

A Walk through an Enforcement Action MECC – Oct. 26, 2021

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Overview

- Provide a Clean Water Act-related hypothetical
 - Outlined in real (-ish) time
- Evaluate actions and considerations at each interval
 - On-the-ground perspective
 - Legal perspective
 - Other practicalities
- Encourage questions/comments/thoughts from audience as we progress through the action

Scenario - Clean Water Act

- Day 1: 10:22 a.m.
- You receive a call that a line ruptured and is creating a “river of chemical” that is headed offsite.
- The site is right on the border of Kansas and Missouri



Now What?

- Have you triggered a reporting requirement?
 - How do you figure that out?
 - Do you have a release reporting tool?
- What is the RQ? Are there other reporting requirements?
 - State? Federal? Local?
 - “Immediate” reporting required (i.e., within 15 minutes) by you
 - Are there any exemptions from reporting requirements?

Now What?

Entity	Circumstances	Timing
National Response Center – Oil	<ul style="list-style-type: none"> •Violate applicable water quality standards; •Cause a film or "sheen" upon, or discoloration of the surface of the water or adjoining shorelines; or •Cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. 	Immediately upon knowledge
National Response Center – Haz Substance	Exceeds applicable RQ	Immediately upon knowledge
State Emergency Response Commission and LEPC	Release exceeds RQ of EHS or hazardous substance	Immediately (verbal) Written follow-up as soon as practicable
Chemical Safety Board	Stationary source must report accidental release resulting in fatality, serious injury or substantial property damage	Within 30 minutes of NRC notification or within eight hours

Now What?

Entity	Circumstances	Timing
Missouri DNR OR NRC	Hazardous substance emergency per Spill Bill, includes RQ, more than 50 gallons of petroleum	Person having control over hazardous substance must notify at earliest practical moment upon discovery
KDHE	Spills that impact (are detrimental to) the soil or waters of the state, hazardous materials > RQ, more than 100 gallons of oil/petroleum on land or that creates a sheen in water of the State	Owner or person responsible must report

- Does the spill itself violation anything?
 - SPCC Plan?
 - SWPPP?
 - Consent Decree?

What would you do?

- Would you report to the National Response Center as a precaution?
- Would you report to the States? Localities?
- How did you arrive at this decision?



United States Coast Guard
National Response Center

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Anyone witnessing an oil spill, chemical release or maritime security incident should call the NRC hotline at 1-800-424-8802.



What else should you be doing now?

- Contain the spill
- Evacuation
- Call OSRO contractor, if necessary
- Call your lawyer
- Call your technical consultant and evaluate if they're needed on site immediately, or have them on standby to help with calculations, etc.
- Evaluate whether there is monitoring that can and should be done to confirm impact
- Other considerations
 - Media
 - Insurance
 - Communication with Board/upper management

Clean Water Act

- Day 1: 10:57 a.m.
- You learn the spill was a petroleum product and get another call that the plume has left the site and is heading to a dry ephemeral creek bed on the Missouri side with a visible high water mark
- The creek bed is currently dry.



Now What?

- Is the dry creek bed a WOTUS? What is a WOTUS these days?

The agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until further notice.

40 CFR 230.3(s)

The term waters of the United States means:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- a. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

- b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

- c. Which are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

6. The territorial sea;

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

What would you do?

- Would you report to the NRC now?
- Would you report to the either state now? Any localities?
- Would your answer change if the creek had standing water in it from a recent rainfall? What if rain was projected?

Clean Water Act

- Day 1: 2:33 p.m.
 - Missouri state inspectors arrive at the site after seeing the site on the news and say they want all your data and investigation report
- Day 1: 7:15 p.m.
 - All available product has been vac'd up and the site is transition from emergency response to remediation
 - The state is gone
 - Calm is restored
- Days 2-14
 - Perhaps that was it ...



Clean Water Act



- Day 15:
 - You receive an information act from the State of Kansas giving you 15 days to respond
- Day 27:
 - You receive a Section 308 information request from EPA Region 7 giving you 30 days to respond

Now what?

- Which agency has jurisdiction?
 - Does the state have jurisdiction?
 - Does EPA have jurisdiction?
- What is your strategy for dealing with both agencies?

Clean Water Act

- Day 45:
 - You and your team meet with EPA and appear to convince them that the dry creek bed was not a WOTUS, so there is no need to respond to the 308 request
 - You have already responded to the state's information request and they appear to be satisfied. You believe they will be reasonable.
- You're hitting it out of the park.



Clean Water Act

- Day 92
 - You receive an NOV from EPA alleging failure to report the release to the NRC.
 - There is no penalty number given and EPA invites you to request a meeting within 10 days or they will pursue additional enforcement.

What would you do?

- Do you request the meeting?
- Who should attend?
- How do you prepare?
- What else are you thinking about?

Clean Water Act enforcement

- Day 117
 - You meet with EPA and they explain, in general terms, that they've gone through their penalty policy and given the gravity of the violation, size of your company, harm to the environment and other factors they have calculated a penalty of \$278,000.
 - EPA is willing to reduce the penalty to \$146,000 provided that the company agrees to injunctive relief in the form of site wide containment (e.g. put a spill page on the website and every time there is a release, agree to post it on the public page).
 - EPA also asks if the company is interested in a Supplemental Environmental Project to offset part of the penalty – KIDDING

Clean Water Act enforcement

CAA Section	Penalty as-promulgated	Current penalty (occurred after 11/2/15; assessed after 1/15/18)
§ 1319(d) – civil penalties	\$25,000	\$55,800
§ 1319(g) – admin penalties	I: \$10,000/\$25,000 II: \$10,000/\$125,000	I: \$22,320/\$55,800 II: \$22,320/\$278,995
§ 1321(b)(6) – admin penalties	I: \$10,000/\$25,000 II: \$10,000/\$125,000	I: \$19,277/\$48,192 II: \$19,277/\$240,960
§ 1321(b)(7) – civil penalties	A: \$25,000 (or \$1,000/barrel) B: \$25,000 C: \$25,000 D: \$100,000 (or \$3,000/barrel)	A. \$48,192 (or \$1,928/barrel) B. \$48,192 C. \$48,192 D. \$192,76 (or \$5,783/barrel)

Clean Water Act enforcement

- What is the cost of the proposed injunctive relief?
- What are other cost-considerations
- What discussions are you having with management?
- **SEP? Amount of credit, time, etc.
- Do you have to disclose to SEC in upcoming filings?

Clean Water Act, Clean Air Act ...

- Day 118
 - You meet with management to give them a report on the meeting with EPA and the first question is why didn't we report to the NRC on the day of the event?
 - Management thinks EPA's penalty demand is unreasonable and that the injunctive relief won't add any value because they've already added secondary containment in the area
 - They want to "fight" this one.

What do you do?

- Are you going to fight?
- What do you consider when evaluating whether to fight?
- Would you propose a counter offer? How would you justify it?
- Did you tell management that the state still has potential claims?

Clean Water Act

- Day 187
 - You are still in negotiations with EPA and they are not moving fast
 - EPA has stated that it cannot provide a binding covenant not to sue in administrative consent orders – i.e., “trust us”
 - You also overheard your accountant talking about changes in the tax code - Fines & penalties not deductible but some injunctive relief may be.
 - You send off a quick note and make yourself another note to make sure safeguards are in place to make sure non-deductible penalties and/or expenses are not deducted

What would you do?

- Do you move forward with the EPA administrative settlement and trust that EPA won't come back for additional injunctive relief later?
- Do you move toward a judicial Consent Decree so you can get the covenant not to sue?

Groundwater ...

- Day 188
 - HSE informs you that the soil sampling that was conducted at the request of the state showed that there is still contaminated soil on and offsite and the state has requested groundwater monitoring.
- Day 197
 - HSE informs you that the groundwater monitoring results are back but there appears to be some anomalies because there are some hits of your chemicals but also other constituents that didn't come from the release on Day 1. The state requested the results within 24 hour of receipt.

Clean Water Act, Remediation

- Considerations
 - Do you give the entire report to the state?
 - Do you report groundwater contamination to EPA?
 - If you don't report, do you notify the EPA case team negotiating your settlement?

Clean Water Act, Groundwater, Remediation

- It can keep going
- Take-aways:
 - Know your release reporting requirements up front and have them accessible
 - There is value to conducting drills
 - What can appear a discrete issue can expand to be multi-media or multi-facility; stay aware of changes that can impact the fact pattern – even a small spill can result in actions or impacts related to CWA, CAA, RCRA and/or remediation
 - Knowing the law across jurisdictions, in advance, is key in responding timely and appropriately
 - Draw on expertise from others including colleagues, outside counsel or technical SMEs when necessary. More complex situations require multiple problem solvers
 - Enforcement takes awhile; plan accordingly