

# Hot Topics in Clean Water Law

March 18, 2015



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# Environmental Compliance for Wastewater Utilities: *understanding the mundane but essentials*

NACWA Hot Topics in Environmental Law

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MARCH 18, 2015



ENVIRONMENTAL & NATURAL RESOURCES

## What is effective compliance?

“Compliance is  
a **culture**, not  
just a policy”

- Brent Snyder, DOJ



**What are the  
risks of  
noncompliance?**



**Environmental harm/  
employee injury**

**License to operate**

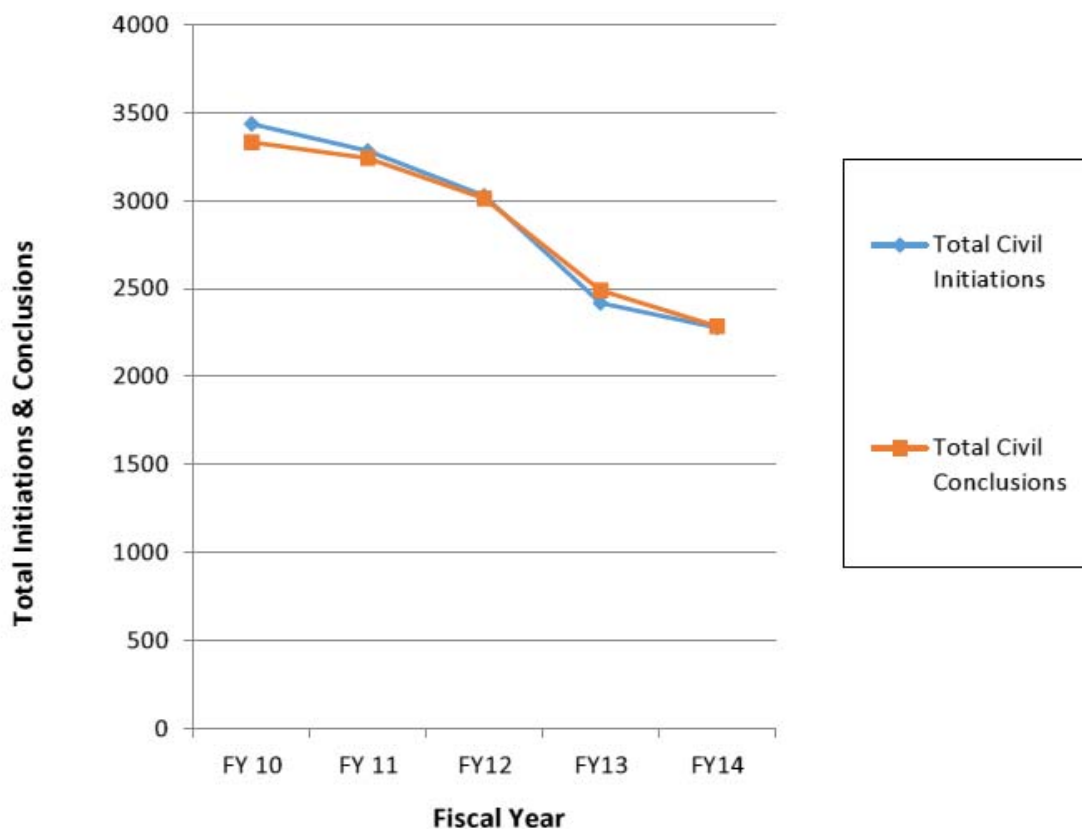
**Civil/criminal  
penalties**



# FY2014 Enforcement and Compliance Annual Results

## Civil Enforcement Case Initiations and Conclusions

FY 2010 – FY 2014



➤ In FY 2014 EPA continued to pursue larger more complex, risk-based enforcement cases leading to significant environmental and health gains, but lower numbers overall.

➤ In FY 2014, EPA initiated a total of **2,278** civil judicial and administrative cases.

➤ In FY 2014, EPA concluded **2,286** civil judicial and administrative cases.

➤ Case numbers in FY14 were also affected by the shut down at the beginning of the year, in addition to budget reductions.

Data Source: Integrated Compliance Information System.

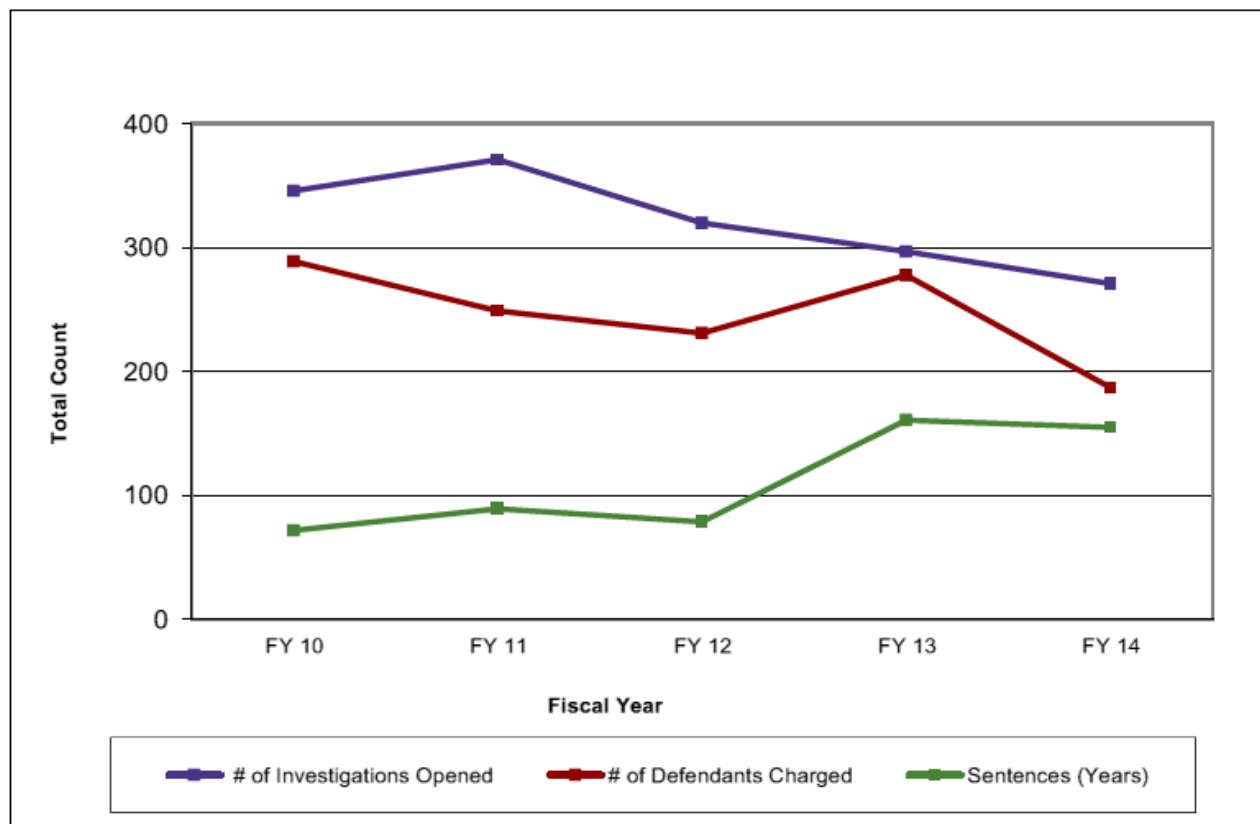
Prepared by: OC/ETDD/DSIMB

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# FY 2014 Enforcement and Compliance Annual Results



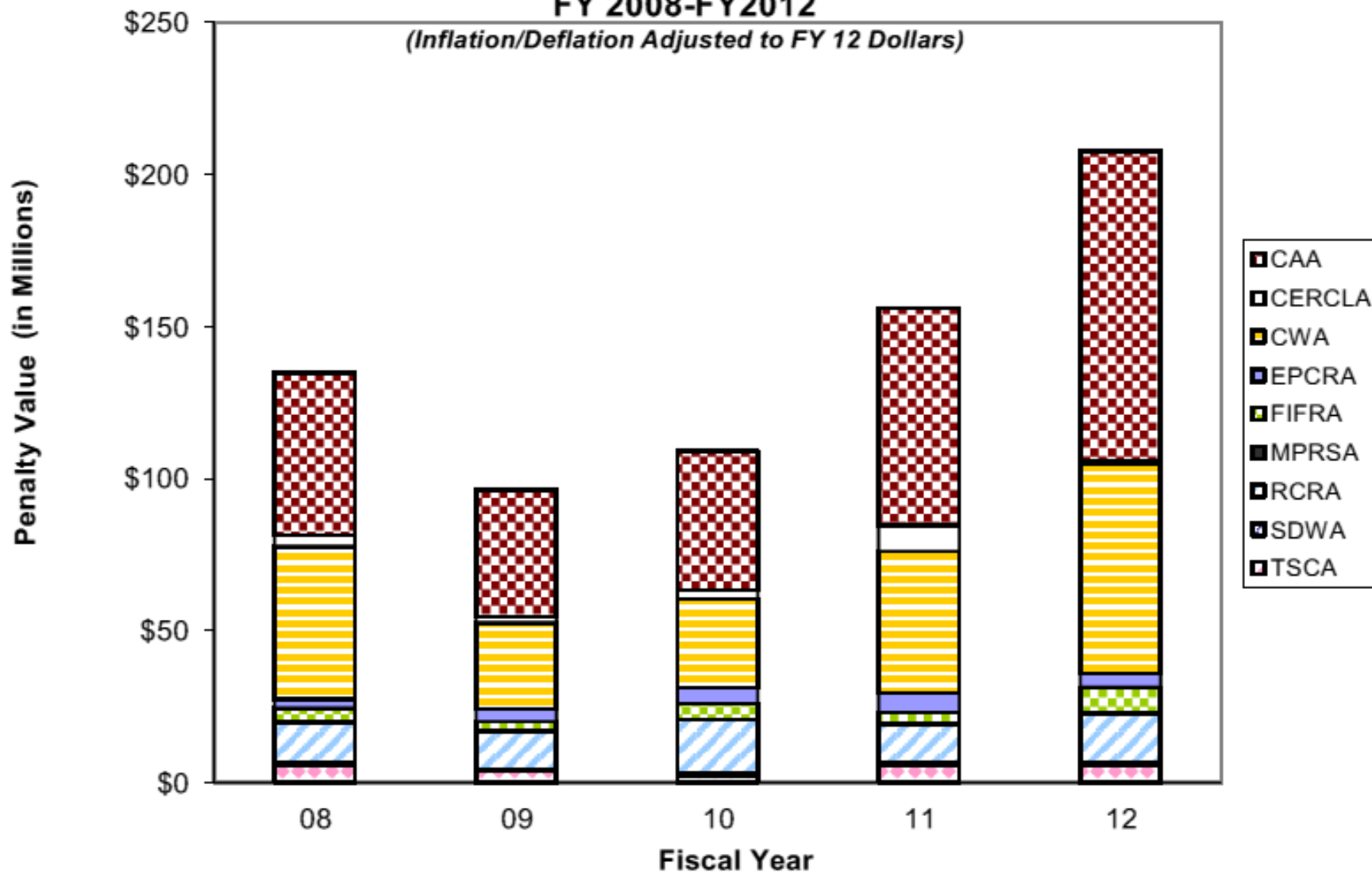
## Criminal Enforcement Environmental Crime Cases Opened, Defendants Charged, and Sentencing Results – Years of Incarceration FY 2010 – FY 2014



- The criminal program continued in FY14 to focus on complex cases that involve a serious threat to human health and the environment or that undermine program integrity, resulting in fewer investigations overall.
- The focus on large and complex cases has led to continued high sentences in FY14, despite the drop in defendants charged.

**Administrative and Civil Judicial Penalties Assessed (with  
Statutory Breakout)  
FY 2008-FY2012**

*(Inflation/Deflation Adjusted to FY 12 Dollars)*



# Laws applicable to the **water** sector

Clean Water

Hazardous Chemicals

Clean Air

Hazardous Waste  
(RCRA)

Contaminated Sites  
(CERCLA/Superfund)

State Laws



## Categories of Compliance

### BIG Infrastructure

- EPA National Priority: Keeping raw sewage and contaminated stormwater out of the Nation's waters

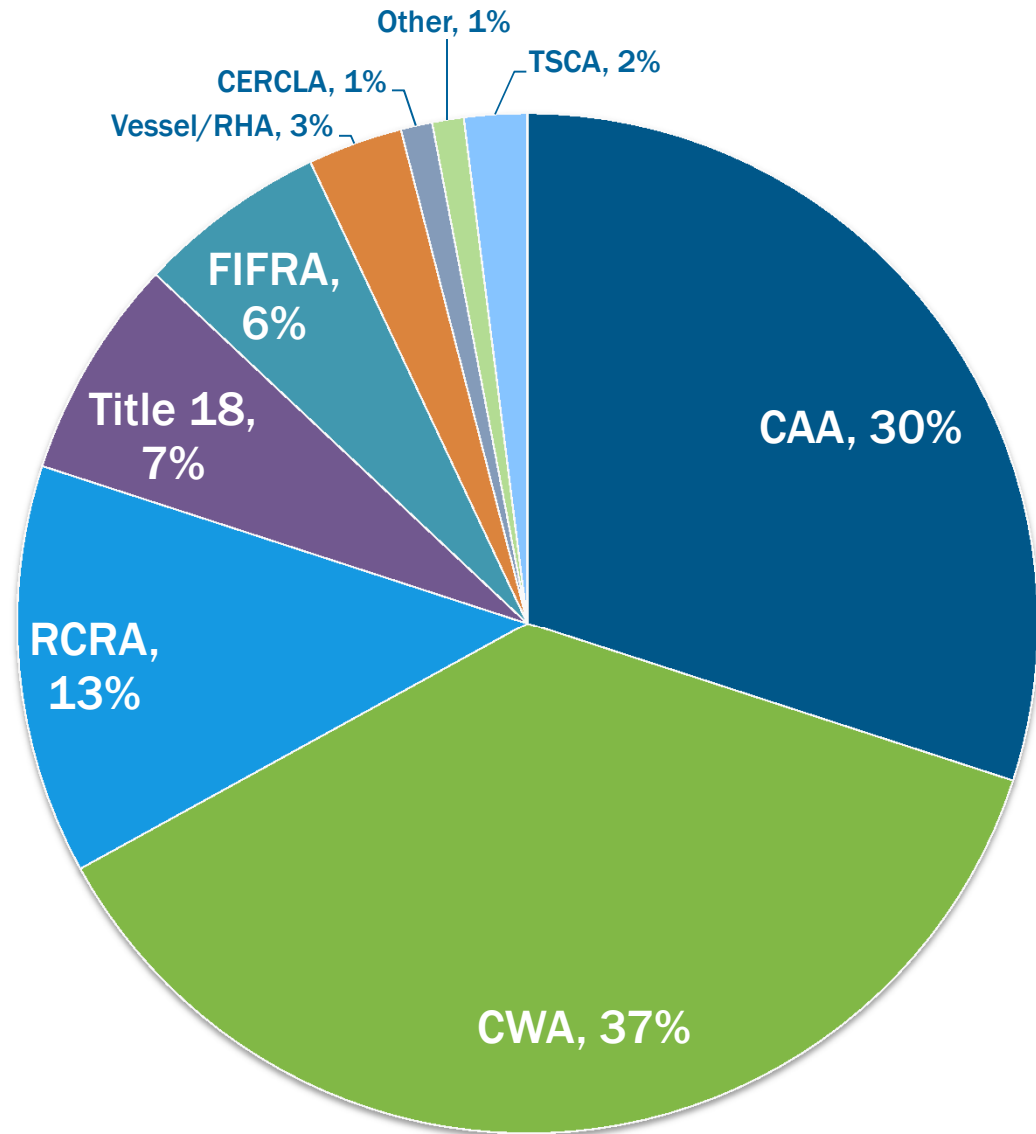
### Daily Operations

# EPA/DOJ Consent Decrees 2013-2015

Consent Decree	EPA Region	Violations	Total Costs	Civil Penalty	EJ
Harrisburg, PA 2/11/15	3	CSO	\$82M	Deferred	Yes
Fort Smith, AR 1/5/15	6	SSOs	\$255M	\$300K + \$400K SEP	Yes
Limo, OH 11/20/14	5	CSO/SSOs	\$147M	\$49K + \$218K SEP	Yes
New Orleans, LA 7/17/14 (3 <sup>rd</sup> Amended)	4	SSOs	\$55M	\$1.5M	Yes
East Bay MUD, CA 7/28/14	9	SSOs	\$1.5B	\$1.5M	No
Mishawaka, IN 2/12/14	5	CSO	\$132.1M	\$28K	No
West Haven, CT 12/19/13	1	SSOs	\$17.1M	\$125K	No
Shreveport, LA 11/13/13	4	SSOs	\$342M	\$650K	Yes
Starkville, MS 10/29/13	4	SSOs	N/A	\$70K	Yes
Columbia, SC 9/10/13	4	SSOs	\$750M	\$476K + \$1M SEP	Yes
San Antonio, TX 7/23/13	6	SSOs	\$1.1B	\$2.6M	No
Vicksburg, MS 7/23/13	4	SSOs	\$15.6M	\$17K	Yes
Cape Fear, NC 7/11/13	4	SSOs	\$40M	\$300K	No
Miami-Dade 6/6/13	4	SSOs	\$1.6B	\$978K	No
Seattle, WA 4/16/13	10	CSO/SSOs	\$860M	\$750K	Yes
Kansas City, KS 3/22/13	7	CSO/SSOs/MS4	\$2.5B	\$600K	Yes

**Note:** SSOs include overflows or releases of wastewater that reach navigable waters; overflows or releases of wastewater that do not reach navigable waters; and wastewater backups into buildings that are caused by blockages or flow conditions in a sanitary sewer other than a building lateral. Wastewater backups into buildings caused by a blockage or other malfunction of a building lateral that is privately owned is not a SSO.

# What EPA Office of Criminal Enforcement investigates



# Clean Water Act (Section 402/404)

## Monitoring/Reporting Violations

- Failure to submit reports or late reports
- Submitting incomplete monitoring reports
- Inadequate monitoring records kept
- Failure to report bypasses/SSOs/CSOs
- Failure to notify of chemical additives

## Chain of Custody/Recordkeeping

## Sampling

## Laboratory QA/QC (standard methods)

- Failure to calibrate meters (pH, chlorine, etc.)

## Wetlands dredge/fill permit

# CWA Stormwater

Failure to submit NOI/NOT for coverage

Failure to develop a SWPPP Plan

Inadequate SWPPP

- Not updated
- No training
- Not site specific
- Inadequate BMPs

# CWA Compliance Sampling

CWA compliance premised on a system of self-monitoring and reporting

- Unlawful for any person “who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained” under the NPDES permit.

“Representative Sampling”

Avoid the appearance of:

- Selective sampling
- “Killing” a bad sample
- Adjusting operating conditions contemporaneously with compliance sampling

Reduce permit gray areas and minimize situations involving field discretion

# Chemical Use/Storage

## EPCRA Tier II

- Failure to include chemical (e.g., diesel fuel, heating oil, silica (sand), lime, battery acid, hydraulic fluids)

## State bulk chemical requirements

# RCRA

## Hazardous Wastes

- Failure to have generator ID
- Improper status (CESQG/SQG/LQG)
- Failure to submit LQG annual report for LQG (often during from episodic disposal)
- Improper storage (off spec/old chemicals)

Universal Waste (e.g., fluorescent lamps)

UST Recordkeeping



# CAA

## Emergency generators

- Run times
- Failure to maintain logs

## Air permits

- Boilers / Heaters / Portable Equipment

## Asbestos NESHAP

## RMP/PSM (e.g., chlorine)

- Failure to update plan
- Inadequate training/records/documentation
- Failure to implement
- Failure inspect

# Handling **conflicts**

What happens in a situation  
when a State DEQ and EPA  
tell you different things?

Who wins, who loses?



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Federal law  
serves as the  
minimum or floor.

State laws can be  
and often are more  
stringent.

EPA overfile action.

# Examples of Best Practices

Auditing  
Self-Disclosures

EMS/Legal  
Registry

Onsite  
Compliance  
Documents

EHS Training

External  
Outreach

Permit Reviews  
(T&Cs)

Ethics/  
Compliance  
Hotline

Incident Review  
Calls - Root  
Cause Analysis

Accountability/  
Deterrence

Management of  
Change

SOPs  
(\*sampling)



# Thank you!

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# LEGAL ISSUES ASSOCIATED WITH SEDIMENT REMEDIATION

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Mark A. Thimke

NACWA's Hot Topics in Clean Water Law Web Seminar Series

March 18, 2015

# Introduction

- Sediment contamination/urban waterways – long-standing, difficult issue
- High costs, social issues and competing uses
  - Navigation/shipping
  - Fishing resources
  - Recreational
- Sources of contamination – often 50 to 100 years old
- Multiple parties, governments, mixed legal authorities
- Long lead times before action occurs; frustrates public and can lead to high transaction costs
- Lack of comprehensive approach can lead to –
  - Spot cleanups
  - Recontamination
  - Limited effectiveness

# Efforts to Address

- Water Resources Development Act (WRDA)
  - United States Army Corps of Engineers based appropriation
- Clean Water Act – impaired water bodies § 303(d)
  - Total maximum daily load (TMDL)
  - Sediment loading calculations
  - Limited use of TMDLs as tool to compel remediation
  - May be useful for addressing recontamination concerns
- Great Lakes Restoration Initiative
  - Great Lakes focused program on Areas of Concern (AOCs)
  - Great Lakes Legacy Act (GLLA) – 43 AOCs, 26 within United States
  - “Works” not a grant program
  - Toledo, OH; Milwaukee, WI; Ashtabula, OH; Sheboygan, WI

# Efforts to Address – Superfund

- Traditional cleanup/enforcement program
- Used at major river/harbor sites and urban waters
  - Hudson River
  - Fox River
  - Portland, Oregon
- Process oriented; transaction costs high
- “Risk-based” focus as opposed to comprehensive solution
- Time consuming process – sites can take over 20 years to complete
- But eventually achieves a result; question if best or most comprehensive
- Gowanus Canal, New York City – recent example
- Variations on a theme – Superfund Alternatives
  - Voluntary Superfund; no NPL listing
  - Greater flexibility in “design” of remediation program
    - Reduces transaction costs
    - Greater emphasis on conducting work
  - Reserved for cooperative situations, in contrast to litigation prone Superfund sites



# Involvement of Water-Related Utilities – Superfund

- Liability under Superfund – broad
  - Owner/operator
  - Arrangers for disposal
- CSOs
  - Discharge source of urban run-off
  - Contamination – historic PCBs, PAHs, heavy metals
  - Sediment within sewers – sources of contamination
  - Owner of storm water system – arranger liability
    - U.S. v. Washington State Dep't of Transportation (W.D. Wash. 2010)
    - Ohio Valley Env'l Coalition, Inc. v. Fola Coal Co. LLC, No. 2:13-5006 (S.D. W. Virg., Jan. 27, 2015)
- Direct discharge from facilities

# Involvement of Water-Related Utilities – “Federally Permitted Release”

- Permit exemption
  - CERCLA § 107(j) – “[r]ecovery by any person (including the United States ...) 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

- Discharge complies with NPDES/state permit
- Discharges resulting from circumstances identified and reviewed, made part of public record **and** subject to condition in permit
- Continuous/anticipated intermittent discharges from a point source, identified in permit or permit application caused by events within scope of treatment system
- Legislative history – Senate Report No. 848 at 49
  - Supports a narrow interpretation
  - Permit/rule must be “specifically designed to limit or eliminate [release] of a hazardous substance ... to qualify for federally permitted release exemption”
- Unanticipated releases – accidents/malfunctions generally do not qualify for federally permitted release exemption; 67 Fed. Reg. 18899 (Apr. 17, 2002)

# Involvement of Water-Related Utilities – Superfund Summary

- In summary –
  - Superfund liability arises because Superfund is intended to address release of hazardous substances “not **explicitly** regulated under other statutes” – Journal of Water Pollution Control Federation (Jan. 1988)
  - Superfund liability
    - Discharges that occurred when there was no discharge permit
    - Not expressly allowed by the permit or contemplated by the permit
    - Exceeded permit limits
    - 24 Boston College Env’l Aff’rs Law Review 821,860 (Aug. 1, 1997); see U.S. EPA NPL Listing, 35th Avenue Site, Birmingham, Alabama (2015) (listing based on excess air emissions not within scope of air permit)

# Common Law Claims

- Also of emerging interest – common law claims
- Compliance with permit is not bar to a cleanup claim
  - *Freeman v. Grain Processing Corp.*, No. 13-0723 (Iowa Sup. Ct. Jun. 13, 2014)
  - *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3rd Cir. 2013)
- Federally permitted release exemption allows state law claims – nuisance, for example
- Application to sediment issues
  - In many states, ownership of bed of streams/rivers is with the riparian owner
  - Ownership of bed of artificial waterways is private ownership detached from riparian
  - Ownership subject to public trust but still ownership
  - Contamination of waterway bed same as contamination of upland property

# Approach to Sediment Remediation

- Movement toward comprehensive remedies
  - Removal/remediation of sediment
  - Addressing recontamination sources
- February 12, 2015 U.S. EPA HQ memo – Water, Superfund and Enforcement Collaboration–Contaminated Sediments
  - Recognition that cleanup without collaboration on recontamination limits effectiveness
  - Encourages use of Clean Water Act tools in conjunction with Superfund cleanup
    - TMDLs to protect remedy
    - Direct discharge limits set at levels protective of remedy
    - Settlements that are cross-program
    - See Portland Harbor related discharge limits – taking into account recontamination concerns
  - Significance of February 12, 2015 memo not so much in specific U.S. EPA actions but in U.S. EPA's recognition of cross-program issues

# Sediment Remediation – Models for Comprehensive Approach

- Gowanis Canal – enforcement model
  - Record of Decision (2013)
  - Sediment – removal/capping
  - CSO control measures
- Anacostia River
  - Anacostia Watershed Restoration Partnership – [www.anacostia.net](http://www.anacostia.net)
  - “Aggregation model” aimed at using multiple authorities in coordinated manner
  - “The big lesson from Anacostia is the integrated approach” – Nagaits Wahba, World Bank (June 2014)

# Innovative Example of Coordinated/ Cooperative Approach

- Burnham Canal – Milwaukee, WI
- Background
  - Part of historic Milwaukee Harbor canal system
  - Built in 1880s
  - Now, no longer used for navigation/shipping; area is lower income and several Brownfield properties
  - On edge of revitalization zone in city
  - Historic CSOs into canal and neighboring industrial operations
- Contaminated sediment
  - Substantial amounts – 11 feet in some locations
  - PAHs/heavy metals – typical urban sediment contamination
  - Superfund Alternatives site
  - Record of Decision issued by U.S. EPA called for sand cap



# Innovative Example of Coordinated/ Cooperative Approach

- Responsible party approached Milwaukee Metropolitan Sewerage District (MMSD) to work out comprehensive reuse plan
- Taking broader view
  - Cap site with “improved cap”
  - Filling in canal (not used for navigation)
  - Repurpose canal as a wetland for storm water control and urban fish habitat
  - More permanent remedy, supports revitalization plans, addresses storm water control

# Burnham Canal



# Innovative Example of Coordinated/ Cooperative Approach

- Lessons
  - Proactive can take more time
  - Need a governmental entity to partner with (MMSD in this case)
  - Regulators – U.S. EPA/states greater willingness to embrace the approach
  - Addresses longer term issues
  - While small scale here, serves as a prototype of how to achieve a successful urban sediment site remediation

# Questions?

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