



## **Borough of Caldwell Sewer Utility Understanding the Issues**

Most people don't worry about what happens when they empty the bathtub or flush the toilet, but the reality is that there is a lot going on that the general public rarely sees. Whenever there is a problem with the waste stream, such as a backup or a moratorium however, and suddenly sewers are the talk of the town.

That has become the case in Caldwell over the last few years, as concerns about plant capacity and lawsuits between Caldwell and two of its neighboring towns have thrust the sanitary sewer system into the headlines and all over social media. This letter is presented in order to allow Caldwell residents to better understand exactly what is going on.

### **The Caldwell Sewer Utility**

Caldwell and its neighboring towns have separate sewer systems for storm water and for sanitary waste. In general, storm water can be piped directly from the street into a river and from there into the ocean. In the United States, sanitary waste, which contains a variety of solid and liquid wastes, must be thoroughly treated before anything can flow into the rivers and oceans.

In the West Essex region, the sanitary waste from parts or all of six towns are treated at the Caldwell Waste Water Treatment Plant ("CWWTP"), which is located on Pine Tree Place in West Caldwell. The towns are Caldwell, Essex Fells, Fairfield, North Caldwell, Roseland and West Caldwell.

The CWWTP is owned by the Borough of Caldwell and is operated by the Caldwell Sewer Utility (the "CSU"). Unlike many sewer utilities elsewhere in NJ, the municipalities served by the CSU are not partners in the operation of the plant nor are they members of the CSU. They are simply customers who do business with the CSU by which they are allowed to send sanitary waste to the plant, for which they pay a fee. All of the management decisions regarding the CWWTP and the operation of the CSU are the responsibility of the Borough of Caldwell, with the Caldwell governing body serving as the decision making body for the CSU.

Municipal sewer utilities are governed by state statutes that are specifically for that purpose and are different than the laws that govern other types of regional service providers. The main law governing municipal sewer utilities is the "Municipal and County Sewerage Act" (N.J.S.A.40A:26-1 et seq.), which shall be referred to hereafter as the "Sewer Act". This is different than the laws that govern the operation of regional sewer authorities, such as the Passaic Valley Sewer Commission or the Essex Union Joint Meeting Sewer Authority, to which many municipalities send their sewerage. In those organizations, governance is by a separate board of directors or commissioners, which are drawn from the many municipalities that are members of the regional group. In those cases, all of the users participate in the governance of the sewer operations. In cases like the Caldwell Sewer Utility, the users do not participate in the governance.

### **Utility Finances**

Organizations like the CSU are expected to be self-sufficient, with the fees charged to the users expected to cover the entire costs of providing the service. The Sewer Act requires that the rates charged be "uniform and equitable for the same types and classes of use and service", which means that you must charge all users on the exact same basis. Consistent with that, all of the municipalities served by the CSU, including Caldwell, must be charged on the same basis.

Under the Sewer Act, the rates established should “allow... the local unit to: Recover all the costs of acquisition, construction or operation, including the costs of raw materials, administration, real or personal property, maintenance, taxes, debt service charges, fees and an amount equal to any operating budget deficit occurring in the immediately preceding fiscal year;”. In other words, the rates charged should cover 100% of the costs of running the utility.

The Sewer Act is also very clear on who has the authority to set rates. It says that “the local unit... may prescribe and, from time to time, alter rates or rentals to be charged to users of sewerage services.” And in setting those rates, the “Rates and rentals...may be based on any factors which the governing body...of that local unit...shall deem proper and equitable within the region served.” In other words, the Mayor and Council of the Borough of Caldwell is the only entity that is empowered to set the rate to be charged by the CSU and that may do so on the basis of whatever factors that they deem proper and equitable.

### **The Capacity Issue**

All sewer treatment facilities are regulated by the state of NJ, through the Department of Environmental Protection (“NJDEP”). Those regulations set standards for how clean the effluent from the plant must be before it can be released into a river or ocean and they set limits on how much sewerage a plant is permitted to process. While those standards are complex, they can be generally understood that the effluent must be very clean and that the capacity of a plant can be represented by the maximum amount of sewerage that it can accept on a dry day. For the CSU, that capacity is currently 4,500,000 gallons a day, often stated as “4.5 mgd”.

During the last calendar year, the CSU has experienced readings that indicate a flow that is equal to about 99% of that limit. To put that number in perspective, at that rate, the remaining capacity at the CSU is only enough to service about 600 additional people, which is equal to about 250 average homes. The towns that use the CSU all have plans for more development, most of which could not occur unless more sewer capacity is created.

While virtually any form of new development would require more sewer capacity, there is one type of development that receives special attention from the state. That special category is called “affordable housing” (“AH”), which every municipality is required by law to provide. Each town has a minimum amount of AH that it must provide, which is set by the state through a complicated set of formulas. In order to assure that towns meet their obligations, they are required to file a plan with the Superior Court, which determines whether the plan will reasonably work to meet the obligation. Towns that don’t file an acceptable plan, or which simply try to ignore the requirements, are subject to penalties, the most common of which is referred to as “the builder’s remedy”.

In a builder’s remedy situation, a developer goes to court saying that Town A has not followed the rules for AH and that the developer is prepared to build in that town with AH as part of the project, if the court will order the town to allow the project. As an inducement to file such suits, the courts typically not only agree to let the project go forward, they often grant the developer greater density than normally allowed by the town. For example, if the town said that you could only build 1 unit on each 50 by 100 foot lot, the court might authorize the builder to build 4 units on each such parcel, provided that at least 20% of the units built meet the AH requirements.

All of the municipalities served by the CSU have an AH obligation. Because of the capacity limits however, most of the projects included in their plans will not be built unless additional sewer capacity is created. Additional capacity is also required for other kinds of development, like new houses or businesses, but the courts are primarily interested in the Caldwell sewer capacity issue because of its effect on affordable housing development. That interest is so great that the court has decided to give itself the sole right to determine what new projects can be connected to the CSU.

### **The Problems**

While the capacity issue is at the heart of all discussions about the CSU, the Borough also discovered other issues when the current administration took office in 2019. Those problems included a lack of proper repair and maintenance at the plant, expired contracts with all of its customers, a billing system that did not meet the statutory requirements, collection systems in every municipality that allowed excessive amounts of clean water to enter the plant during rainy weather and a lack of knowledge about the condition of its underground infrastructure. Those issues, coupled with the capacity issue, resulted in NJDEP increasing its oversight of the CSU.

The Borough has attempted to address all of those concerns. More than \$2.14 million has been spent to fix the plant, doing things like replacing the backup generator, repairing most of the sand filters and replacing significant parts of the ultraviolet disinfection equipment. New contracts have been presented to all of the municipal customers, with 3 of the 5 having agreed to the new terms. Those contracts include a billing methodology that fully conforms to the governing law. In order to fully understand the condition of the system and why there was so much extra water entering the plant, a two-phase study was commissioned to provide real data on what was going on underground. NJDEP has appreciated the actions taken and has refrained from imposing any regulatory restrictions on the plant at this point (although the Superior Court has imposed its own standards).

Ultimately however, the long-term solution requires that the capacity be increased and that can only happen if the Borough is assured that the costs of capacity expansion will be equitably shared by all of the customers using the CSU. That means that all 5 municipalities need to be subject to the terms of the new contracts, which make it clear that those costs will be borne by everyone in the system, in the “uniform and equitable” manner required by the Sewer Act.

### **The Vision**

The knowledge gained from the two-phase study has allowed Caldwell to develop a very straightforward plan for what it should do with the CSU. That plan has only 3 parts, as follows:

- 1.) Eliminate as much of the extraneous water entering the system as possible, referred to in the industry as “infiltration and inflow” or “I & I”. This requires every town to consciously address problems with broken pipes in its sewer lines and illegal connections to their sanitary sewer lines, to force property owners to disconnect sump pumps from the sanitary system and to close the places where rainwater is directly entering the sanitary sewers; and
- 2.) Take the actions required to permit NJDEP to rerate the existing plant to allow it to operate at an increased level of capacity. This will require upgrading the technology at the plant and some changes in treatment chemistry, but will have a lower capital cost than the physical expansion described below. This could increase capacity by 15 to 20%; and
- 3.) Expand the physical facilities at the existing plant. This will consume all of the land available at the current site of the plant, but it would increase the capacity by 50%, which should be enough to allow all of the development projected by the customer municipalities over the next few decades.

### **The Lawsuits**

In the course of all of the steps taken regarding the CSU, the Borough has enjoyed good cooperation with 3 of the customer municipalities, Essex Fells, Fairfield and North Caldwell. Those municipalities have understood the issues and have agreed to both the new contract terms and the vision for the future of the utility. On the other hand, both Roseland and West Caldwell have been both uncooperative and openly resistant to what Caldwell has recommended for the future of the CSU

Roseland’s objections have been centered on the idea that they should be billed on the basis of a completely different factor than all of the other customers. Unlike the other towns, the vast majority of Roseland’s sewerage reaches the plant through a single pipeline. Roseland installed a meter on that line and was charged on the basis of the flow measured by that meter for several years. All of the other towns are billed on the basis of a formula that involves the amount of metered water consumption. Caldwell analyzed the difference in the billing bases and determined that the Roseland system was not equitable and allowed Roseland to be billed for significantly less cost than would be the case if the same method used on all other towns was used for Roseland. When Roseland was billed on the same basis as used for everyone else, they refused to pay, which forced Caldwell to go to court to compel payment. The court required Roseland to pay all undisputed amounts, but has not yet considered the larger issue.

In the case of West Caldwell, that town has taken the position that they are entitled to refunds due to Roseland being under billed (which the court has yet to determine) and that Caldwell's budgets for the CSU were inappropriate, even though West Caldwell never commented on any of those budgets at the time that they were adopted. Under the Local Budget Law (N.J.S.A. 40A:4-1 et seq.) when a municipality adopts its annual budget, anyone objecting to any aspect of the budget must bring an action within 45 days after the date on which notice of the adopted budget was published. If no objection is filed, everyone is "estopped" from bringing an action thereafter. Despite that restriction, West Caldwell has not only brought suit, but also has deducted the alleged "credits" that they maintain are due to them. Between the two towns, the CSU has been unable to collect more than \$1,000,000 in sewer charges in 2021.

### **Caldwell's Position**

The Borough's position in this matter is straightforward. Since 2019 the Borough has done everything necessary to both allow the plant to function properly and to plan for the necessary expansion of its capacity. Caldwell has set the stage for the West Essex region to be able to meet its statutory requirements for affordable housing and to proceed in an orderly and predictable way to attract and build new ratables in accordance with their locally approved plans.

In order for those plans to be implemented however, whether in the form of the re-rating discussed above or the actual plant expansion, Caldwell needs to be assured that it has the legal authority to recover the costs associated with those actions, in a uniform and equitable manner, from all of the municipalities that will benefit. This means that we need every customer municipality to execute the new contracts and for the current lawsuits to be resolved in a way that is fair to the citizens of Caldwell.

Sincerely,

John T. Kelley, Mayor

