What’s the Real State of the Law Regarding SSOs?

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Overview

One Minute Topics

• SSO Definition
• SSO Legal Status
• SSO Control Endpoint (design; elimination)
• Basement Backups – Enforcement trends
• Recombination/Advanced Overflow Treatment
SSO Definition
Definition of SSOs

• SSO NOT defined in CWA
• Only mentioned in 402(q) for grant funding from December 1999 effort to incorporate CSO Policy
  – Made grant funding applicable to SSOs so there would be something in it for all members of Congress....
SSO Definition

• CWA: Discharges to Waters of the US (surface)
• State CWAs: Waters of the State (surface and ground)

• EPA and some states pressing hard to make collection system releases to the ground/private property violations
SSO definition

• Many decrees have compromised
  – Penalties for SSDischarges (actually reach waters of the US (and, maybe, State))
  – No penalties for SSOs (which is defined to include releases that do not reach waters of the US/State)
• Basically, utilities agree in CDs to report all SSOs in return for only being fined for released that actually reach waters of the US/State
SSO Legal Status
SSOs are (Mostly) Illegal

- SSOs are almost always unpermitted discharges

- Unpermitted discharges are violations of the CWA and most State counterpart laws
SSOs are (Mostly) Illegal

- While an SSO may be a violation, you still may have a defense from penalty/injunctive relief
- Be sure to assert “upset” with your 5-day letter
  - EPA’s draft rule announced “named storms”
  - Unforseeable equipment failures, vandalism, etc.
  - Bottom line: Agencies must get a Judge to impose a fine/injunctive relief
    - See Colorado Springs where Court (8/20/09) excused:
      » Vandalism & Contractor Error (11 events)
      » Severe storm of June 22, 2005 (2 events)
      » Equipment malfunction
SSO Control Requirements
Is SSO Elimination Required?

• EPA enforcers seek to make SSO “elimination” an objective of all SSO enforcement actions
  – This is not possible
  – Some communities have agreed to this – unqualified
  – Others have agreed to qualified elimination
    • HRSD: eliminate capacity-related overflows up to the approved regional level of service (TBD 2-10 year design storm)
  – Others massaged this:
    • **Goal** of elimination
    • Eliminate to the extent practicable
    • Minimize to the extent practicable
SSO Control Plan Targets

• Practical reality requires a design storm for sewer remediation programs
  – i.e., 2, 3, 5 or 10-year storm

• Many federal/State enforcement documents require this

• After historically approving such programs, EPA recently balking at approving EXPRESS level of control-based programs
SSO Control Plan Targets

• EPA concerned that it is “authorizing” overflows above the approved design storm

• Utilities may need to recharacterize programs or expressly acknowledge that overflows above the design level are unpermitted discharges
  – Interpretation A: this is ok because fines/penalties should be small for events beyond the agreed/approved LOC
  – Interpretation B: Utility should pay a penalty because they were not required to control to that level of storm event
Basement Backups
Basement Backups

• 2009 Trend: EPA wants more
  – Wants to force utilities to adopt formal basement backup response programs, including cleaning, warranting safety (gas, electric) and paying replacement value for damaged personal property

• Utilities are aggressively seeking to ward this off
  – Upset State law on this STATE issue
  – Make basement backup federal violation
    • Some utilities are already there but vast majority are not
Recombination
Recombination

• If you are poor and “recombination” will achieve greater pollution reduction than other approaches, fight for it

• You may have to propose it as an “interim” measure
  – “Interim” can have long-term meaning in the public utility business
  – Once in place you can demonstrate lack of material additional benefit from more secondary treatment and enormous cost....
“Recombination”

• No one “blends” anymore

• NB:
  – “Chemical” is now “chemistry”
  – “incinerator” is now “thermal recovery facility”
  – “blending” is “advanced wet weather treatment” or “recombination” or ______________???