



PALERMO WELLFIELD SUPERFUND SITE

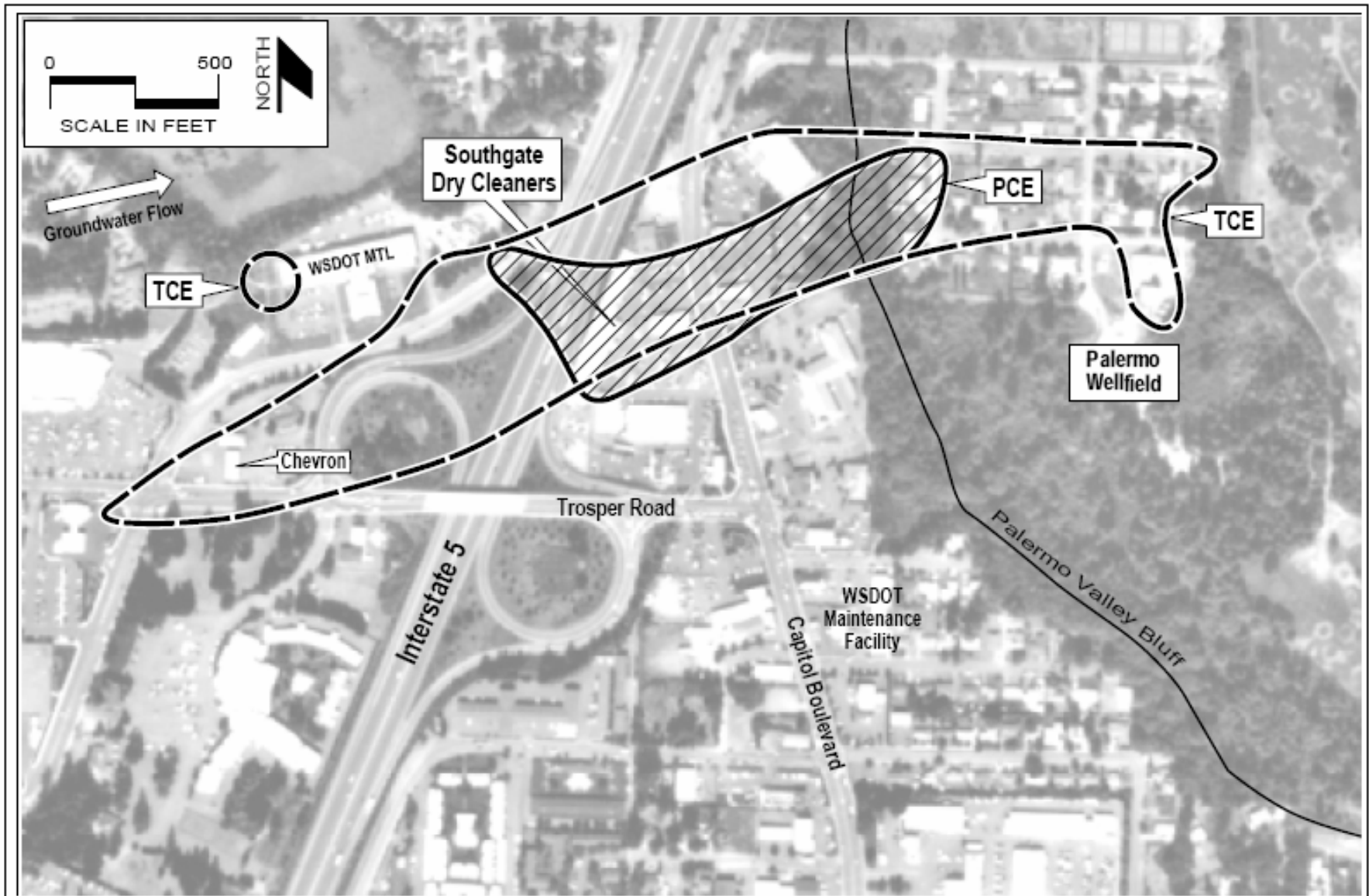
LESSONS LEARNED:
ADMINISTRATIVE RECORD
AND DECISION TO CONDUCT A
REMOVAL ACTION

BACKGROUND



- Palermo Wellfield provides drinking water for 5600 residents of the City of Tumwater, WA
- 08/93 TCE discovered in several wells > MCL (likely source WDOT)
- Contaminated wells removed from service; replaced by two new wells

Figure 2. Approximate limits of groundwater PCE or TCE concentrations found at greater than the EPA standards used for protecting public health



BACKGROUND



- 09/93 Tumwater requests EPA assistance
- 03/95 RA; 05/95 RA; 96 Expanded SI; 03/97 RA; 04/97 NPL
- 07/97 AM (SVE & air stripper)
- 09/98 ROD (GW)

LITIGATION



- EPA brought cost recovery suit against WDOT
- Suit seeks joint and several liability for \$11,420,040
- Motion for administrative record review

ADMINISTRATIVE RECORD



- “Treatment of the administrative record in this case has been extremely problematic.”
 - ◆ EPA added documents to the AR
 - ◆ No notice to court or opposing counsel
 - ◆ Contents of administrative record mislabeled and/or incomplete

- “These and other problems raise serious concerns about the reliability, accuracy, and completeness of the administrative record and about the government’s actions at the Site.”

ISSUES



- Whether the removal action was inconsistent with the NCP (i.e., arbitrary and capricious or otherwise not in accordance with law)
- Whether the action was properly characterized as a removal action



I. ARBITRARY AND CAPRICIOUS

REMOVAL FACTORS CONSIDERED IN DETERMINING THE APPROPRIATENESS OF THE 1997 REMOVAL ACTION



- Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants (§300.415(b)(i))
- Actual or potential contamination of drinking water supplies or sensitive ecosystems (§300.415(b)(ii))
- High levels of hazardous substances or pollutants or contaminants in the soil largely at or near the surface, that may migrate (§300.415(b)(iv))
- Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released (§300.415(b)(v))

Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants



- AM: “TCE . . . and other VOC contamination exist in groundwater, surface water, and soils on site. The maximum contaminant level . . . for TCE is 0.005 mg/l. ATSDR has derived an intermediate-duration inhalation risk level . . . of 2 ppm”
- Court: *“This relatively short explanation fails to articulate how the concentration levels listed result, or potentially result, in exposure to humans, animals . . . and does not reference data in the record that may support this conclusion.”*

Actual or potential contamination of drinking water supplies or sensitive ecosystems



- AM: “The City can no longer meet sustained peak demand [and] has actively rationed water since 1993.”
- Court: “*Evidence that the City could not meet customer demands . . . Is virtually nonexistent.*”
 - ◆ Personal communication, without record or transcript of conversation
 - ◆ Contrary evidence of sufficient water supply, including EPA fact sheet: “Two new drinking water wells have been developed These wells have replaced the water supply lost due to the contamination.”

High levels of hazardous substances or pollutants or contaminants in the soil largely at or near the surface, that may migrate



- AM: Contends that without a twelve month exemption, “the contaminant plumes will migrate and continue to impact more ground waters used for human consumption.”
- Court: *“There is no evidence of how much time installation of the air strippers as a remedial action, would have required. There is no evidence that the actual or potential rate of migration was such that EPA did not have time to comply with the procedural steps required of remedial actions. Evidence in the record demonstrates that contamination levels were fluctuating, but evidence that contaminant levels were increasing in any particular location is weak.”*

Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released



- AM: “The area experiences heavy rains which provide physical movement of pollutants and contaminants in the groundwater toward the PWF.”
- Court: The AM does not “*reference data demonstrating that the rainfall at the Site is ‘heavy,’ that the nature of subsurface soils had the effect of causing rainwater to migrate, that the effect of rainfall is to move contaminants, or that such movement of contamination is in the direction of the well field.*”

Court Conclusion on EPA's Decision to Conduct a Removal Action



- Actual or potential exposure to nearby human populations - *findings are conclusory and not supported by the evidence.*
- Actual or potential contamination of drinking water supplies - *determination lacks support and is contradicted by evidence.*
- High levels of hazardous substances in soil at or near the surface that may migrate – *relied primarily on one piece of data and that reliance alone was unjustified because the sample was analyzed only by a mobile lab and was merely an estimate.*
- Weather conditions that may cause hazardous substances to migrate or to be released – *conclusory and not supported by the record.*

Lessons Learned: Administrative Record



- Must establish an administrative record that contains the documents that form the basis for the selection of a response action.
- Qualitative statements are simply insufficient; quantitative statements are required with supporting documentation.
- Work closely and frequently with ORC attorneys and SF Records personnel.



II. CHARACTERIZATION AS A REMOVAL ACTION

Distinction Between Removal Actions and Remedial Actions



- W.R. Grace & Co. (9th Circuit Court, 2005):
 - ◆ Removal: time-sensitive responses to public health threat for which the EPA is granted considerable leeway in structuring the cleanup;
 - ◆ Remedial: permanent remedies to threats for which an urgent response is not warranted.
- TCE discovered in 1993, yet EPA did not recommend a removal action until 1997.
 - ◆ AM did not articulate why data justified a removal, rather than a remedial action.

Interplay between Removal Actions and Remedial Actions



- Where an alleged removal is followed by remedial measures, the initial action may be properly characterized as a removal because the NCP contemplates progression from removal to a comprehensive plan.
- NCP §300.415(e) lists the type of situations where a removal action is appropriate, including access restrictions, drainage controls, stabilization to maintain integrity of structures, protective barriers, excavation and consolidation, removal of containers, containment, provision of alternate water supply.
- Rather than characterizing removal actions as a temporary solution of short duration, consider emphasizing “interim or partial response actions that are focused on immediate risk reduction.”

Lessons Learned: Characterization as a Removal Action



- NCP §300.415(e) is not exhaustive – other actions may be appropriately considered removal actions based on site-specific conditions (e.g., air strippers).
- Urgent or time sensitive factor is of paramount importance in determining whether action may be properly characterized as a removal action versus a remedial action.
- Removal actions may involve permanent solutions.



QUESTIONS?