,849	\$2,118,897	\$4,955,178	
	100	\$17,777	\$34,353	\$56,545	\$93,069	\$124,564	\$295,947	\$486,981	\$940,355	\$1,546,248	\$2,540,826	\$5,568,648	
	250	\$23,703	\$45,803	\$75,391	\$124,086	\$166,073	\$394,529	\$649,126	\$1,253,132	\$2,059,840	\$3,382,845	\$7,401,258	
	500	\$33,578	\$64,886	\$106,798	\$175,772	\$235,242	\$558,758	\$919,169	\$1,773,678	\$2,913,810	\$4,780,785	\$10,429,847*	
	750	\$43,453	\$83,968	\$138,201	\$227,450	\$304,395	\$722,895	\$1,188,960	\$2,293,293	\$3,765,268	\$6,171,986*	\$13,426,677*	
	1000	\$53,328	\$103,048	\$169,601	\$279,118	\$373,532	\$886,939	\$1,458,501	\$2,811,977	\$4,614,226*	\$7,556,497*	\$16,392,242*	



Recent EPA Enforcement Actions



EPA Takes First-Ever Federal Clean Water Act Enforcement Action to Address PFAS

On April 26, 2023 The U.S. Environmental Protection Agency ordered the Chemours Company to take corrective measures to address pollution from PFAS in stormwater and effluent discharges from the Washington Works facility near Parkersburg, West Virginia.

This is the first EPA Clean Water Act enforcement action ever taken to hold polluters accountable for discharging PFAS into the environment. PFAS are a group of man-made chemicals that have been manufactured and used in industry and consumer products since the 1940s. There are thousands of different PFAS chemicals, some of which have been more widely used and studied than others.

In 2021, EPA launched the PFAS Strategic Roadmap, a whole-agency approach for addressing PFAS. The Roadmap sets timelines by which EPA plans to take specific actions and commit to new policies to safeguard public health, protect the environment, and hold polluters accountable.

In the national PFAS Roadmap, EPA commits to investigate releases of PFAS and, where needed, requires manufacturers to characterize and control their PFAS releases. In the Roadmap, EPA also commits to take swift action to address potential endangerments to public health.

Recent EPA Settlements for Violations of the Clean Water Act

On March 6, 2023 U.S. Environmental Protection Agency announced a settlement with Huntsman Advanced Materials LLC of Ashtabula, Ohio to resolve alleged violations of its Clean Water Act permit limits for pollutant discharges.

Pollutants including chlorine, mercury and E. coli were discharged into the Diamond Shamrock tributary which flows to Fields Brook and the Ashtabula River. In June 2021, EPA issued an administrative order requiring the facility to upgrade wastewater treatment equipment and improve cleaning, maintenance, and sampling procedures.

The company completed all actions and returned to compliance in August 2022. As a result of the settlement, the company has agreed to pay a \$180,000 penalty for its violations.

Recent EPA Settlements for Violations of the Clean Water Act

On November 9, 2022 the city of Elyria entered into a consent decree with the United States and the State of Ohio to complete a series of capital projects designed to eliminate discharges of untreated sewage from its sewer system into the Black River, 10 miles upstream from Lake Erie.

Elyria is expected to spend nearly \$250 million to improve its sewer system. It will also pay a civil penalty of \$100,000 to the United States and pay \$100,000 to Ohio's Surface Water Improvement Fund. Under the proposed consent decree, Elyria will construct various projects within its sewer system to be completed by Dec. 31, 2044.

The most environmentally-significant of these projects will be completed within the first 15 years. This includes completion of the city's East Side Relief Sewer, increasing capacity at Elyria's wastewater treatment plant, and adding processes to mitigate the harm from any bypasses around the wastewater treatment plant, and twelve other projects that will control waste overflows or the flow of non-wastewater into the sewer system.



WARNING

COMBINED SEWER AREA

Combined sewer overflows exist upstream and downstream of this area. During periods of wet weather, a mixture of storm water and sewage may discharge into this area. Ohio EPA permits such discharges only during wet weather. Bodily contact with such discharges should be avoided. Please contact the City of Elyria Wastewater Plant at (440) 366-2211 or contact the Ohio EPA for additional information.

Permittee: City of Elyria
NPDES Permit: 3PD00034

Recent EPA Settlements with Elyria for Violations of the Clean Water Act

Recent EPA Settlements for Violations of the Clean Water Act

On November 1, 2022 the city of Lakewood agreed to perform work that will significantly reduce discharges of untreated sewage from its sewer system into Lake Erie and the Rocky River. Under the decree, Lakewood will spend about \$85 million to improve its sewer system and will pay a civil penalty of \$100,000, split evenly between the United States and Ohio.

The decree would partially resolve the violations alleged in the underlying complaint filed by the United States and the State of Ohio. The complaint alleges that Lakewood discharged untreated sanitary sewage into the Rocky River or directly into Lake Erie on at least 1,933 occasions from January 2016 through the present.

The complaint also alleges that on numerous occasions from January 2016 through the present, Lakewood discharged water from combined sewer outfalls that violated the effluent limitations included in its National Pollutant Discharge Elimination System permit.

Lakewood will be required through a subsequent, enforceable agreement with the United States and the State of Ohio to implement a plan that addresses the remaining permitted and unpermitted overflows in Lakewood's sewer system and to demonstrate compliance with the Clean Water Act.



Construction



Infrastructure Construction: Contract Drafting

Be weary of form AIA contract documents and understand general terms and conditions.

Watch for onerous notice or dispute procedures intended to foreclose remedies

Litigation outcomes often turn on procedural missteps and not substantive arguments about workmanship

Infrastructure Construction: Contract Enforcement

Regularly inspect work throughout construction lifecycle, preferably using a third-party if feasible, and require daily logs with photographs especially before covering buried infrastructure.

Document all communications with the prime contractor and engineering consultants from inception to completion and make sure to follow all notice and dispute procedures.

Remember the statute of repose in Ohio is 10 years from substantial completion, but the statute of limitations for breach of contract claims was reduced to **6 years** in 2021.

Infrastructure Construction: Competitive Bidding

Most people in the industry have a rudimentary understanding of the procurement regulations applicable to LGAs.

HB 33 became effective October 3, 2023 and raised the threshold to \$75,000 through 2024, after which it will increase by 3% annually.

All statutes referring to \$50,000 will be revised to refer to new R.C. 9.17.

Infrastructure Construction: Competitive Bidding

HB 33 still prohibits subdividing contracts by severing labor and materials to each be under the threshold.

The variance between a bid and the engineer's estimate was raised from 10% to 20%.



Infrastructure Construction: Competitive Bidding

However, there are many exceptions to the rules of procurement affecting water authorities, such as:

- Emergencies;
- Purchasing used equipment or supplies at public auctions or sales;
- Purchasing services, material, equipment or supplies from another Ohio political subdivision; and
- Sole-Source Procurement.

Infrastructure Construction: Sole-Source Procurement

On some construction projects, especially ones that are complex and involve new technologies, a water utility may have a very good idea of exactly what equipment and systems it wants, such as a particular water or wastewater treatment process or AMR system.

The uniqueness of certain equipment and systems may mean that they are not readily available from more than one vendor, creating tension with statutory competitive bidding requirements.

Another problem arises when the desired equipment is not necessarily unique with respect to the rest of the world, but unique in that it is the only equipment that matches equipment or processes already used by the public authority, such as a particular meter-reading or emergency power system.

Infrastructure Construction: Sole-Source Procurement

The doctrine of sole-source procurement, when correctly applied, can help a utility procure equipment and processes it wants for its infrastructure project without running afoul of Ohio's competitive bidding laws.

A utility must be prepared to demonstrate that the decision to specify certain equipment as sole-source is rational. Transparency of the selection process and technical justification are key to demonstrating rationality.

Properly crafted resolutions setting forth the predicate for sole source procurement can withstand challenges and satisfy auditors.

Competitive Bidding Exceptions: Councils of Government (COGs)

ORC § 167.01 states that “governing bodies of any two or more counties, municipal corporations, townships, special districts, school districts, or other political subdivisions may enter into an agreement with each other, or with the governing bodies of any counties, municipal corporations, townships, special districts, school districts or other political subdivisions of any other state to the extent that laws of such other state permit, for establishment of a regional council consisting of such political subdivisions.”

A member of a COG can use a bid accepted by the collective COG for certain types of contracts. This allows the members of the COG to save tremendous amounts of both time and money by streamlining the competitive bidding process. This process is extremely efficient, especially for contracts for the purchase of supplies and materials.

Competitive Bidding Exceptions: Councils of Government (COGs)

There are some limitations to this rule. For example, according to Ohio Attorney General Opinion 2019-028 the question of whether COGs may take advantage of the unit pricing and competitive bidding standards under R.C. 167.081 when entering into a contract for “new construction” was answered in the negative.

R.C. 167.081 authorizes a regional council of governments to enter contracts on a per unit basis for “materials, labor, services, overhead, profit, and associated expenses for the repair, enlargement, improvement, or demolition of a building or structure[.]” The Attorney General opinion suggests that this only applies to existing buildings or structures.

Competitive Bidding Exceptions: Councils of Government (COGs)

A regional council and its members may obtain the benefits of a per unit contract under R.C. 167.081 only if the contract is awarded under competitive bidding requirements applicable to a current member of the council.

In other words, if a political subdivision enters into a competitively bid contract and then joins the regional council, a regional council cannot enjoy the benefits of the contract. The subdivision must already be a member of the council for the council's members to enjoy the per unit contracting authority provided under R.C. 167.081.

Board Governance



Board Governance – An Ongoing Challenge

Board member responsibilities are generally the same whether your organization is a city, county, village, township, or special district.

The Board/Council is the ultimate governing authority.

Board/Council members set direction, instill ethics, oversee results and correct course.

Board Governance: Codifying Rules & Regulations

A Board can create its own set of rules and regulations, much like an employee manual.

It is important to conduct a legal audit to evaluate existing Board policies, create new ones, and identify areas where Board members may be exposed to liability.

For example, reaching beyond the policy-setting goal can expose a Board and its members to personal liability.

Boards should abolish any grievance procedure that permits employees or customers to bring problems to the Board.

The Board should not be a court of appeals for customers or employees.

Board Governance: Codifying Rules & Regulations

Even if your manual states the obvious, it bolsters positive public perception.

The Auditor's Office appreciates the effort and will sometimes look to your Board policies on governance and expenditures.

Be mindful of auditors' pet peeves, which can change annually.



Labor and Employment



Labor & Employment Disputes

Ohio is a dual jurisdiction state for enforcing anti-discrimination laws.

The Equal Employment Opportunity Commission enforces the various federal laws, and the Ohio Civil Rights Commission enforces ORC Chapter 4112.

Ohio public employers are subject to ORC Chapter 4112 and all federal laws no matter the size of the workforce.

Drafting Policies, Procedures & Job Descriptions

Written policies, procedures and job descriptions are a necessary component of a utility's operations so that it may successfully defend an alleged claim of discrimination, either under federal or Ohio law.

Under the EEOC's guidance manual, a lack of policies, procedures and/or job descriptions strengthens the inference that the employer has committed discrimination and allows the EEOC/OCRC to rely more favorably on the information provided by the individual alleging discrimination.

Drafting Policies, Procedures & Job Descriptions

Reasonable accommodations for disabilities are mandated where the employee can perform the essential job functions with the accommodation.

The ADA does not specifically require a document called a “job description,” but the EEOC requires all employers to note what jobs require essential job functions.

Without a written document listing the essential job functions for a particular job, all applicants for a position are qualified no matter what the applicant’s skill level.

Drafting Policies, Procedures & Job Descriptions

The Occupational Safety Health Act (OSHA) generally followed by PERRP mandates written descriptions of those duties and responsibilities of an employee to the handling of, or exposure to, human body fluids, biological agents, laboratory chemicals, or hazardous materials such as noise, asbestos or carcinogens.

The DOL is also increasing enforcement of proper FLSA exemption classifications, and enterprising plaintiffs' attorneys are cashing in on unpaid overtime claims.

This same issue exists when treating employees as classified or unclassified members of the civil service with job protections.

Easement and Property Acquisition



Easement & Property Acquisition

Most LGAs may condemn any public or private land, easement, rights, rights-of-way, franchises, or other property within or without the LGAs' boundary required by it for the accomplishment of its purposes according to the procedure set forth in R.C. 163.01 to 163.22 of the ORC.

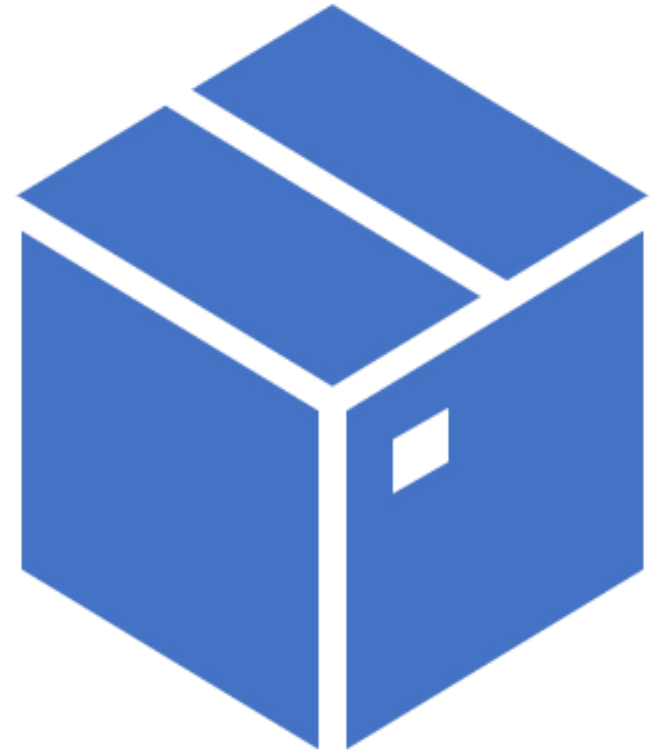
When a property is acquired by a public entity, this is called a "taking."

The Fifth Amendment of the U.S. Constitution permits the government to acquire private property for public use for "just compensation." The "Takings Clause" of the Fifth Amendment applies to state governments through the Fourteenth Amendment.

Easement & Property Acquisition: The Process

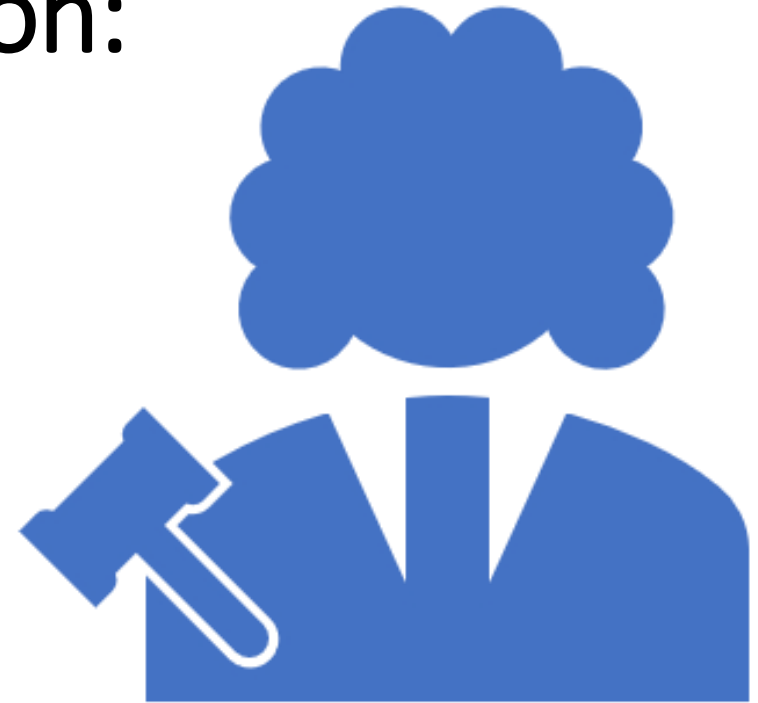
The process involves:

- Establishing ownership of the parcel;
- Identifying stakeholders of the parcel;
- Drafting easements and subordination agreements;
- Contacting stakeholders; and
- Recording documents.



Easement & Property Acquisition: The Practice of Law

- Remember that drafting easements is considered the “practice of law.” See *Ohio State Bar Assn. v. Newburn*, 119 Ohio St.3d 96, 2008-Ohio-3823 (holding that the “unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice in Ohio,” imposing a civil penalty on a registered professional surveyor who prepared easements and ordering the surveyor to notify the easement grantors that he had engaged in the unauthorized practice of law).
- Avoid form documents and use precise descriptions.
- Internally audit pipeline routes to confirm property interest



Easement & Property Acquisition: Petition for Appropriation

If a stakeholder refuses to sign an easement or grant title to property, an appropriation can begin by:

Sending a Notice of Intent to Acquire in compliance with O.R.C. 163.041, enclosing the easement or title and related documents.

The Notice of Intent must include an appraisal if the take is more than \$10,000 in value.

The owner has a minimum of 10 days to either accept or reject the offer.

Upon rejection, a Petition for Appropriation will be drafted that will include the appraisal, Notice of Intent and preliminary judicial report.

Easement & Property Acquisition: Trial Process

There are often threshold challenges to the necessity and the public use of the appropriation.

A finding that the appropriation is not necessary or not for public use may result in an award to the owner of the full amount of attorney's fees, costs and expenses.

Once necessity established, a jury determined the value of the take.

HB 64 proposes amendments to Ohio's eminent domain laws, increasing the standard to demonstrate a "public necessity" from "preponderance of evidence" to "clear and convincing" (more likely than not vs. highly and substantially more probable). The bill also locks in the agency at its initial offer for purposes of trial and awards fees in inverse condemnation cases.

A Proactive Approach to Combat Uncertainty

- Outside counsel should serve as primary risk managers.
- Clients should feel comfortable seeking advice before making decisions that create liability without fear of high bills.
- Advice and counsel should add value and not be a pure cost.
- Access to counsel for acute problem-solving should be streamlined.
- Multidisciplinary practitioners form a winning team.



Questions

Feel free to reach out via phone or email anytime with additional questions:

Tel: (440) 930-4001

Email: mdooley@dooleygembala.com

