Who Should Pay for Sediment Management?

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Industrial Legacy = Contaminated Sediments

- Two important questions:
  - Technology: How will we clean up the contamination?
  - Finance: Who will we pay for the cleanup?
- Polluter should pay… correct?
  - Which polluter?
  - How much for each?
- How can we organize the process of distributing the cost?
Concept of Liability

• Liability is triggered by:
  – A “Release” or “Threatened Release”
  – Of a “Hazardous Substance”
  – At or from a “Facility”
  – At or above concentrations considered hazardous
  – And “causes” cleanup costs to be incurred

• These are very general concepts and open to a lot of interpretation

• Legal issues must be considered on a country-specific basis
Liability… Who and How Much?

• Who can be liable?
  – Current owners and operators
  – Past owners and operators
  – Transporters and arrangers
  – Disposal facilities

• What is the magnitude?
  – Past costs of study or remediation
  – Increased operating or disposal cost due to contamination
  – Cost of remediation
  – Cost of monitoring
How to Decide Who Should Pay?

• Parties are often responsible for different types and amounts of contamination
• Each could be responsible for a different share of cleanup costs
• Often, allocation proceeds in a dispute resolution setting
Private Allocation vs. Litigation

• Private allocation can have some advantages:
  – Much greater control over process
  – Increased degree of certainty as to results
  – Ability to interview qualified candidates and to select experienced allocator
  – Ability to decide whether to participate in allocation process and to what extent
  – Retention of control over ultimate decision whether to accept allocation and to join settlement based on allocation
  – Opportunities for settlement negotiations and mediated settlement

• Litigation offers a prescribed process
  – Less control over the steps in the process
  – More finality of outcome
What is the Approach to Organizing the Allocation?

• Within these settings, there is no prescribed method for allocating cleanup costs
• The allocation method must be developed specific to the site, and should account for:
  – Commonly accepted scaling factors
  – Area(s) requiring cleanup
  – Contaminant(s) requiring cleanup
  – Behavior of the waterbody where the site exists
  – Number of participating potentially responsible parties (PRPs)
  – Nature and extent of PRP contributions to the areas requiring cleanup
Factors Typically Used to Allocate Liability

- Amount of Substance
- Toxicity of Substance
- Degree of Fault
- Degree of Involvement
- Degree of Care
- Degree of Cooperation
- Permits to Discharge
- Knowledge/ability to act
- Finances/ability to pay
- Benefit received
- Timing
- Equitable Defenses
- Quality of Evidence
- Control
Allocation Strategies

• Reducing the size of the pie
  – Is the site definition appropriate?
  – Is the site characterization sufficient?
  – Is the selected remedial/removal action appropriate?
  – Is adequate source control in place?

• Reducing your slice of the pie:
  – Defensive strategy – “We are not liable (or we have a defense to liability), because . . .”
  – Divisibility – “We are not jointly and severally liable, because we can distinguish the harm caused by our release from others”
  – But-for argument – “But for the harm created by others, ours would not be a cause of action”
  – De minimis/de micromis argument – “Our contribution of hazardous substances is minimal, in amount and toxicity, compared to others and to the site as a whole”
  – Offensive strategy – “Those others caused the harm”
Factual and Technical Challenges

• Site can include river, harbor, or other waterway bottom and adjacent land, while area of interest can include surrounding drainage area
  – Numerous industrial and commercial properties
  – Primary and secondary sources
  – Extensive transportation and utility infrastructure elements

• Sources can be distant from sediment cleanup area
  – Currents, tides, and vessels spread contamination
  – Sewer lines transport and discharge contaminants from upland sources

• Contamination can be result of multiple releases of multiple contaminants from multiple sources
  – Industrial and commercial facilities in close proximity
  – Multiple contributors to storm drains and combined sewer overflows
  – Vessels, vehicles, and other transportation modes

• Contaminants may have been released and deposited over the past century or even longer
Develop a Strategic Approach

• Realize that this is a time consuming process
• Develop a consensus methodology – transparency is important
• Agree on data sources and rules
• Agree on schedule
Tools for Allocation Technical Support

- Sediment Quality data
- Particle transport studies.
- Historical research (ownership and operation)
- Waste discharge records and permits
- Sewer networks
- Particle transport modeling tracer studies
- Chemical and isotopic fingerprinting
Thank You

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