

CERCLA & Clean Water Act - Overlapping Authorities & Cross-Program Implementation

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Potential Sources of Recontamination that Need To Be Controlled

- Upstream/tributary contamination
 - Contaminated Suspended solids
 - Dissolved contaminants
- Overland transport/
sheet flow
- Riverbank erosion
- Groundwater



Potential Sources of Recontamination that Need To Be Controlled

- Overwater Activities
- Stormwater discharge
- Wastewater discharge
- Atmospheric deposition



Steps to Control

- Identify source
- Determine Remedial Action Objectives
 - In-water
 - Possibly also point of compliance
- Evaluate and choose remedy
- Legally require remedy
- Monitor
- Re-assess

Importance of Source Control

Fresh Contamination Taints Superfund Foss Waterway

The News Tribune - Tacoma, Wash. * Oct 15, 2006

“Recent laboratory tests of bottom-dwelling critters exposed to [Thea Foss] Waterway sediment confirm it has been recontaminated. The problem is excess phthalates, or plasticizers, which enter the waterway through Tacoma's storm drain system, said EPA, city officials and others. . . .
Portland-based PacifiCorp and two other utilities spent \$8.5 million to clean up that part of the Superfund project. The rest of the Foss cleanup - costing more than \$90 million - was coordinated by city officials.”

Sources Typically Subject to CERCLA/State Cleanup Law Remedies

- Riverbank erosion
- Groundwater
- Overland transport/sheet flow
 - To extent can remediate upland source areas
- Overwater activities (after fact/cleanup)

Sources NOT Typically Subject to CERCLA/State Cleanup Law Remedies

- Upstream/tributary contamination
 - Can be coordinated as part of another “site”
- Permitted NPDES wastewater discharges
- Permitted NPDES stormwater discharges
- Atmospheric deposition

Federally Permitted Release Exemption

- CERCLA 107(j):

“Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section.”

Federally Permitted Release Exemption

- CERCLA 101(10):

“The term ‘federally permitted release’ means (A) discharges in compliance with a [NPDES permit], [or] (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a [NPDES permit] and subject to a condition of such permit, [or] (C) continuous or anticipated intermittent discharges from a point source, identified in a [NPDES permit] or permit application, which are caused by events occurring within the scope of relevant operating or treatment systems . . .”

Oregon Permitted Releases Exemption

- ORS 465.405(2)
 - “In adopting rules under this section, the commission shall exclude from the list and inventory . . .
 - “(c) Releases specifically authorized by and in compliance with a current and legally enforceable permit issued by the Department of Environmental Quality or the United States Environmental Protection Agency. . .”

Oregon Permitted Releases Conditional Exemption

- OAR 340-122-030 (2)

“Conditional Exemption of Permitted Releases.
These rules do not apply to permitted or authorized
releases of hazardous substances, **unless the**
Director determines that application of these rules
might be necessary in order to protect public
health, safety or welfare, or the environment.
These rules may be applied to the deposition,
accumulation, or migration resulting from otherwise
permitted or authorized releases.”

Can Cleanup Be Imposed on Top of NPDES Permits? Are Those Permits Currently Protective of Health, Safety, Welfare & the Environment?

- OAR 340-045-0080(1):

“A permittee in compliance with a [NPDES permit] during its term is considered to be in compliance for purposes of enforcement, with Sections 301, 302, 306, 307, 318, 403, and 405(a)-(b) of the federal Clean Water Act (CWA) and ORS 468B.030, 468B.035, and 468B.048, and implementing rules, applicable to effluent limitations, including effluent limitations based upon water quality basin standards, and treatment systems operation requirements.”

CERCLA/State Cleanup Law and CWA As Legal Tools for Source Control

	CERCLA /State cleanup	NPDES
Riverbank erosion	X	
Groundwater	X	
Overland transport/sheet flow	Partial (to extent of upland cleanups)	
Overwater Activities	(After fact)	(Stormwater authority for docks)

CERCLA/State Cleanup Law and CWA As Legal Tools for Source Control

	CERCLA /State cleanup	NPDES
Wastewater discharge	? (state)	X
Stormwater	Partial	X (but currently not all discharges covered)

CERCLA/State Cleanup Law and CWA As Legal Tools for Source Control

	CERCLA /State cleanup	NPDES
Upstream/tributary	Partial	Partial
Atmospheric deposition		

Focusing on Stormwater. . .



Tools that Won't Work . .

- CERCLA alone
 - Federally permitted release exemption
 - State permitted release conditional exemption
 - Vast number of small sources that need to be controlled

Tools that Won't Work . .

- “Souped Up” 1200Z permit
 - new 1200Z permit requires quarterly monitoring for benchmark parameters
 - Assume expand to whole Portland Harbor parameter list (TSS, TOC, Metals, phthalate esters, chlorinated herbicides, organochlorine pesticides, selected SVOC, PAHs, PCBs) at meaningful detection limits
 - Cost per water analysis = \$2200
 - \$1340 for analysis
 - \$860 for sampling and QA/QC
 - Not including any report preparation

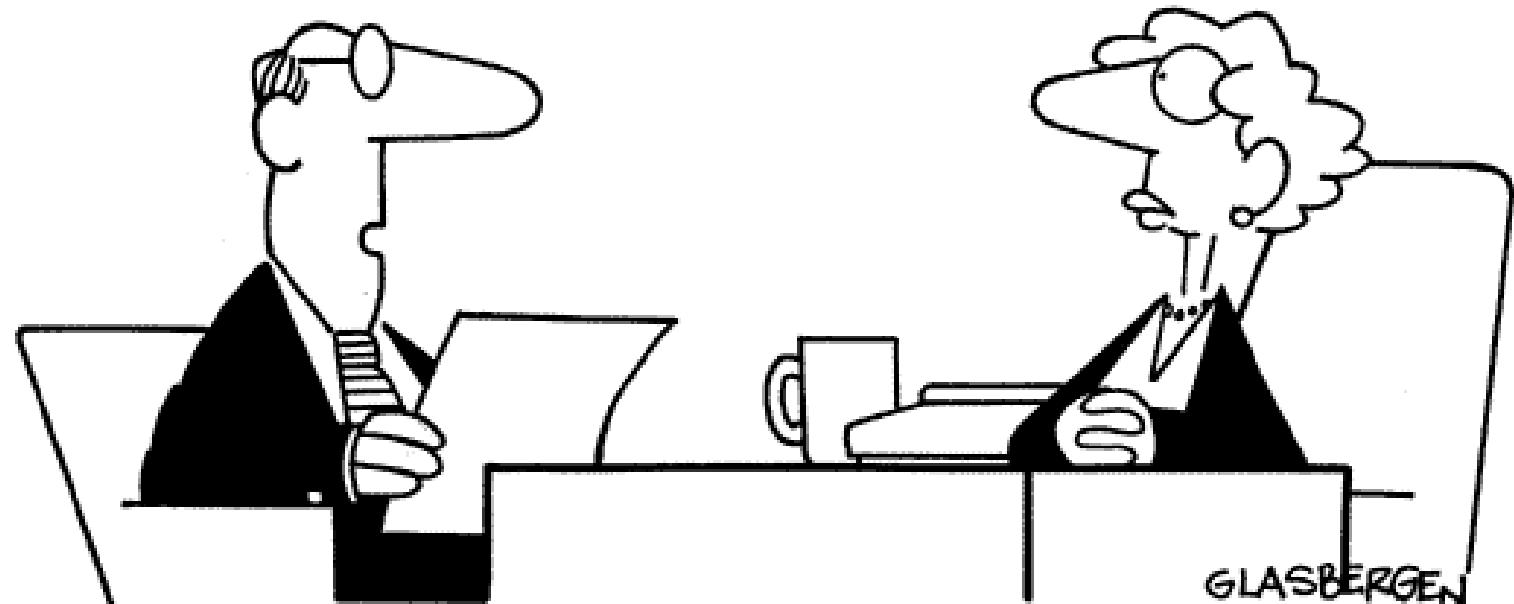
Tools that Won't Work . .

- Quarterly water sampling for the 76 existing 1200Z permits in Portland Harbor Study Area = \$0.7M per year
- If for $\frac{1}{2}$ presumed 300 outfalls in Study Area = \$1.3M per year on water sampling alone

Think Outside the Box . . .



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**"My team is having trouble thinking outside the box.
We can't agree on the size of the box, what materials
the box should be constructed from, a reasonable
budget for the box, or our first choice of box vendors."**

Thinking Outside the Box . . .

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Thinking outside the box . . .

- New NPDES Stormwater Permits
 - Tiered
 - Bmp/SWPCC based
 - Focused on risk-driving contaminants
 - With monitoring only for higher-tier sources
 - Possibly sub-tiered
 - » TSS
 - » Site specific contaminants
 - E.g. Michigan Stormwater permit approach

Thinking outside the box . . .

- Incentives for Green Building and Green Infrastructure
 - Reducing amount of stormwater or reducing surge
 - Infiltration (downspout disconnect, eco-roofs, permeable pavers, etc.)
 - Collection (CSO tunnel, wetlands (e.g., purchasing conservation easements for existing wetlands; building constructed wetlands), retention tanks)
 - Re-use (e.g. rainwater harvesting for irrigation and gray water applications)

Thinking outside the box . . .

- Stormwater Trading
 - Nationwide, being considered for nutrients, TSS, temperature, oxygen demand
 - Usually TMDL driven, but TMDLs currently limited to mercury and dioxin for Mainstem Willamette
 - Willamette Partnership developing in Oregon—initially focused on temperature
 - Suitable for TSS
 - Could be suitable for some chronic risk exposures within habitat/risk areas
 - EPA policy would allow consideration of bioaccumulative compounds in pilot project

Thinking outside the box . . .

- Educational Outreach

Portland, Portland Business Journal
Business Impact Committee

