

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

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NACWA Law Conference 2009

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 _____???