

To Flush or Not to Flush: That's the Question

(Case 1008)

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The Case:

You are a senior engineer and project manager for Enviroconcern, Inc., a geo-environmental group specializing in groundwater and underground pollution mitigation in a large, heavily industrialized area on the Atlantic seaboard. Your firm has established a reputation for excellent and accurate work among clients and regulatory agencies, including the federal EPA and state health and ecology departments, as well.

Several months ago, your firm was contacted by Ira Klene, the president of Industrial Solvents, Ltd. His company was named, among others, as suspected of having moderate to severe groundwater pollution concentrations beneath his industrial solvent manufacturing plant and adjacent plant property by the state regulatory agency. In order to avoid severe fines and potential lengthy litigation, Mr. Klene negotiated a contract with your firm to investigate the alleged problem, determine the severity of the condition, and prepare a report of the site investigation and conclusions for transmittal to the state regulatory agency, in compliance with their stated requirements.

As a result, you were assigned to be the project manager and coordinated the installation of an array of groundwater monitoring wells, well sampling and testing, analyses and preparation of the written report. During your visits to the site, you noted that abutting the Industrial Solvent plant property on three sides and directly across the street were several other firms either manufacturing or using the types of chemicals used by Industrial Solvents.

Based on the results of the field monitoring and sampling, Ira Klene's initial claim that his company was only a minor contributor to the problem, if at all, appeared to be substantiated. Groundwater elevation monitoring in the observation wells indicated that the direction of groundwater flow was from west (upgradient) to east (downgradient) underneath the Industrial Solvents site. Testing of samples taken from the monitoring wells indicated that the concentration of toxics in the groundwater were higher at the west side of the site, and decreased in the wells further to the east on the site.

You finished putting your report together yesterday in preparation for a presentation to the state regulatory agency the day after tomorrow, accompanied by Mr. Klene and his in-house corporate legal counsel. The conclusion stated in

your report is that the test results showed the levels of toxics in the groundwater decrease across the site from west to east, therefore the major portion of the pollution is originating with the industrial chemical plants further to the west. If Industrial Solvents Ltd. is contributing to the pollution under their site, it can only be a minor to insignificant amount.

Early this morning you decided to visit the Industrial Solvents site one more time, just to be certain that you had not missed anything of importance in your general description of the site and the activities in the plant. Since the site is not far out of your way from your home to the Enviroconcern offices, and you are by nature an early riser, you arrived at the Industrial Solvents site about 6:45 a.m., about 45 minutes before the plant goes into operation on a weekday basis. After looking around inside the plant, you wandered around to the parking lot to the west behind the building to glance at the monitoring well installations in that area. When you got there, you recognized Ira Klene with a rubberized raincoat over his suit, wearing boots and standing at one of the monitoring well caps in the middle of the parking lot with his back to you.

Since he had not seen you, you stepped behind a pickup truck lot and continued to observe Mr. Klene's actions. It soon became obvious that he had a key to the monitoring well caps in one hand and a hose connected to the water spigot on the back of the building in the other. In the next 25 minutes he proceeded from well to well toward the building, unlocking the well caps, inserting the hose and allowing water to flow into each well for several minutes. At first you could not believe what you were seeing. Poring water into these downgradient wells causes a reduction in the measured level of toxics in the groundwater at those locations, creating the appearance of decreasing toxic concentrations across the site from west to east.

Not knowing what to do or say, and not wanting to confront Mr. Klene directly at that moment, you crept back around the truck, waited until his back was turned, and rapidly went back into the building and out the front to where you had parked your car, and drove as quickly as possible to your office.

As you sit at your desk you realize that all of the analytical data in your final report is now suspect and unreliable. Your firm's contract with Industrial Solvents Ltd. contains a confidentiality clause requiring you to discuss the findings in your report with them before releasing the information to anyone else. The presentation for the state agency has been confirmed for the day after tomorrow.

You alternately stare at the wall and at your finished report for the Industrial Solvents site on your desk in front of you. You then ask yourself the big question of the day: what do I do now?

Alternate Approaches and Survey Results for “To Flush or Not to Flush: That’s the Question” (Case 1008)

1. Call Mr. Klene, indicate that you had stopped by the site this morning and observed him pouring water into a number of the monitoring wells near to plant building. Ask him what he was doing that for, and how long he had been doing it. Perhaps it was a one-time occurrence.
Percentage of votes agreeing: 7%
2. Talk with your corporate management and explain what you have observed. Let them decide what to do about the issue, if there really is an issue in their estimation. After all, there may well be a logical explanation to what you observed and you are not in a position to question the actions of your company's client. Indicate that you do not want to be directly involved in this communication, but will do whatever your management decides.
Percentage of votes agreeing: 16%
3. Say nothing to the client or to your management. Realize that since you were not invited, you were probably legally trespassing on the property this morning, which was an error in judgment. Your job was to direct the field investigations, monitoring and laboratory results, and to determine if a toxic problem existed based on these results. You cannot be responsible for watching the monitoring wells on a 24-hour basis, nor are you in a position to confront the person who hired your firm in the first place.
Percentage of votes agreeing: 1%
4. Submit the report as it stands. You know that there is not enough money in the project budget to redo all of the sampling and testing, as well as reanalyze the results. Also, there is no way Mr. Klene is going to agree to increase the budget to redo the work. With all of the other groundwater pollutant contributors adjacent to the site, some variation in the contribution resulting from the Industrial Solvents Ltd. operations is probably insignificant when viewed on a larger scale.
Percentage of votes agreeing: 0%
5. Before submitting your report to Industrial Solvents for review, and then on to the state agency, add a qualifying disclaimer to the end of your report indicating the conclusions made in the report are based on the results of chemical testing of the groundwater samples obtained at the site at the time, locations and depths indicated in the data. Also indicate that these results may vary at locations away from the monitoring wells, and/or from time to time at the specific monitoring well locations. Therefore, no other warranty, express or implied, is made or intended.
Percentage of votes agreeing: 4%
6. Write a short memo to your project file indicating what you observed, and that you have no basis for determining what, if any, effect Mr. Klene's

actions have made on the test results shown in your report, nor is there any way to make such a determination without throwing out all of the accumulated data and starting the sampling and testing program over from the beginning - an unwarranted action since the project scope of work has been completed and the project budget has been depleted. This will stand you in good stead should there be any question in the future.

Percentage of votes agreeing: 5%

7. Put in a confidential call to the state agency and indicate that you have reason to believe the results of the testing data in the report they are about to receive may be suspect, but you cannot determine the extent. Realize that if the word gets out to Mr. Klene that you have done this, your company, and quite possibly you personally, may get sued for violating the confidentiality clause in your contract with Industrial Solvents Ltd.

Percentage of votes agreeing: 2%

8. Submit the report as it is today to Industrial Solvents Ltd. for their information, in accordance with the terms of your contract agreement with them, and indicate that the final report is due at the state agency the day after tomorrow. Tell them that you have reason to believe that the results may be erroneous, and that you are willing to discuss this issue, as well as methods of rectifying the situation (e.g., obtaining an agreement from the state agency to delay the report and redoing the sampling and testing to either confirm or revise the original results, all at additional cost to the client). Since they are legally responsible for submitting the report to the state agency, it is their decision on how to proceed.

Percentage of votes agreeing: 15%

9. Have your management contact Industrial Solvent's legal counsel and indicate what has happened. Tell them that the sampling and testing needs to be redone to confirm or revise the suspect data, and that actions such as those of Mr. Klene cannot be tolerated during the repeat program. Indicate that the locks on the well caps will be changed, and if there is any evidence or indication of tampering with the wells during the repeat program, your company will report Industrial Solvents Ltd. directly to the state agency, no matter what the contract says. Also tell their legal counsel that the repeat program will be done under your normal fee schedule for additional work, and an amendment to the contract is required to cover the additional anticipated cost.

Percentage of votes agreeing: 42%

10. Confer with your management; decide to tell Mr. Klene what was observed and that the results presented in the report are suspect. As a result, your company refuses to present the report to the state agency as Industrial Solvents' consultant, and furthermore will not do any more work for Industrial Solvents Ltd., realizing that you will in all likelihood never get paid

for the work you did on the project, and may even get sued for breach of contract.

Percentage of votes agreeing: 8%

Forum Comments from Respondents

1. It was a definite error in judgement to arrive unannounced and unaccompanied at the client's site; now you know more than you wanted to. Having screwed up, the best approach is to a) tell your boss and b) tell Mr. Klene's legal counsel. Mr. Klene may be acting independently and putting his company at risk. The company may even thank you for your ill-advised initiative.
2. Tell Mr. Klene that you have found some evidence of tampering with the wells and that new samples will have to be analyzed, as well as having the locks changed on the well caps.
3. Consult with peers in other companies by asking them if they have ever been involved with falsifying test samples.
4. I would approach Mr. Klene's legal counsel in no more an adversarial way than I needed to. Specifically, I would note that I sympathize with their basic position that others contributed to the problem, and I would not be too heavy on Klene's actions being inappropriate and his knowing they were -- perhaps I would not let on immediately how much had been observed. Basically I would try to first get them to see that honesty is the best policy without explicitly threatening them.
5. First, draft a letter and have it hand-delivered to Mr. Klene letting him know what you saw in detail and giving him notice that you will send it to the state agency tomorrow unless he "comes klene" immediately. Having the letter notarized wouldn't be a bad idea. Do not proceed with the meeting with the state unless Mr. Klene is willing to admit what he did at the meeting. His actions were criminal; you cannot afford to be involved. The confidentiality clause probably is void in the face of overt criminal acts, so don't worry too much about that.

Second, notify your firm's attorney and see what can be done to position the firm for cost recovery, 'cause Mr. Klene ain't gonna pay for your services. And third, notify your firm's insurance carrier, because they are going to be involved soon, too. Keep the specifics vague for the present with them, but put them on a notice of a probable problem.
6. As a professional engineer, you are bound by the Code of Ethics for Engineers which clearly states that you are responsible for protection of the health, safety and welfare of the public. As a result, this ethical obligation supercedes the confidentiality clause in your contract with Industrial

Solvents, and you must disclose the information to the state agency unless Mr. Klene is willing to pay for a new sampling and testing program. This does not mean, however, that your firm will not be engaged in a legal battle with Industrial Solvents for breach of contract if Mr. Klene refuses to redo the sampling program and pay for it.

Epilogue

You conferred with your management and decided not to represent Mr. Klene and Industrial Solvents, Ltd. at the meeting with the state regulatory agency. You notified Mr. Klene of your firm's decision and the reason for it, and resigned the contract without submitting a written report. Mr. Klene immediately initiated a law suit against your firm for breach of contract (since you did not finish and submit the report). He then appeared before the state regulatory agency himself and presented the accumulated field data.

After Mr. Klene's meeting with the state regulatory agency, a member of his own staff called the agency and blew the whistle on Klene. The state prosecuted Industrial Solvents and fined the company several hundred thousand dollars under civil law proceedings. In addition, they sued Mr. Klene in criminal proceedings, resulting in his conviction and release on probation.

However, the law suit initiated by Mr. Klene with your firm continued for years, and was finally resolved by an out-of-court settlement in which your firm paid \$10,000, and never recovered any of the \$25,000 consulting fee for the original project.