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Portland Harbor in the Post-ROD World

Integrating In-Water & Upland Remedies and Permitted Discharges --Legal Structure and Tools

Presented by
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Topics to Cover

- Regulatory structure for post-ROD actions
- Continuing viability of pre-ROD guidance and structures
- EPA/DEQ roles per concurrence letters
- Available tools
- Specific cases
  - Re-sampling
  - Riverbanks
  - Groundwater
  - Integration with permitted discharges
  - In-water remedies adjacent to upland sites
  - Broader watershed issues

DO YOU SEE YOURSELF IN THIS PICTURE?

REGULATORY STRUCTURE FOR POST-ROD ACTIONS

- Cleanup within Site needs to meet standards of CERCLA and the National Contingency Plan, as set forth in the Record of Decision (ROD), ***with flexibility***
  - As specifically reserved in the ROD, e.g.
    - " …the ROD decision tree demonstrates that there is flexibility in the technology assignments based on criteria to be evaluated during remedial design." ROD Responsiveness Summary, 2-87.
    - "EPA agrees that maintaining flexibility in type of construction methods through the remedial design phase is an important consideration. The ROD includes a flexible decision tree along with general design requirements to guide the assignment of capping and dredging technologies, based on specific characteristics within SMAs. The decision tree will be used during remedial design to define what actions should be taken under different environmental conditions and locations based on the most recent design data." ROD, App. IV, at 14.

REGULATORY STRUCTURE FOR POST-ROD ACTIONS (CONT.)

- **And with flexibility** as allowed under guidance for minor and non-significant changes (e.g., that arise during remedial design) based on new information.

  – EPA. 1999. *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and other Remedy Selection Decision Documents. EPA 540-R-98-031. July.*

REGULATORY STRUCTURE FOR POST-ROD ACTIONS (CONT.)

- However, any **significant or fundamental change** would require an Explanation of Significant Difference (ESD) or ROD amendment, respectively, **supported by consideration of significant new information** that supports the need to alter significantly the response action, NCP 300.825(c)
  - E.g., "If EPA determines that no additional response actions can be implemented to meet ARARs, EPA may issue a ROD Amendment or ESD providing the basis for a technical impracticability waiver for water-quality based ARARs under §121(d)(4)(C) of CERCLA." ROD at 124.

Continuing Viability of Pre-ROD Guidance and Structures

- 2005 EPA DEQ Joint Source Control Strategy
  - Consensus guidance between DEQ, EPA, and federal, state and tribal project partners on how to identify, evaluate and prioritize upland sources of contamination that are affecting or may affect the Willamette River in the Portland Harbor area.
  - Was guided by “screening level values” (SLVs), which were comparisons used to establish priority for potential source control.
  - SLVs now functionally replaced with the ROD’s contaminant specific cleanup levels.
  - Will be amended (e.g., Table 3-1) to update.
  - But remainder of guidance, including “lines of evidence” approach, remains in place.

CONTINUING VIABILITY OF PRE-ROD GUIDANCE AND STRUCTURES (CONT.)

2001 Memorandum of Understanding (MOU) remains in effect between:

- EPA
- DEQ
- Yakama
- Grand Ronde
- Siletz
- Umatilla
- Warm Springs
- Nez Perce
- NOAA
- US Fish & Wildlife
- Oregon Fish & Wildlife

CONTINUING VIABILITY OF PRE-ROD GUIDANCE AND STRUCTURES (CONT.)

- MOU – assignment of roles and structure
  - EPA lead on in-water portion of site, with DEQ support
  - DEQ lead on upland portions, with EPA support
    - Pursuant to state authority, which is substantially the same as CERCLA authority
  - With respect to both lead roles:
    - "The Lead Agency retains its statutory decision-making authority and obligations for areas under its management."
  - EPA and DEQ to coordinate on any enforcement or cost recovery action

CONTINUING VIABILITY OF PRE-ROD GUIDANCE AND STRUCTURES (CONT.)

- MOU – assignment of roles and structure (cont.)
  - Technical Coordinating Team (TCT)
  - Legal Coordinating Team (LCT)
  - Tribes
    - MOU acknowledges need for regular and meaningful consultation with tribal governments
    - Representatives on TCT and LCT
    - Special consultation role with respect to cultural resources

CONTINUING VIABILITY OF PRE-ROD GUIDANCE AND STRUCTURES (CONT.)

- MOU parties may negotiate new MOU or amendment

- Possible approach to technical issues:
  - Work-shopping major technical issues for broader input to TCT?

EPA/DEQ Roles Per Concurrence Letters

- Set forth in EPA 12/7/16 letter memorializing key DEQ/EPA expectations and DEQ 12/22/16 concurrence letter
  - Upland sites
    - DEQ still has lead, and this remains a priority
  - In-water actions
    - EPA may have DEQ perform technical oversight function for certain areas
      - Has to comply with CERCLA, NCP and ROD
      - EPA has ultimate approval authority
      - TCT will meet and provide input
  - Broader watershed
    - DEQ and EPA to work to develop comprehensive strategy
  - All with discussions with tribal governments in fulfillment of tribal trust obligations

AVAILABLE TOOLS

- Interagency personnel agreements (DEQ to EPA, or EPA to DEQ)
- EPA funding or Joint funding
  - State Superfund Cooperative Agreements under 40 CFR Part 35, Subpart O
    - To transfer funds to a State, political subdivision, or Indian Tribe that assumes responsibility as the lead or support agency for Superfund responses. 40 CFR §35.6015 .
    - Has been a mechanism for funding to state and tribes and others during RI/FS
      - DEQ Support Agency Cooperative Agreement
      - Agreement for Government-to-Government participation of tribes
      - Technical Assistance Grant to Willamette Riverkeeper
      - *See also* Commencement Bay Source Control Cooperative Agreement between EPA and Washington Dept. of Ecology

AVAILABLE TOOLS (CONT.)

- Increased emphasis on federal/state cooperative approach under new Administration?

AVAILABLE TOOLS (CONT.)

- EPA funding or Joint funding (cont.)
  - Superfund State Contract under 40 CFR Part 35, Subpart O
    - A Superfund State Contract is used to transfer cost-sharing funds *when EPA has the lead role in the implementation of a remedial action*, but the state (or tribe) will operate and maintain the cleanup once completed (e.g., orphan site)
      - *See* 40 CFR § 35.6105 for agreement requirements
        - Requires at least 10% cost sharing by state (cash, credit for site-specific expenditures, in-kind)
        - Requires detailed statement of work

AVAILABLE TOOLS (CONT.)

- PRP performance and oversight funding
  - Administrative Orders on Consent (AOCs) or Consent Decrees
    - With negotiated, agreed-upon defined Scope of Work
    - And agreed-upon defined oversight roles and reimbursement mechanisms
      - E.g., RI/FS AOC

SPECIFIC CASES: RE-SAMPLING

SPECIFIC CASES: RE-SAMPLING (CONT.)

- "The EPA is conducting preliminary planning to determine what site-wide baseline sampling will be conducted. We need current data to get a snapshot of sediment contamination. This will help inform where future design work and related design sampling should occur." EPA 3/17 Fact Sheet.
- Necessarily EPA-lead because in-water
- Possible tools:
    - PRP AOC with negotiated Scope of Work, and DEQ/EPA coordinated technical oversight?
    - Cooperative Agreement EPA/ODEQ/State of Oregon for sampling?

SPECIFIC CASES: RIVERBANKS

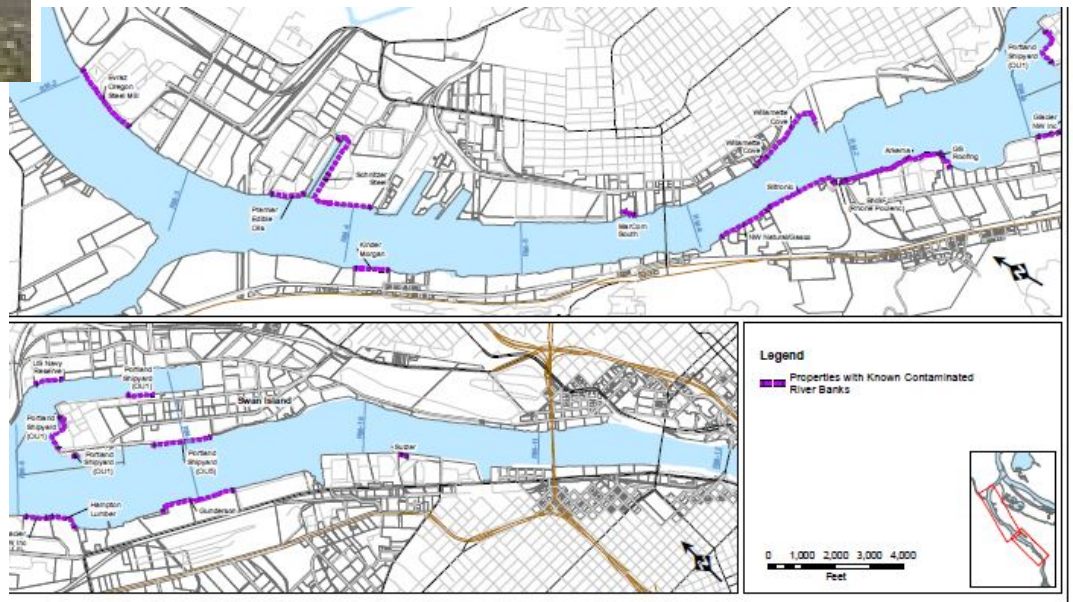

Figure 9. River Bank Areas

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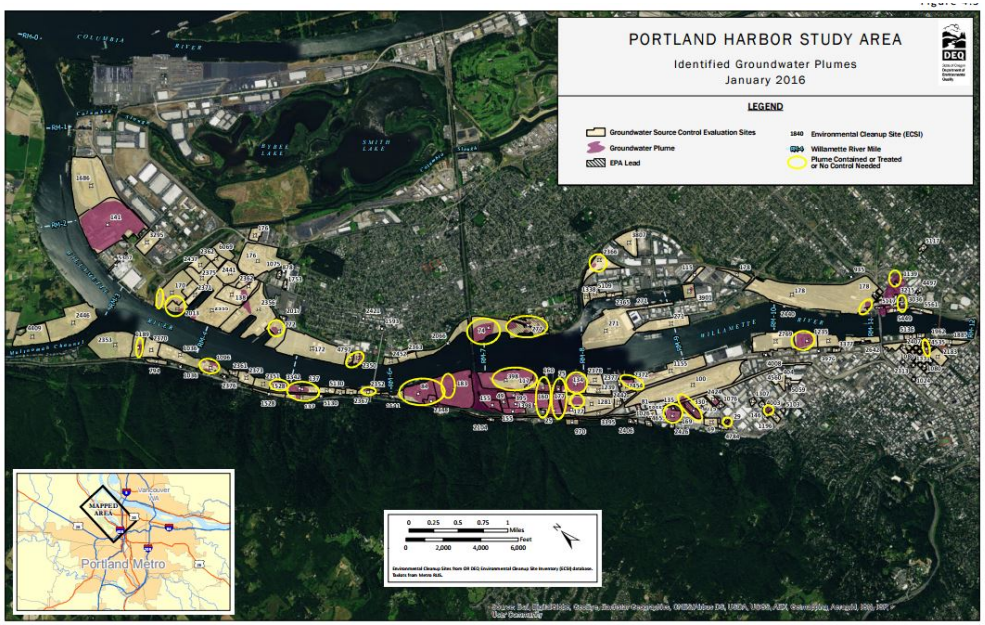
SPECIFIC CASES: RIVERBANKS (CONT.)

- Per ROD, §14.2.5 and § 14.2.9.5:
  - Some may be remediated in conjunction with in-water remedial action
    - Engineered caps or vegetation with beach mix
    - Excavation if NAPL or Principal Threat Waste that cannot be reliably contained
    - Minimizing adverse impacts to riparian habitat
  - Others "subject to this ROD" (that are adjacent to contaminated in-river shallow areas) may be remediated under DEQ oversight prior to in-water remedial actions
  - Others, not adjacent, remain subject to DEQ source control lead

SPECIFIC CASES: GROUNDWATER

- "Stranded plumes" addressed as part of in-water actions (e.g. reactive caps)
  - Should be determined as of time of remedial design
- Remainder of contaminated groundwater issues addressed by DEQ-led source control actions



DEQ 3/16 Milestone Report

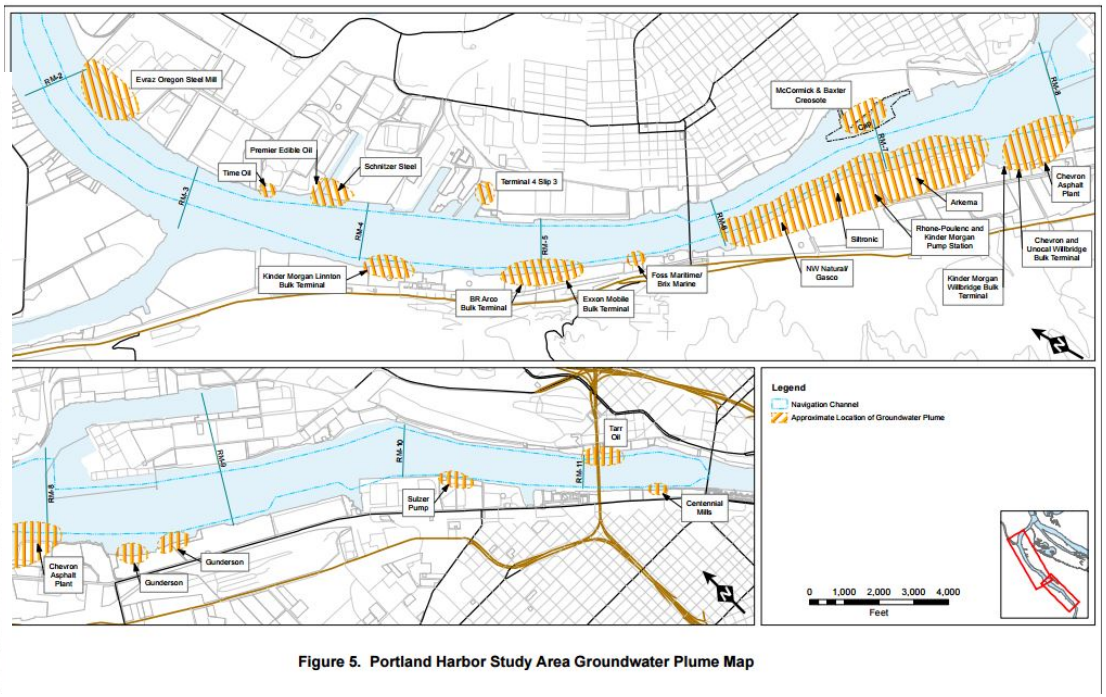


Figure 5. Portland Harbor Study Area Groundwater Plume Map

EPA Proposed Plan

Specific Cases: Integration with Permitted Discharges, e.g. stormwater

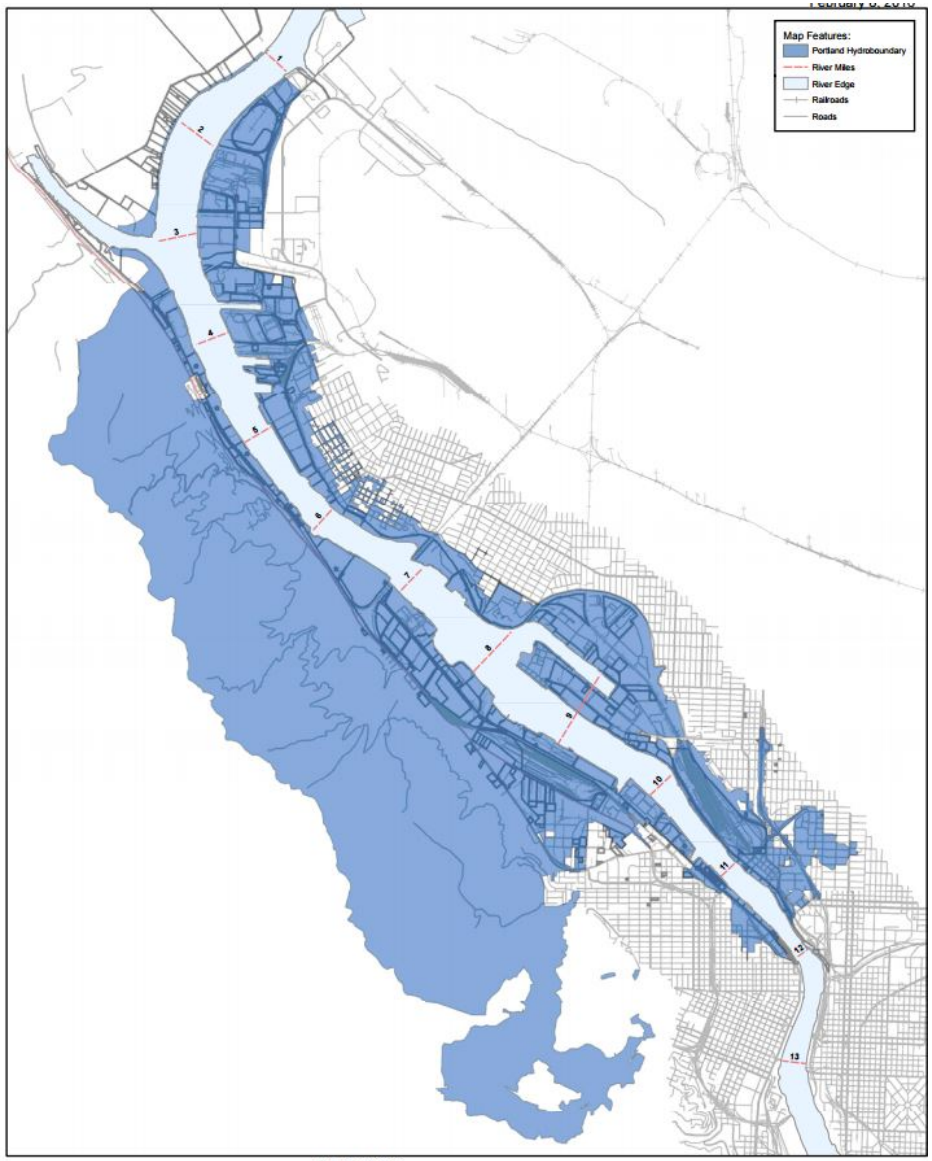
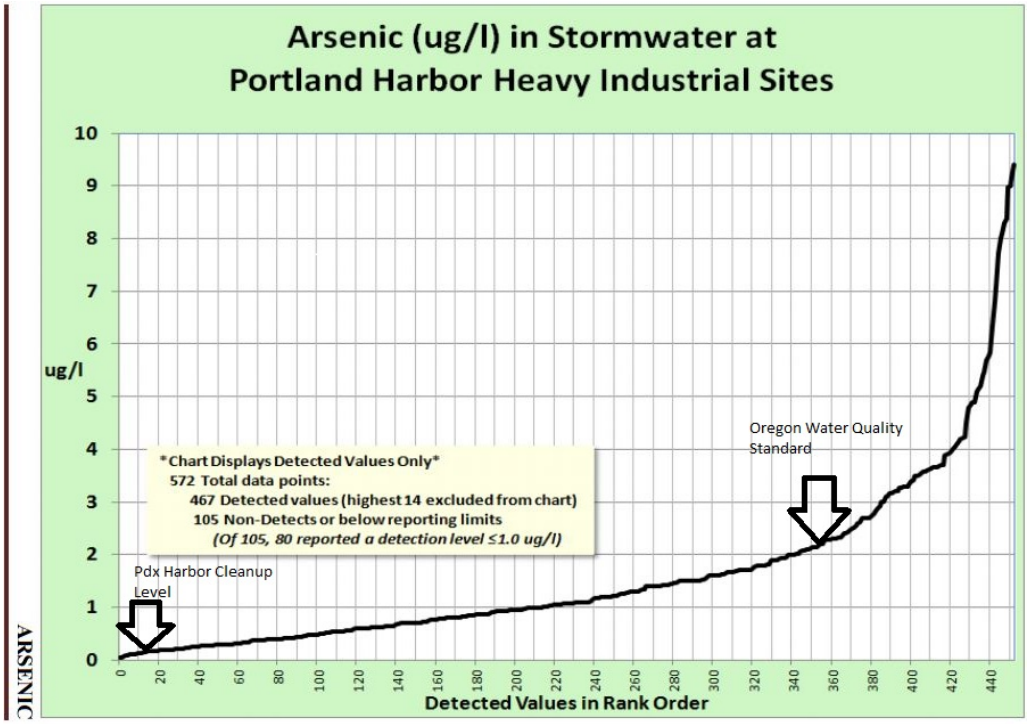


Figure 3.2-1
Portland Harbor RI/FS
Remedial Investigation Report
Stormwater Basin Hydroboundary



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SPECIFIC CASES: INTEGRATION WITH PERMITTED DISCHARGES (CONT.)

- CERCLA 107(j) ("federal permit shield"):

  "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."

- 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 . . ."

SPECIFIC CASES: INTEGRATION WITH PERMITTED DISCHARGES (CONT.)

- State Cleanup rules/practices generally allow state agency to address a specific upland source, but not the NPDES-permitted stormwater discharge itself
- Oregon has a specific exception:
  - 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."

SPECIFIC CASES: INTEGRATION WITH PERMITTED DISCHARGES (CONT.)

- With respect to DEQ's application of that exemption, suggested decision criteria:

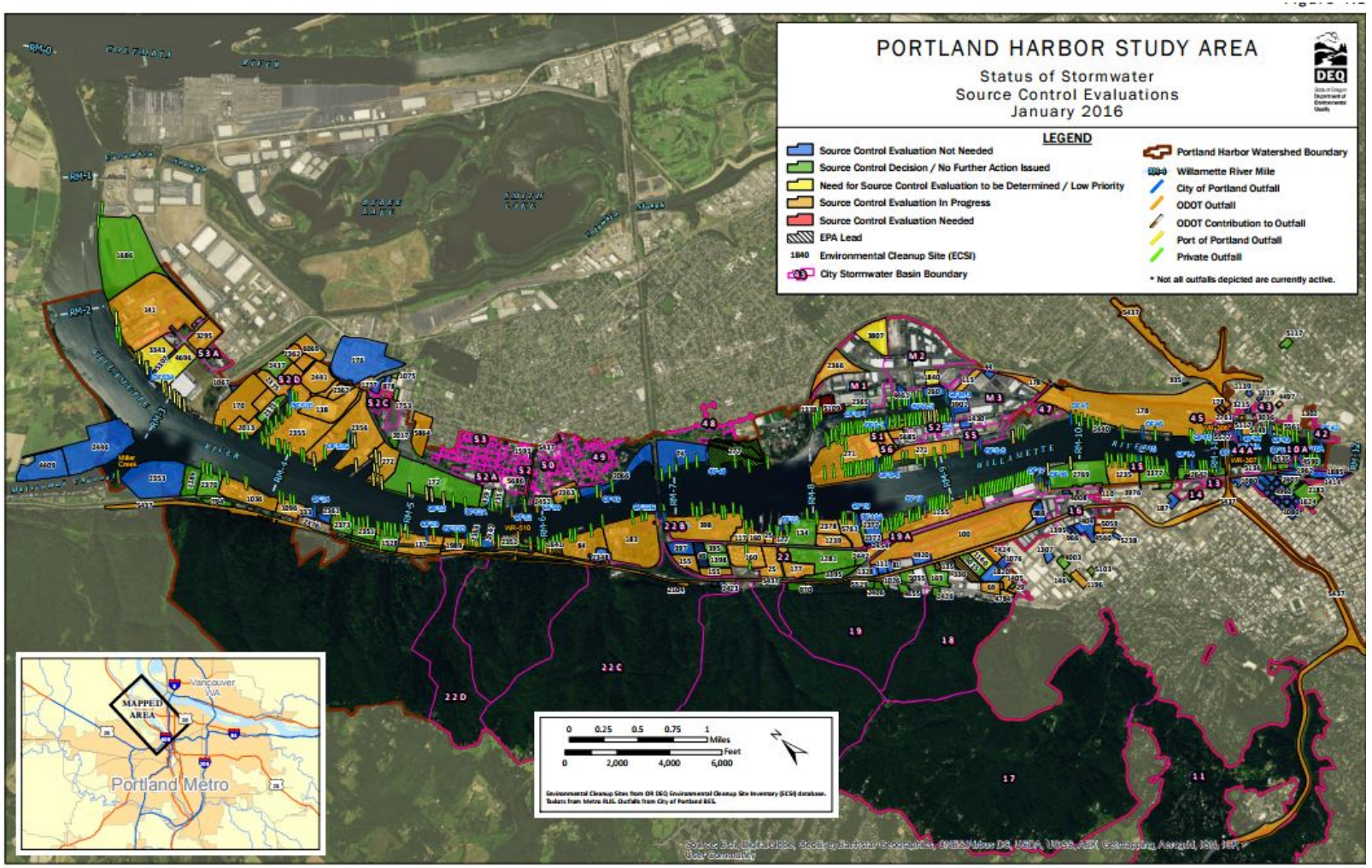
  Is this a source that only needs to be controlled at select individual sites, or is it something that needs to be controlled for all dischargers in the Site? That is,

  - IF Discrete elevated upland soil contamination being transported in stormwater at one site => Cleanup program
  - IF General industrial-level contaminant discharges, e.g. lower level PCBs in industrial, municipal and transportation stormwater => NPDES program and, if necessary, TMDL program

SPECIFIC CASES: INTEGRATION WITH PERMITTED DISCHARGES (CONT.)

- DEQ stormwater evaluation tools allow to use best tool for the job
  - Have tool to determine whether a discharge is “typical” or “atypical”
  - “Atypical” discharges addressed under Cleanup Laws
  - Typical discharges generally addressed as group under CWA NPDES permits

Specific Cases: In-Water Remedies Adjacent to Upland Sites



DEQ 3/16 Milestone Report

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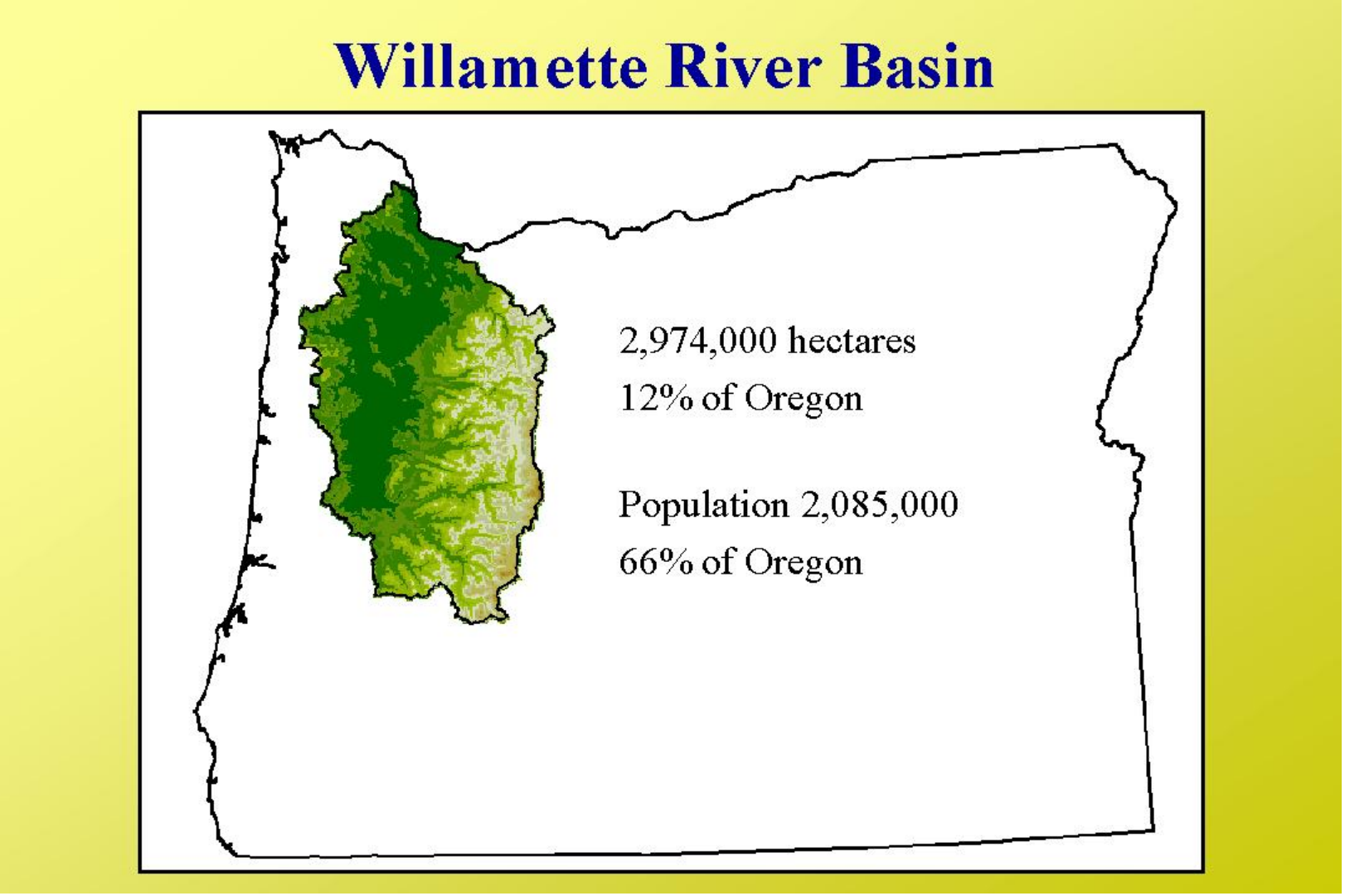
SPECIFIC CASES: IN-WATER REMEDIES ADJACENT TO UPLAND SITES (CONT.)

- Per EPA 12/7/16 letter, "EPA may manage the in-river cleanup by dividing the Site into work areas *[operable unit equivalents?, or DEQ's "geographic areas" from Milestone Report?]* for purposes of design and construction activities based on factors such as prioritization of significant source areas, logistics and efficiency. . . Additionally, . . . there may be an opportunity for ODEQ to perform certain technical oversight functions, in coordination with EPA, at specified areas of the in-river portion of the Site."

Specific Cases: Broader Watershed Issues



Source: Oregon State University, Willamette River Basin Mapping Project

SPECIFIC CASES: BROADER WATERSHED ISSUES (CONT.)

"Although sediment cleanup and related source control efforts will greatly improve water quality in the Site and downstream areas, other efforts in addition to, or coordinated with, Superfund authorities can improve the overall environment of the watershed. By coordinating work between multiple programs, these other efforts will complement the work conducted within the Site. . . **Because the larger watershed contamination is beyond the scope of the Selected Remedy, EPA and the state will coordinate actions under other authorities within the larger watershed that focus on reducing contaminant loading to the watershed as well as improving overall environmental conditions.**

"One component of this strategy includes an effort to identify sources of contamination within the broader watershed. EPA and the state are committed to compiling existing watershed contamination data, identifying data gaps, evaluating the efficacy of existing efforts, and identifying new strategies to reduce contaminant loading in the watershed. These efforts will use all appropriate regulatory authorities, including the CWA and federal and state authorities, and will be conducted in collaboration between EPA, the state, local government, the tribes, and other interested entities, and will build on other current and planned efforts throughout the Willamette and Columbia River watersheds. . . . In addition, Superfund site assessment and sampling efforts to review additional areas beyond the boundaries of the existing Site may be used to identify additional actions to be taken under Superfund or state law."

ROD at 119.

SPECIFIC CASES: BROADER WATERSHED ISSUES (CONT.)

- ??
- Who
- What?
- When?
- What source of funding?

FASTEN YOUR SEAT BELTS . . .

QUESTIONS?

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