

establishing
successful RMEs

FACT SHEET

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how regulations work in this sector



READ THIS FACT SHEET IF...

you want to work out what types of organizations and operations are possible in your area.



Building confidence in performance.

Some RMEs report that in the early days of their operation, regulators required stringent and frequent performance monitoring and reporting. This can represent a significant cost. Over time, stable high performance was proven, so regulators developed trust in the systems and in the RMEs providing the services. The outcome was reductions in requirements for monitoring frequency and scope.

Regulations are the “rules of the game” that drive and govern many aspects of the space your organization has to fit into. They set what you can and cannot do, and what types of organizations can or cannot operate. Understanding these rules is critical to operating successfully, regardless of the type or structure of your organization.

If you are a government entity, some regulations may lie within your control (e.g., “sewer” or special district ordinances), while others (such as standards for system design and installation) may not.

If you are a privately owned service provider or Responsible Management Entity (RME—for an explanation of these terms, see *Fact Sheet #1*), you need to be active with respect to regulations. **If appropriate regulations to support and protect your business are not in place, you will likely fail!**

Your communication with regulators affects how regulations are implemented. Forming positive, collaborative relationships with relevant regulators early on builds trust with both parties. It is even more important if regulators

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Local regulations determine the type of management models allowed.

The contractor-based operation and maintenance management model used in the state of Washington is viable because regulations are not in place for privately owned, publicly regulated RMEs. Since this lack of regulation has led to poor performance, regulators will not allow homeowners' associations and/or developers who own cluster systems to manage—or to use private RMEs to manage—their decentralized systems.

The Washington On-Site Sewage Association works hard to ensure professional practice across the industry. Its licensing program for designers ensures good practices and mandates continuing professional development.

are not familiar with the concept of responsible management for decentralized systems.

Three types of regulation are important to your organization:

- Corporate regulation.
- Utility regulation.
- Environmental and public health regulation.

INFLUENCING LEGISLATION

Individual or collective action can influence legislation and regulations.

For example, in 2007 the Virginia Onsite Wastewater Recycling Association (VOWRA) helped get state legislation passed that requires, among other things, statewide tracking and minimum maintenance for all onsite systems.

The Washington On-Site Sewage Association (WOSSA) is another example of an industry association influencing local regulations for the benefit of all—the environment, property owners, and itself. WOSSA pushed for operation and maintenance (O&M) regulations but was not successful until it partnered with environmental groups to help get the legislation passed. Now O&M providers need to be certified, and county authorities receive copies of all inspection and performance reports. As a result, regulators have the information they need to enforce property owner compliance. Furthermore, O&M providers have the backup they need to convince property owners to invest in their systems and improve performance.

CORPORATE REGULATION

Corporations are legal entities created under state law, and they must follow state law in their day-to-day operations. Corporate regulation applies to the legal formation of the corporate entity that will operate as the RME or service provider.

Limited liability companies are allowed in many states and have different operating requirements from corporations with shareholders. Both are for-profit entities, however, and are created and operated differently from not-for-profit corporations, such as homeowners' associations (HOAs). All of these, however, are registered with a state corporations office or secretary of state and file annual reports.

The types of RMEs that fall under corporate regulation include special purpose districts, subordinate service districts, non-profit electric or sewer cooperatives, for-profit private utilities, private maintenance contractors, and private homeowners' associations. There are also various types of public or government entities, including regional water authorities, tribal authorities, and county health departments.

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Utility regulation for decentralized systems is highly variable across the country.

In New Jersey, the Municipal and County Utilities Authority Law establishes the powers of a utility to specifically include the authority needed to operate an RME—such as property access for inspections, charging and collecting fees, etc.

In contrast, Alabama's rules for privately owned, publicly regulated RMEs mandate the fiscal parameters under which such organizations operate but do not necessarily grant other rights.

Still other states have laws related to centralized wastewater utilities or sewer districts that exclude decentralized wastewater services from the utility's jurisdiction.

This fact sheet was prepared by the Institute for Sustainable Futures at the University of Technology Sydney in Australia and Stone Environmental, Inc., in Vermont.

UTILITY REGULATION

Once a type of corporation is selected, then utility regulations must be addressed. Utility regulation covers unique aspects of utility operations e.g., certificated franchise area designation, meeting a state's fiscal viability requirements, and rate-setting.

The scope of specific entities that may be formed, and the authorities granted to such entities, vary significantly from state to state. Most states have an economic regulator (such as a Public Service Commission) whose role is to ensure that safe and reliable utility services (usually wastewater, water, phone, gas, and electricity) are available to customers at fair and reasonable prices.

The presence of a strong utility regulatory framework is critical to the success of any decentralized RME venture. Regulated utilities can have considerable protection through rules regarding protected territories, collection of fees, enforcement means for non-payment, and property access. Decentralized privately owned utilities should consider avoiding states without adequate public utility regulatory structures.

Agencies that oversee utility regulations generally regulate rates that can be charged by private, for-profit utilities. They typically do not regulate the rates set by government (e.g., town public works department, sanitation district) or non-profit organizations (e.g., homeowners' association). Local governments, including their chartered municipal authorities (i.e., governmental RMEs), engage in their own version of price regulation through setting their rates or accepting/rejecting contractor prices.

ENVIRONMENTAL AND PUBLIC HEALTH REGULATION

Environmental and public health regulations protect and enforce a community's or state's environmental and public health goals. They strongly affect the operating environment for the decentralized wastewater sector, and they vary a great deal across the country. State environmental protection agencies or county health departments each may set standards for siting, designing, installing, servicing, and performance monitoring of systems. The cut-off for whether a local health department or state environmental agency regulates systems usually depends on system design flow and varies significantly from state to state.

One key factor is whether local regulations governing treatment systems are prescriptive or performance-based. According to the CIDWT Glossary, which explains hundreds of terms at www.onsiteconsortium.org, prescriptive regulations provide minimum specific physical standards for design, siting, and construction of system components. A prescriptive approach controls the components of an onsite or cluster system and leaves little room for professional discretion.

A performance-based approach, on the other hand, sets specific, measurable, enforceable standards for outcomes. For instance, water quality performance regulations might set pollutant concentrations and mass loads in treated wastewater discharged to groundwater. Operation and maintenance performance regulations might set the frequency and types of required O&M activities and how they are reported. Under performance-based approaches, each RME determines how best to meet the outcomes in its service area.

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Time, effort, and good relationships make for successful rate cases.

Tennessee's Public Service Commission (PSC) regulates privately owned utilities.

A company can become a publicly regulated utility by demonstrating technical competency, fiscal adequacy, and by posting a bond and paying a fee.

However, when the Pickney brothers (now Adenus Utilities Group) started to prepare a rate case for their RME to go before the PSC in the early 1990s, there was no precedent. It took nearly four years for the first approvals to come through.

Now, Adenus is a success in Tennessee as well as other southeastern states and serves thousands of people. Still, preparing for rate cases is a very time-consuming endeavor.

One of the keys to Adenus's success is that it works closely with developers and state regulators to design, own, and operate new decentralized systems. Its focus on new systems allows Adenus to specify collection and treatment technologies and therefore to accurately predict and control its costs for operation, maintenance, repair, and replacement. This provides a strong technical basis for its rate cases.

Another key question for new RMEs is whether management is mandatory. Is inspection, operation, maintenance, and/or monitoring of some or all systems required by state or local regulation? Privately owned, publicly regulated RMEs have tended to gravitate towards managing new cluster or larger-flow onsite wastewater treatment systems for a variety of reasons. A key reason is that these systems are often permitted at the state rather than county level and are far more likely to have O&M and other management activities mandated by permit. Thus, with these systems, in addition to economies of scale and other non-regulatory advantages, there is more likely to be a requirement for the types of services an RME would provide.

It is important to understand how public health and environmental regulations are applied statewide. Providing RME services across political boundaries with different sets of requirements, which can happen if county or local jurisdictions have their own distinct authority, can hamper success.

On the other hand, related local environmental and public health regulations can provide additional business opportunities. For example, some counties in the state of Washington require an annual food-service permit to run a restaurant, coffee shop, or any business that sells food. To obtain that permit, the business must have the decentralized wastewater treatment system inspected by a licensed O&M service provider who provides a report that is filed with the county certifying that the system is functioning properly.

RESOURCES AND STRATEGIES FOR LEARNING ABOUT LOCAL REGULATORY ISSUES

Useful starting points include the National Small Flows Clearing House onsite wastewater regulations database at www.nesc.wvu.edu/regs_database.cfm and the Environmental Research Institute of the States' 2002 decentralized wastewater report at www.ecos.org/section/publications. A review of state and local governmental websites for environmental and public health regulations and regulatory contacts will also be useful.

Talk to other RMEs and service providers in your area. The National Onsite Wastewater Recycling Association maintains a list of affiliated state associations at www.nowra.org/stategroups.html.

Make appointments with state, municipal, and county environmental, public health, and economic regulators. Through discussions with these individuals, find out:

- What state, regional, or local governmental agencies (health department, state environmental protection agency, etc.) have jurisdiction over the systems your organization desires to design, install, own, operate, and/or maintain? What determines the boundaries of the jurisdictions (system design flow, number of connections, residential or commercial construction)? What regulations apply? What ancillary regulations should you know about?
- How do utility regulations operate in your state? Do they cover wastewater? Has the Public Service Board or Commission dealt with small-scale systems before, in wastewater treatment or other services?
- Within your organization's potential service area, what role does planning and zoning have in the approval process for onsite or cluster wastewater systems? Is there a formal commission? How do they handle planning for growth?