

# Federal Clean-Up on State-Owned Submerged Lands: Federal Authority vs. States' Rights

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# Introduction

- This presentation is intended to provide a brief overview of federal CERCLA authority and states' rights issues relating to remediation projects involving use of state-owned submerged land.

# Federal Authority

- CERCLA – Comprehensive Environmental Response, Compensation and Liabilities Act.
- Enacted in 1980, also called “Superfund”
- Amended in 1986 – SARA (Superfund Amendments and Reauthorization Act)

# Federal Authority

- CERCLA is a reactive statute, unlike RCRA (Resource Conservation and Recovery Act)
- Seeks to remedy problems from past uses, regulates remediation of release or threatened release of hazardous substances
- Notification requirement
- Regulates places rather than persons
- Excludes petroleum and nuclear materials

# Federal Authority

- Facility is defined as “(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.” 42 U.S.C. 9601(9)

# CERCLA

- CERCLA also allows private rights of action for recovery of clean-up costs, unlike Clean Water Act and RCRA
- PRP's – potentially responsible parties.
- Liability can be “joint and several” or “several”
- Generally, parties are held joint and severally liable when there is no basis for dividing liability

# Federal Authority

- CERCLA §120(a)(4) – “state laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States...when such facilities are not included on the National Priorities List.”
- CERCLA §121(e)(1) – “no Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite...”

# What is on-site?

- Definition – NCP states “the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.” 40 C.F.R. § 300.400(e)(1)

# States' Rights

- USEPA manages Superfund program in Virginia
- VADEQ is involved in implementation
- States may judicially challenge a ROD (record of decision)
- States should participate in ARARs (applicable or relevant and appropriate requirements)

# States' Rights

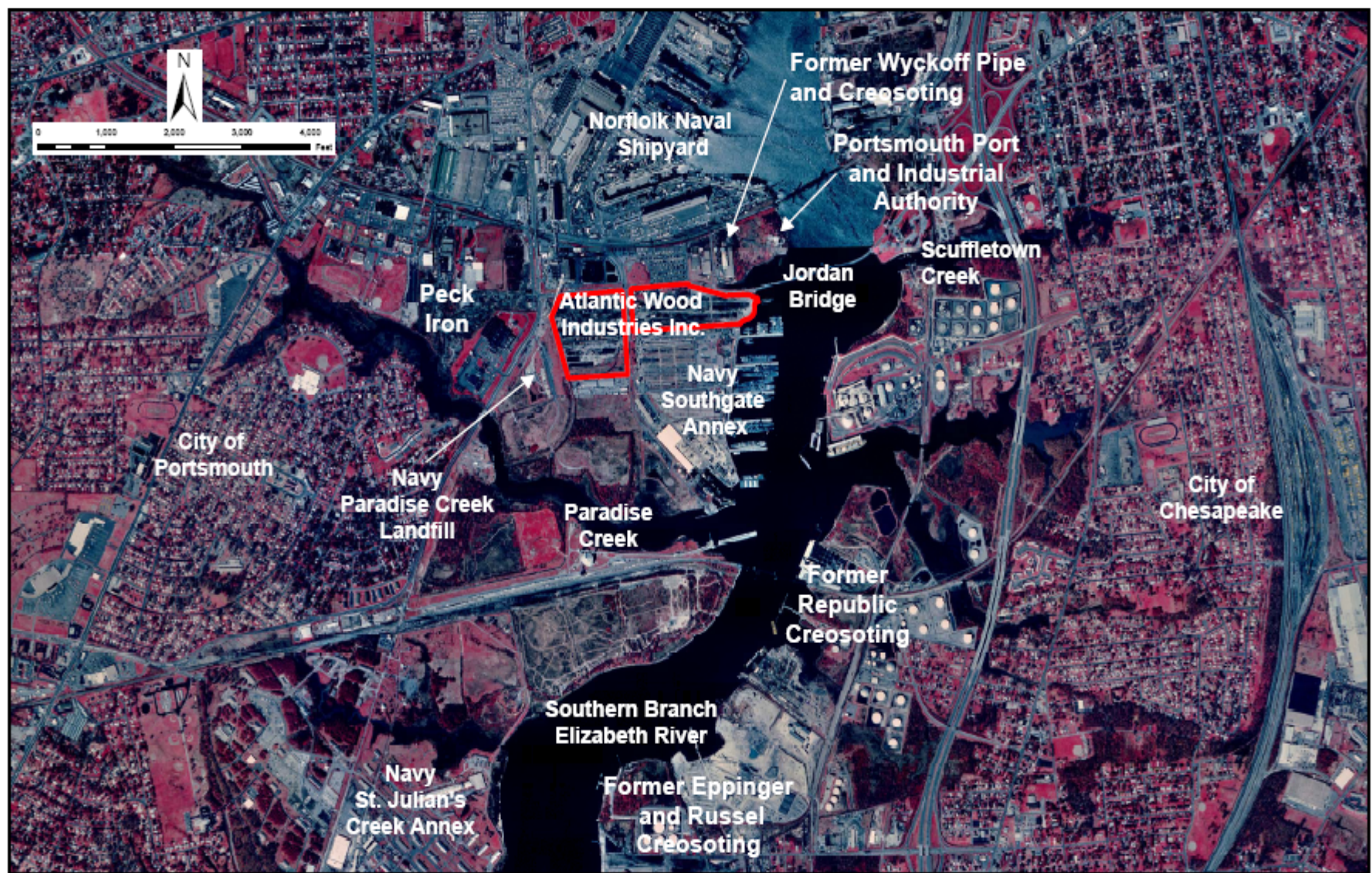
- States have right to “substantial and meaningful involvement” with initiation, development and selection of remedial actions. CERCLA §121(f)(1)
- States are responsible for future operation and maintenance of all remedial and removal actions

# States' Rights

- Virginia Code §1-405
  - “No land containing environmental contamination shall be transferred or revert to the Commonwealth, unless and until all corrective action necessary to protect human health and the environment with respect to any environmental contamination on the lands, or portion thereof, has been completed to the satisfaction of the Commonwealth and approved by the Governor...”

# Atlantic Wood Industries

- Approximately 48 acres along Southern Branch of Elizabeth River in Portsmouth, Virginia (tidal navigable water – streambed owned by state to low water mark)
- 1926-1992 – creosote and pentachlorophenol (PCP) wood-treating operation
- Highly industrial area
- Navy leased portion of western part of property during WWII



CDM

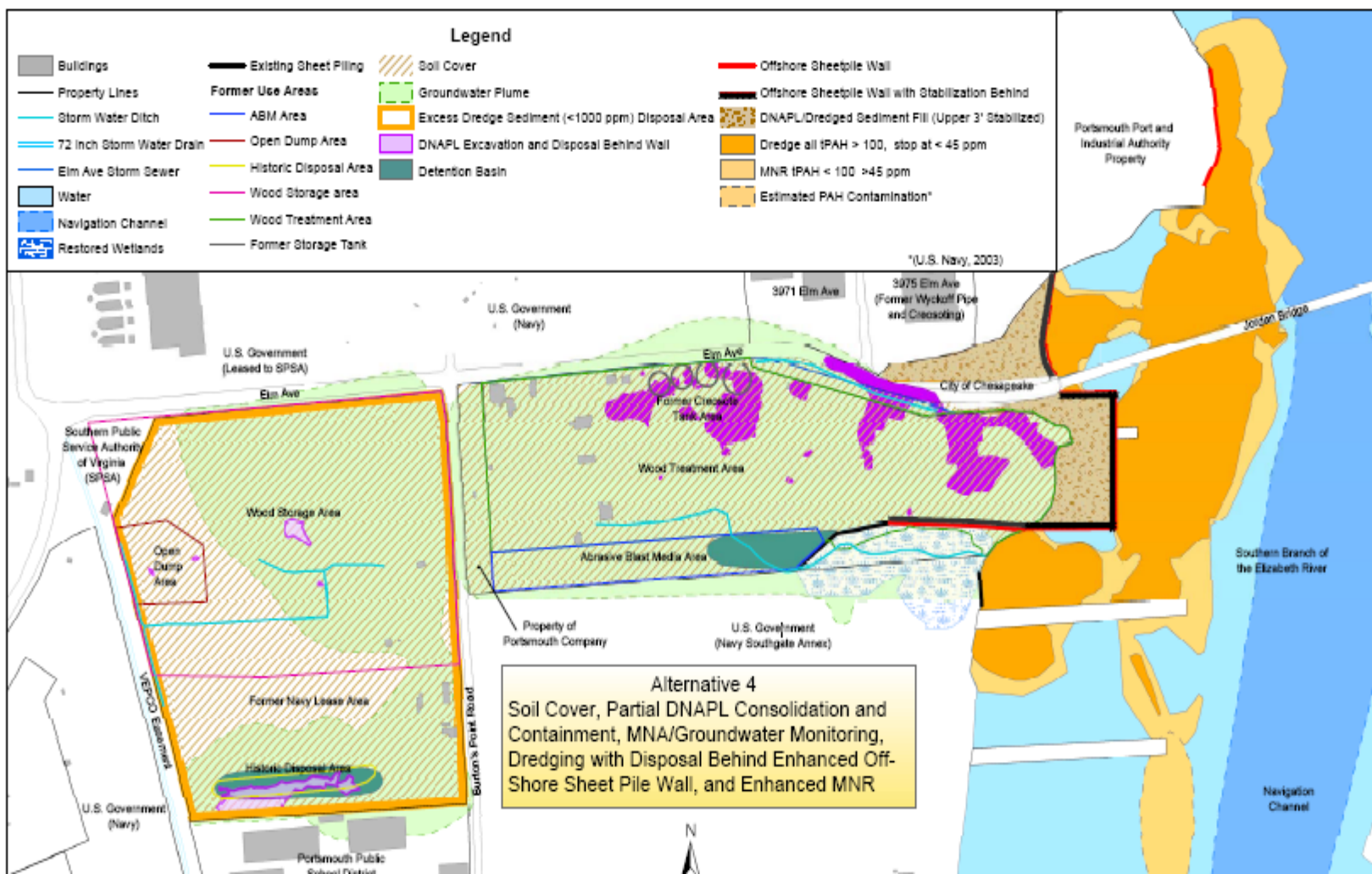
Atlantic Wood Industries, Inc. Superfund Site  
Portsmouth, Virginia

Figure 2  
Location of Site and Other Watershed Sources of Pollution

AWI Proposed Plan - July 2007

# Atlantic Wood Industries

- EPA preferred remedy (#4 in Proposed Plan) would require construction of a sheet pile bulkhead 200-550 feet offshore of property
- **“creating new land behind the sheet pile bulkheads”**
- Material from west side of property will go here, less contaminated dredge material from river to west side of property...



# Example of Legislation

- *§ 1. That the Marine Resources Commission is hereby authorized to sell and convey on behalf of the Commonwealth to \_\_\_\_\_, and its successors and assigns, upon such terms and conditions and the payment of an amount commensurate with the property interest being conveyed as provided in §§ 2 and 3, with the approval of the Governor and in a form approved by the Attorney General, such rights, title, and interest as the Commonwealth may have in a piece or parcel of subaqueous land in the Elizabeth River in the City of Norfolk, being more particularly described as follows:*

# What Does This Mean???

- Debate continues as to whether state permits are required at federal remediation sites.
- There is a lot of room for interpretation in this area of the law.
- Many more questions for courts to review.

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