NEW YORK CITY LAW DEPARTMENT

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*Developments in Clean Water Law Seminar*

# The Clean Water Act and Superfund: The Challenges of Overlapping Statutes

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# CWA and Superfund

- Common goal to protect human health and the environment
- Very different concerns
  - CWA: achieve water quality standards; fishable/swimmable
  - CERCLA: clean up hazardous waste sites
- Intersection when CSOs, storm sewers discharge into Superfund sites

# CERCLA Liability

- Responsible party
- Facility
- Release/threatened release of hazardous substances
- Response costs
- Consistency with the National Contingency Plan

# CERCLA Liability: Responsible Parties

- Owner/Operator
  - *Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995) – sewer system
  - *U.S. v. Union Corp*., 277 F. Supp. 2d 478 (E.D. Pa. 2003) – CSOs
- Arranger
  - *United States v. Washington State Dept. of Transp.*, 716 F. Supp. 2d 1009, 1015 (W.D. Wash. 2010) – agency can be responsible as arranger for stormwater drainage discharges
  - *Carson Harbor Village v. Unocal Corp.*, 287 F. Supp. 2d 1118 (C.D. Cal. 2003) – municipality not responsible as arranger for stormwater drainage discharge
- Transporter ?

# CERCLA Liability: Affirmative Defenses

- Federally permitted releases
  - Releases that pre-date permit
  - Releases that violate permit
  - Releases not expressly permitted
- Actions of a third party
  - Release caused solely by a third party
  - Owner exercised due care
  - Owner took precautions
  - *Adobe Lumber, Inc. v. Hellman*, 658 F. Supp. 2d 1188 (E.D. Cal. 2009); *Lincoln Prop., Ltd. v. Higgins*, 823 F. Supp. 1528, 1540 (E.D.Cal.1992).

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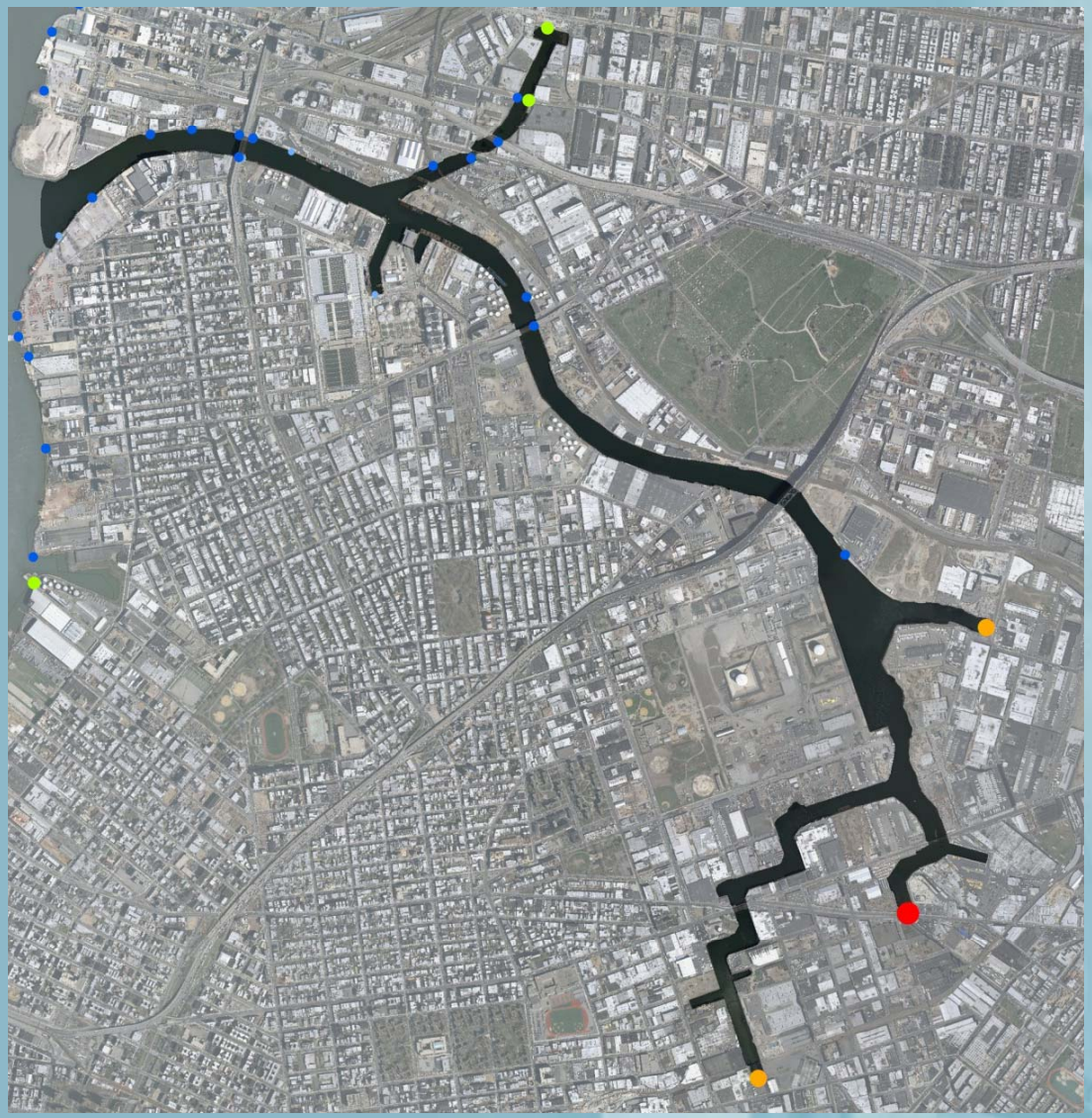
# New York City Superfund Sites


# GOWANUS CANAL

- 1.8 miles long, 100 feet wide
- Created in 1860s
- Heavily industrial; now large residential areas
- 10 CSO outfalls, 3 City-owned stormwater outfalls
- 200+ non-City outfalls



# Newtown Creek

**3.8 miles long**

**Heavily industrial since mid-1800s/petroleum refiners**

**23 CSO outfalls, numerous City-owned stormwater outfalls**

**300+ non-City outfalls**

# NYC CSOs

- Two-thirds of NYC served by combined sewers
- 29 billion gallons of CSO per year
- 216,000 acres of CSO drainage area
- 422 CSO outfalls

# NYC CSO Program

**Well established, comprehensive program:**

- **Began in 1972 - Built first retention tank**
- **1988 SPDES Permits required development of facility plans for 9 geographic areas**
- **2005 Consent Order required development of draining basin specific waterbody/ watershed plans (incorporated previously approved facility plans) and drainage basin and city-wide Long Term Control Plans**
- **More than $1.7 billion in CSO controls invested under 2005 Order**
- **More than $4 billion committed over next 20 years in green and gray infrastructure**

# Gowanus Canal CSO Program

**WWFP:**

- **Goal – Attain Existing Water Quality Standards (Class SD)**
- **Pump Station/Force Main Upgrade – complete 2013/14**
- **Flushing Tunnel Repair and Upgrade – complete 2013**
- **Environmental dredging**

**LTCP:**

- **Goal – Evaluate attainment of a high appropriate classification**
- **Evaluate effectiveness of WWFP projects**
- **Evaluate additional cost effective CSO controls**
- **Due 2015**

**High level sewer separation – design 2012, complete 2020**

**Green Infrastructure**

# Newtown Creek CSO Program

**WWFP:**

- **Goal – Attain Existing Water Quality Standards (Class SD)**
- **Enhanced Aeration: started 2008, complete 2019**
- **Bending Weirs/Floatables Control**
- **NC WWTP @ 700 MGD:  complete 2014**
- **Environmental dredging**

**LTCP:**

- **Goal – Evaluate attainment of a high appropriate classification**
- **Evaluate effectiveness of WWFP projects**
- **Evaluate additional cost effective CSO controls**
- **Due 2018**

**Pilot area for green infrastructure**

# CWA and CERCLA Areas of Similarity

- Common goal to protect human health and the environment
- Attainability as limitation on clean-up/controls
- Consideration of cost
- Require CSO/Stormwater controls

# CWA and CERCLA Areas of Potential Inconsistency

## Focus of Statutes:

- **CWA: CSO program is City-wide; City considered as a whole in identifying priority areas, making investment decisions, considering affordability**
- **CERCLA: focused only Superfund site and on sources contributing to site**

## Standards:

- **CWA: CSO program designed to achieve water quality standards; ultimately fishable/swimmable**
- **CERCLA: Human health risk and ecological health risk site specific remediation goals**

# Impact of on-going CSO work on Superfund investigation

- Potential to complicate Superfund investigation and feasibility study
  - CSO upgrades/in-water improvements
    - ❖Gowanus Canal pump station upgrade
    - ❖Newtown Creek aeration system
- Potential to interfere with Superfund remedy
  - CSO dredging work

# CSOs as a Source of Liability for Remediation Costs

- Flow volume v. Contamination
- Need for data
- Spread the potential liability
- Arguments to help limit allocated share of costs
  - Relative contribution of COPC
  - Passive conduit v. generator
  - Essential public service
  - Robust pretreatment/enforcement program

# CSO Discharges as a Source of Post-Remedy Recontamination

- Need to control potential sources of *significant* recontamination
- Potential for direct conflict with CWA obligations if not coordinated
  - consideration of CSO controls committed to under CWA
  - Timing
- CERCLA remedy potential for reducing DO/altering hydrology of waterbody

# Regulatory Coordination?

- **EPA**
  - Region – Emergency and Remedial Response Division;
  - D.C. – Office of Solid Waste and Emergency Response
  - Region – Water Compliance Branch
  - D.C. – Office of Water
- **NYS DEC**
  - Division of Environmental Remediation
  - Division of Water

# Desired Elements of CWA/CERCLA Coordination

- Defer to CWA regulators and ongoing CSO program
- Assess CSOs' impacts and determine CSO remedy after CSO controls under CWA are completed and evaluated
- Understand extent of CSO's future on-going contribution of Superfund contaminants of concern, if any
- If CSOs are significant contributor, seek to address source into CSOs
- Get water and Superfund regulators to coordinate both within EPA and state and between EPA and State

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