

## **AUTHORITIES FOR THE BLM TO ENTER AND FUND WATER RESTORATION AND CLEANUP PROJECTS ON NON-BLM LANDS**

In cleaning up non-BLM lands, the BLM risks incurring future liabilities that the BLM would not otherwise have. Generally, this potential liability could attach regardless of the authority that the BLM invokes in participating in the project. However, when BLM uses CERCLA authority as the basis for action, there may be some protection. Accordingly, the BLM needs to take measures to mitigate the risks.

**A. Federal Land Policy and Management Act (FLPMA)** (P.L. 94-579, Section 302(b)) provides that in managing the public lands the Secretary of the Interior shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands. The BLM implements this authority for the Secretary on the public lands.

**B. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).** The BLM has legal authorities allowing it to enter non-BLM sites adjacent to a release on BLM land when necessary to obtain information relevant to the release (See CERCLA section 104(e)(1) and (3)). Pursuant to Executive Order 12580 and CERCLA Section 104(a) and (b), the BLM is authorized to conduct removal and remedial action to address any release or threatened release of a hazardous substance on or solely from land under the BLM's jurisdiction, custody, or control. The EPA has CERCLA removal and remedial authorities on non-Federal lands. Thus, where mixed ownership sites are the focus of a water restoration project, and where CERCLA is used as the authority for project, the BLM should establish a partnership with the EPA before initiating or funding restoration or cleanup projects involving private sites. There are several advantages to use of CERCLA authorities as a basis for undertaking response actions where the release or threat of a release of a hazardous substance may be involved. By combining CERCLA and funding authorities, the Federal government can take advantage of the statutory benefits provided under CERCLA (e.g., the exemption from permits, including National Pollutant Discharge Elimination System permits under the Clean Water Act; National Environmental Policy Act equivalency; pre-enforcement review bar; favorable standard of review; possible defense against subsequent claims where the BLM is acting consistent with the National Contingency Plan with respect to an incident creating a danger to public health, wildlife, or the environment; and right of cost recovery in the event a financially viable responsible party were found later. Also, at sites involving natural resource injury and/or associated lost services caused by viable responsible parties, the BLM has authority to seek restoration of the damaged resources to baseline conditions.

**C. Clean Water Act (CWA).** **C. Clean Water Act (CWA).** The CWA, also known as the Federal Water Pollution Control Act, aims to restore and maintain the chemical, physical and biological integrity of the Nation’s waters. National goals include the elimination of the discharge of pollutants into navigable waters and, where attainable, water quality sufficient to provide for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water. Provisions that are key to the BLM cleanup and restoration actions include Section 313 on control and abatement of water pollution on Federal property and facilities and Section 319 regarding nonpoint source management administered by the States. Pursuant to CWA Section 311(f) and Executive Order 12777, the BLM, acting through the Department, is also authorized to make claims on responsible parties for injuries to natural resources on public lands from hazardous substance releases. ( Executive Order 12777 implementing the CWA designates federal natural resource trustees including the Department of Interior.) The EPA has removal authority under the CWA for hazardous substances discharged on Non-BLM lands.

**D. Wyden Amendment.** The provisions of 16 U.S.C. 1011, attached as Attachment 3, and commonly referred to as the “Wyden Amendment,” provide a framework by which the Bureau may enter “into cooperative agreements with the heads of other Federal agencies, tribal, State, and local governments, private and nonprofit entities, and landowners for the protection, restoration, and enhancement of fish and wildlife habitat and other resources on public or private land and the reduction of risk from natural disaster where public safety is threatened...” The Wyden Amendment also spells out the required terms and conditions of a watershed restoration and enhancement agreement authorized by the law. The Wyden Amendment provides authority for the BLM to fund projects on non-federal lands where the BLM enters into formal watershed restoration and enhancement agreements.

The BLM interprets the authority contained in the Wyden Amendment as follows:

“**Other resources**” means biotic and watershed resources related to “the protection, restoration, and enhancement of fish and wildlife habitat,” including those watershed resources reducing risk from natural disaster where public safety is involved. The BLM interprets this language as providing authority to conduct projects directly related to protecting and enhancing fish and wildlife habitat and the reduction of risk from natural disaster. The BLM does not interpret this authority to include enhancements that are primarily of an economic, rather than an environmental, focus. However, environmental projects that foster incidental economic benefits are permissible.

Examples of permissible projects under this provision could include improving the watershed’s ability to maintain historic water quantity and quality, flushing flows, etc. Permissible projects related to reducing risk to public safety could include enhancing the ability of a watershed to provide gradual runoff (as opposed to flooding), or reducing the risk of mass wasting and debris/mud slides in a municipal watershed.

Examples of inappropriate enhancements include recreational opportunities, efforts to increase production of forest products, resumption of mineral extraction, enhancing other commercial uses, or improving other resources not directly related to protecting and enhancing fish and wildlife habitat and the reduction of risk from natural disaster.

Watershed Agreements must contain provisions to “improve the viability and otherwise benefit the fish, wildlife, and other biotic resources on public land in the watershed.” (Emphasis added). The BLM interprets this provision as meaning that any cooperative agreement to restore non-BLM lands must provide a demonstrated benefit to BLM lands within the watershed covered by the agreement.

The BLM interprets “On public or private land” as providing authority to enable the sharing of expenses of restoration on all Federal, non-Federal, public, and private lands in watersheds. This authority would include county, State, and Tribal lands. For instance, this authority would allow the BLM to participate in the replacement of culverts on county roads to allow anadromous fish passage upstream to historical spawning areas on BLM-administered lands.

**D. Department of the Interior’s Central Hazardous Materials Fund.** Though part of the BLM’s budget, this Fund is administered by the Department’s Office of Environmental Policy and Compliance.