

The Oregon Wet Weather Approach & the Clean Water Act

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Summary and main points

- SSOs cannot be fully eliminated, but can be controlled to a specified level on a site-specific basis.
- NPDES permit program includes a lot of flexibility
- SSOs are point sources and should be permitted like any other point source
- Blending is not a bypass. Cannot have a bypass if treatment plant is being operated as designed and meeting limits.
- Limits for POTWs apply at the end of the POTW
- PEFTFs are point sources and a good idea

Quick Outline

- SSOs
- Listening sessions
- SSOs
- Blending
- Peak excess flow treatment units

- All in the context of what is happening in Oregon and what should happen elsewhere

Background on Wet Weather Approach

- 1996 Bacteria Water Quality Standard
- Numeric Criteria
- Raw Sewage Discharge Prohibition
- Wet Weather Storm Exceptions
- Winter Storm OAR 340-041-0009(6)
- Summer Storm OAR 340-041-0009(7)
- Smaller Storm Exception Until 1/2010
- Permitting Approach 1996-2009
- Community Success

Current Approach for SSO's in Oregon required by EPA

- No SSO Outfalls Listed in permit
- Report All SSO Events
- SSO event is a permit violation
- Enforcement Discretion
- SSO Internal Management Directive – Prevention/Reporting
- Emergency Response & Public Notification Plan

SSOs

- EPA says - SSOs are prohibited
- SSO Prohibition is not specifically in the CWA
- Prohibition is a limit and the limit is not attainable
- “lex non intendit aliquid impossibile”
“the law does not compel the doing of impossible acts”

EPA Listening Sessions

- Focus on SSOs
- Discussion of blending
- PEFTFs

5. What is the appropriate role of NPDES permits in addressing **unauthorized** SSOs that are caused by **exceptional** circumstances?

■ Some ideas

- SSO discharges remain prohibited
- Enforcement defenses analogous to bypass/upset provisions
 - For wet weather SSOs, enforcement **discretion** if:
 - **Severe** natural conditions, and
 - No **feasible** alternatives
 - Does not contain advanced approval language but specific criteria (e.g. design storm) could **possibly** be in permit
 - For other SSO's, affirmative defense if notice and:
 - SSO was an exception, beyond **reasonable** control, and
 - Took all **reasonable** steps to stop and mitigate

Federal Water Pollution Control Act – a.k.a. - CWA

- Section 301(a)
 - (a) ILLEGALITY OF POLLUTANT DISCHARGES EXCEPT IN COMPLIANCE WITH LAW—Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Technology-based & Water Quality-based Limits

- CWA Section 301(b) and 304(d)
- Requirement for technology-based controls and for EPA to develop secondary treatment “standards”
- Note – In case of SSOs, technology-based limits are the tougher issue as far as the policy level decisions

EPA regulations

- 40 CFR 133.102
 - Secondary treatment standards (BOD, TSS, pH; no mention of specific technology)
 - Weekly and monthly averages
- 40 CFR 125.3
 - For POTWs, effluent limits based upon
- 40 CFR 122.45(a), 122.44(a), 122.45(d), 122.45(e), 122.44(d) and 122.44(k)

Permitting Process & Regulatory Requirements

- ▶ Point source discharge
- ▶ Permit application – identifying all discharges
- ▶ Permitting authority must identify limitations necessary for point source discharge to comply with CWA/State Statutes
 - For SSOs, what is appropriate limit?
 - Prohibition – Justified by what regulation?
 - Secondary treatment – what does that mean in context of noncontinuous discharge?

Permit Process

- ▶ Permit Application – Identifies all outfalls, including SSO points
- ▶ Permit development must include
 - limits for all outfalls -- 122.45(a)
 - Technology-based limits -- 122.44(a)
 - Is the outfall for a POTW or non-POTW?
 - If POTW, technology-based limits **must be based upon secondary** treatment standard - 40 CFR 125.3 & 133.102.
 - Based upon does not necessarily mean weekly and monthly limits, especially when the discharge is non-continuous - see 122.45(d) & (e).
 - If Non-POTW, then BAT/BCT limits using BPJ

Continuous versus Noncontinuous

- 122.45(d) & (e)
- Continuous – requires daily max and monthly ave for non-POTWs and weekly and monthly ave limits for POTWs
- Noncontinuous – allows permit writer to consider a number of options based on the type of discharge.

Based upon Secondary

- 40 CFR 133.102 – Limits for secondary are 30/45 mg/l (monthly/weekly) for BOD & TSS
- Continuously discharging plant
- Play with statistics and the curves that developed these limits, you cannot reproduce the 30/45 numbers, but get close.
- Can use the curves to develop a daily average number that is around – 90 mg/l
- Can also use 122.45(e) and 122.44(k) and EPA policy memos to argue for BMPs (CMOM)

Water Quality-based Limits (40 CFR 122.44(d) & CWA 301(b)(1)(C))

- OAR 340-041-0009 – (2); (5) & (6)
- Bacteria criteria
- Prohibition against discharge of raw sewage, unless allowed by other section of rule
- Storm exception (winter and summer)

BMPs and CMOM and Asset Management

- Note consent decree ends with CMOM (and some form of “enforcement discretion”)
- At the end of a consent decree, what does the next permit look like?

Permits and SSOs

- Using 40 CFR 122.45(e) and 122.44(k) apply CMOM as BMP limit
- Serves as both a technology-based and water quality-based limit
 - Caveat – where WQS allow flexibility to address wet weather conditions
- Provides necessary flexibility to develop permits on a watershed basis, integrate requirements and apply resources where it makes the most sense.

Another Option

- SSOs and CSOs what is the difference?
- CSOs are not POTWs because they are designed to discharge, not to convey wastewater to a treatment plant (CSO Policy, citing Montgomery Coalition decision)
- SSOs that are from designed overflow points are also “designed to discharge, not convey wastewater the treatment plant.”
- Permit SSOs like CSOs

Other Permit Language Issues

- Basement backups – are not point sources and should not be mentioned in NPDES permits.
- Blending/Peak Flows – these are not bypasses. They do not “divert” flow “from” the treatment facility – Definition of Bypass
- CSO related Bypass – Draft CSO policy in 1992 clearly states, "For a POTW a bypass does not refer to flows or portions of flows that are diverted from portions of the treatment system but that meet all effluent limits for the treatment plant upon recombining with non-diverted flows prior to discharge."

One Last Thought

- “Even with exemplary management, a collection system operator cannot prevent acts of vandalism, third party negligence, acts of war, extreme wet weather events and other acts of God. For example, one of Rockville’s recent overflows was the result of a student flushing T-shirt down the toilet as a prank at a local high school. The resulting blockage caused an overflow that triggered a State enforcement response against the City. Municipalities should not face Clean Water Act liability for acts of others or nature beyond their ability to control.”

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