

Sewer System Failures

Aging systems, lack of funds for adequate maintenance and a new awareness of toxicity issues that requires more elaborate and costly clean-up procedures make sewer system backups a growing exposure in many Oregon communities. Insurance is one, but certainly not the only remedy local governments should be using to protect their citizens from the consequences of accidental backups.

Entities that operate sewer systems, and users hooked up to those systems, have a common interest in protecting themselves against sewer system failures. This article explains the role of insurance and recommends additional actions that might help avoid system failures and ensure that citizens are protected when “*!%#@ happens”.

Some Basic Principles

User Responsibility: When the cause of the failure is on the user’s premises or in the service line connecting the user to the main sewer line, responsibility for cleanup and repairs usually lies with the user.

Sewer System Operator Responsibility: The agency providing sewer system services imposes user fees that generate revenues to fund capital, operating and maintenance costs associated with the system. In circumstances where the apparent failure occurs beyond the user’s service line, public sentiment would likely favor the agency assuming some responsibility for the costs of cleanup. Agency budgets can address the potential of system failure in the following ways:

- a. Adequately fund maintenance of the system to minimize the likelihood of system failures.
- b. Purchase liability insurance coverage that will pay covered cleanup costs if the entity is liable for the damages.
- c. Include in ratemaking considerations, a contingency reserve to pay for clean up costs in the event that insurance proceeds are not available.

CIS Responsibility: As the “insurer” when CIS denies a liability claim, it is usually not an issue of coverage i.e. whether or not the entity’s coverage through CIS covers the claim. Rather, the issue is liability; that is, is the entity legally liable for the damages of this particular claim?

Liability Insurance

CIS will pay, up to the liability limits purchased by the member, whatever a member is legally obligated to pay under the Oregon Tort Claims Act (OTCA). Currently, ORS Chapter 30.270 limits liability at \$50,000 per claimant for property damages arising out of a single occurrence, e.g. a sewer backup. The \$50,000 can be multiplied by a number of claimants, up to the maximum cap of \$500,000. In a typical property ownership arrangement, a husband and wife can be considered separate claimants so the OTCA cap in many instances would be \$100,000. The Oregon Court of Appeals in Clarke vs OHSU calls into question the enforceability of these limits, with the Supreme Court yet to give the final answer.

While the cleanup cost for an average sewer backup among CIS members is still less than \$5,000 per occurrence, there have been instances where costs have exceeded \$50,000. This is likely to occur more often as environmental safety concerns drive up the cost of cleanup and repair.

In CIS surveys of city managers and administrators, respondents have argued against raising the tort cap limits and against the idea of “no-fault” coverage that would pay regardless of liability. They expressed a preference for negotiating excess sewer backup payments with insurers and the affected party(ies).

The premise behind liability insurance coverage is that it pays, up to the coverage limits, if the entity is at fault or liable, i.e. the entity has either done or failed to do something that causes damages to a third party. In the role of “insurer”, CIS tries to draw a link between the event and some theory of liability in order to pay a claim. Even though damage has occurred, insurers may deny claims where it is clear that the entity has done nothing wrong, or there is evidence that it has done everything right. There will be instances where a malfunction occurs in the main line and insurance recovery is not available. Either (1) the entity is clearly not liable, or (2) damages exceed the maximum insured value. Recognizing that there may be instances where liability insurance does not cover third-party property damage, some entities maintain a contingency account in their Sewer Fund to at least preserve the ability of the entity to negotiate a local resolution where the entity has no clear liability and the user did nothing wrong.

Responding to a Sewer System Failure

Good public relations are very important when a sewer backup occurs. Whatever the cause and wherever liability lies, the initial outcome of the sewer system backup is likely to involve an agitated system user with effluent discharging on their property. The immediate response by the entity’s maintenance crew should be to investigate, locate and remove the cause of the backup, facilitate clean up, and minimize potential health hazards associated with the incident.

Recommendation: A quick response can often limit the size of a claim so having sewer crews and reputable cleaning firms offer clean-up assistance as quickly as possible in order to minimize the damage is very important.

Usually the initial response of the entity’s maintenance crew will involve checking the main line upstream and downstream of the plugged service connection. If the main line is blocked it will be cleaned and returned to normal operation. If, after checking or clearing the main line, the private service connection remains blocked then entity personnel may inspect the service line (after securing (a) permission to access the property, (b) waivers for damages due to inspection and (c) acknowledgement that cleaning, maintenance and repair of the service line is the property owner’s responsibility). Any defects should be reported to the owner, along with a list of the names of cleaning companies in the area.

Recommendation: Using the entity’s own maintenance crew to remove any plugs found in the private service connection is discouraged. Many service lines are old, never been cleaned or serviced, decaying, or have unseen cracks and breaks. In the act of unplugging, more damage may occur and the entity may not want to open itself up to future claims that may be tied back to the “work” the crews did on the private line. The sight of the entity’s equipment and personnel working on private property has the potential to raise political questions as well.

Determining “Fault”

If the plug that causes the back up is located in the service connection line on the users own property, it is hard to argue that the public system is responsible and that there is any liability on the part of the entity. The cost of clean up in these circumstances is a direct expense for the user/property owner.

Recommendation: Remind the property owner to check their homeowners or business insurance coverage. Policies may or may not make funds available to help defray clean-up costs inside the home or business premises (coverage does not usually extend to service connection repairs or removal of the plug if it is in the service line). Insurance companies offer a Form V Homeowners Policy that includes this coverage but it is offered on a limited basis to newer homes with higher values. In many communities, older sections of sewer systems may be located in areas where homes may not be able to qualify for Form V coverage. The standard Form III coverage excludes sewer back-ups but companies have paid claims in the past. Concerns about mold exposure cause many companies to not want to extend coverage to homes where any water damage claim has been filed.

If, on the other hand, the plug is in the main sewer line, the system user will usually look to the public entity for assistance in dealing with any ensuing property damage. Contact with CIS Claims personnel will trigger the investigation into liability. If the entity has a demonstrated maintenance program and adequate records that indicate recent cleaning of the line in the vicinity, the entity's liability for negligence may be questionable. For example, liability insurance is not triggered if the system's malfunction is due to an act of vandalism or an event the entity could not reasonably anticipate and prevent. So, strict adherence to liability standards may leave the system user, a non-contributor to the cause of the backup in the entity's line, as an innocent victim without recourse to funding assistance to clean up the mess.

Where CIS, or any insurer, is able to determine "fault" on the part of the agency, then coverage should apply up to stated limits. If repeated incidents happen at the same general location, you can expect CIS or any other insurer to encourage the entity to not rely on insurance as a temporary solution. Agencies will be encouraged to fix the problem, e.g. install back flow prevention units or check valves, or assume a higher per occurrence deductible for these kinds of claims.

What Should Local Agencies Be Doing?

Key local strategies CIS members use to deal with sewer system failures include the following:

- a. Sewer rates are set at levels sufficient to fund line inspection and regular maintenance so that blockages might be avoided.
- b. Adequate coverage is secured to protect the city in those instances when its actions or inactions make it liable for property damage to others.
- c. Adherence to strict liability standards governs whether the entity makes payments for property damages to third-parties. Some entities, wishing to preserve the ability to negotiate a local resolution regarding damages where the entity has no clear liability and the user did nothing wrong, maintain a contingency account for this purpose in the Sewer Fund. Entities that exercise this option consider recovery from sewer system failures as a maintenance component of the agreement between the entity and its sewer system users. The premise being that, by paying their sewer bill, sewer users are purchasing not just sewer collection service but also maintenance service that reasonably includes reimbursement for qualified property damage caused by main line or system malfunctions. The basis for the payments to the property owner is the implied contract between the entity and the system

user. Funding for the payments come from insurance proceeds (where liability exists) or the entity's Sewer Fund contingency account set up to provide, at the entity's option, payments on non-covered claims.

- d. A maintenance crew trained in appropriate response procedures can be readily deployed to the incident site.
- e. Arrangements have been made in advance for a reputable disaster recovery cleaning firm to provide rapid response. (Contact CIS for a list, by region, of certified and licensed black water cleanup companies.)
- f. Incidents are reported to CIS in a timely manner so our claims and risk management staff can provide assistance.
- g. Adequate, up-to-date maintenance records are kept as these are often of critical importance in determining liability.
- h. The public relations aspects of the incident are managed with care.

Where CIS Can Help

CIS adds value by:

- a. Monitoring proposals to change tort cap limits in the Legislature.
- b. Providing specific risk management training, education and handout materials on sewer back-up issues – exposure, claims and loss experience, maintenance and inspection policies and practices, record keeping, factors that determine liability, rate adequacy etc.
- c. Providing members with a list of reputable clean-up firms and, if necessary, facilitating members coming together on a regional basis to jointly contract for cleanup services or outsource maintenance.
- d. Helping members avoid the costs of litigation where possible. It is clearly a public purpose and in the public interest to help reduce health hazards by encouraging prompt cleanup of sewer system failures. The laws and facts surrounding most sewer backup claims are rarely so clear that the liability issue is black and white. There's almost always a way for a claimant's attorney to make some type of argument for entity liability and we want to eliminate the need to spend public funds on litigation costs in many of these cases (as opposed to cleanup costs).

NJK, 8/17/07