



Criminal charges assessed for unpermitted distillery wastewater discharge

By Sarah Lobe and Alison Torbitt

Charges of 115 environmental violations, including 57 felonies, were recently brought against one distillery. Virginia's Attorney General's office and Department of Environmental Quality took legal action against the Filibuster Distillery after a two-year investigation allegedly revealed that the distillery dumped over 40,000 gallons of industrial wastewater with excessive zinc and copper levels into a stream and that the distillery's vice president lied about this discharge to investigators. The state's attorney general intends to send a clear message: "All businesses, no matter what size they are, must adhere to state and federal environmental protections, and when they don't, they will be held accountable." This cautionary case is a major reminder to all distilleries, breweries, and the beverage industry to properly manage wastewater.

Industrial wastewater is regulated under state and federal environmental laws

Water discharged from distilleries, breweries, and other beverage companies is considered industrial wastewater regulated under state and federal law, generally requiring industrial wastewater discharge permits and/or a National Pollution Discharge Elimination Permit (NPDES) or State Pollution Discharge Elimination Permit (SPDES). Regulated entities must obtain those permits and maintain compliance with any conditions within them. Recently, NPDES/SPDES permitting requirements have changed.

Businesses should consult their legal counsel to be clear on what permits are required and whether any of the recent and forthcoming changes to NPDES or SPDES permits apply to their wastewater. Some of the changes include who may need a permit now based on where the wastewater is discharged from, where the wastewater is discharged to, and what the wastewater contains. For example, the U.S. Supreme Court and U.S. EPA recently clarified that wastewater discharge permits are required for the *functional equivalent* of direct discharges to regulated water. The receiving waters that are regulated (i.e., where a business's wastewater is discharged to) has been redefined at the federal level through the recent Navigable Waters Protection Rule. Additionally, which wastewater contents are regulated and the extent to which certain contents may be permitted are currently under consideration. Businesses will want to stay current on such changes that may affect

their wastewater discharge permitting requirements by communicating with their environmental attorney.

A knowing violation of environmental laws heightens consequences

In this case, the distillery allegedly knew about its unpermitted discharge of their high zinc and copper wastewater into a stream. Knowledge of this kind of environmental violation can be found if there is an intentional decision to dispose of such contaminants into certain waters, like a stream, without a permit or in violation of a permit or if someone knew that a violation happened to exist. Civil liability for an environmental violation is triggered by the mere existence of the violation. But knowledge could trigger environmental criminal liability and lead to felony offenses, as is the case here.

Lying to investigators makes matters worse

According to the state's attorney general, charges were brought after the distillery's vice president lied to investigators about the wastewater discharge. He claimed that the wastewater discharge was a one-time accident rather than a series of intentional discharges over time, but later admitted that this was false information and that he had known about the discharges.

Proper cooperation with regulatory agencies is key. Non-cooperation may be a tipping point that leads to formal violations or stricter consequences, which may either be required under the law or determined at the discretion of the regulatory agency. Working with an attorney to ensure proper cooperation, while assessing the timing and content of any admission, can reduce these risks. If there is a one-time accidental discharge of wastewater, the wastewater discharge permit or regulations spell out exactly what type of self-disclosure would be required and the timeframe in which the agency must be notified. Although a business may strive to maintain compliance with wastewater requirements, accidents still happen. Businesses that understand these self-reporting requirements in advance can be ready to properly handle and meet often tight notification requirements. Additionally, if an agency raises wastewater discharge investigation inquiries, businesses should immediately seek legal counsel to help work with the agency to efficiently and effectively resolve issues.

Personal liability is possible

Here, the Filibuster Distillery's vice president—who admittedly lied to investigators and knew about wastewater dumping—was personally charged with 56 felonies and a misdemeanor. Under Virginia law, such felony charges have the potential consequence of two or more years in prison per charge and fines up to \$250,000. Businesses should be aware that their leadership or employees may be held personally liable and should understand that an attorney representing the business on a particular matter does not represent any individual of the business in their personal capacity for that matter. Attorneys can help develop clear internal policies to help guide the business and its people to best deal with environmental legal liabilities.

This distillery case is an important reminder that understanding environmental regulations for industrial wastewater is essential to protect our waters and our distilleries, breweries, and other beverage businesses. Environmental attorneys can help ensure such protections by assisting businesses in complying with these important regulations and facilitating productive cooperation with regulatory agencies.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Sarah Lobe, 585-263-1308, slobe@nixonpeabody.com
 - Alison Torbitt, 415-984-5008, atorbitt@nixonpeabody.com
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