

CERCLA/Superfund Liability Due to CSOs

QUESTION

The following question was sent to members of NACWA's Legal Affairs Committee on April 6, 2009:

A public agency member reports that its regulatory authorities are considering applying CERCLA/Superfund liability to a local waterway due to pollution from CSOs, and would like to know if any other NACWA members have dealt with a similar situation.

RESPONSES

The following responses were received from members of the committee:

Response 1: Although I haven't run into the situation where CERCLA liability has been imposed on a CSO discharge, I have dealt with the federally permitted release authority under CERCLA. The CERCLA protection is pretty broad as Section 101(10)(B) deals with discharges resulting from circumstances identified and reviewed and made part of the public record with respect to an NPDES permit. Also, section 101(10)(C) addresses continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under CWA section 402.

Response 2: Not from CSOs. There are waterways that have been CERCLA "listed." CERCLA site listings must, of course, be predicated on the presence of CERCLA "Hazardous Substances," a defined term. It doesn't focus in the abstract on use impairments. My initial thought is that bacterial contamination doesn't cross that legal hurdle. If there are toxics as the result of CSOs, that's addressable under CERCLA. And state programs may be broader.

Response 3: Regarding the superfund designation of a CSO receiving water, that is possible, particularly if there were industrial metals (or other) sources discharging high volume and/or high strength waste entering the public sewer system proximate to a CSO outfall. During wet weather a good bit of such industrial contribution could end up exiting the system at the CSO outfall. However, I think this would be a very rare situation.

My bet would be that long-standing direct industrial discharges and/or storm water runoff are more likely responsible for the contamination, but CSOs may certainly have contributed. I think the San Francisco Bay Copper issue (from car brake pads/dust) might be something to consider in this context.

Response 4: In 1989, Tacoma, Washington was named a CERCLA liable party for sediment contamination attributed to municipal stormwater discharges in the Thea Foss and Wheeler-Osgood Waterways (and at other locations in the Commencement Bay Nearshore/Tideflats Superfund Site). The one distinction is Tacoma's storm drain system is an MS4, and not a combined discharge. The key constituents of concerns identified by EPA for the sediment cleanup included certain metals (zinc was one), Bis(2-ethylhexyl)phthalate, and PAHs. The City completed the remedial action phase of the cleanup in 2006 under a Consent Decree with EPA. The City is now conducting the O & M phase. The total cost of the cleanup to date is approximately \$100M. Seventy-five plus parties settled their Superfund liability for this contamination by making cash-

out settlements. The City and a group of three private utility companies conducted the cleanup work.

EPA's webpage dedicated to this cleanup can be found at <http://yosemite.epa.gov/r10/cleanup.nsf/346a4822da38ae7088256da6005fc923/f20d5533cce7a46088256c68007af323!OpenDocument>. I'm also including a link to the 2007 Findings and Recommendations of the Sediment Phthalate Work Group, which included EPA, the state Department of Ecology, and the cities of Tacoma and Seattle. It highlights the difficulty (and in some instances, the impossibility) of controlling certain sources of pollutants and is, I think, a must read for any governmental stormwater manager. The study can be found at:

Sediment Phthalate Work Group – Summary of Findings and Recommendations, September 2007, at:

www.ecy.wa.gov/programs/tcp/smu/phthalates/phthalates_hp.htm

Response 5: With respect to situation number 2, below, the municipality could very well have a "federally permitted release" exemption from CERCLA for its CSO discharges, and perhaps other issues to raise to fend off a CERCLA approach to the waterway, depending on the specific facts.