

Hot Topics in Clean Water Law

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Using The SAFETY Act To Minimize Tort Liability: What Clean Water Utilities Can Do Right Now

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Today's Topics

- ❖ What is the SAFETY Act and how does it work?
- ❖ What types of products /services are covered by the SAFETY Act?
- ❖ How can the SAFETY Act benefit public water systems and water treatment plants?
- ❖ How can entities that use EPA's Vulnerability Self-Assessment Tool ("VSAT") 6.0 to be eligible for SAFETY Act coverage?
- ❖ How can entities obtain SAFETY Act coverage for the various security programs used at their facilities?

What is the SAFETY Act?

- SAFETY Act stands for “Support Anti-Terrorism by Fostering Effective Technologies” (SAFETY) Act
- Passed as part of the Homeland Security Act of 2002
- This landmark legislation eliminates or minimizes tort liability for Sellers of a “Qualified Anti-Terror Technology” (QATT) Approved By the U.S. Department of Homeland Security (DHS) should lawsuits arise in the U.S. after an Act of Terrorism.

What Kind of Liability Protection Does the Act Provide?

- Lawsuits can only be filed in Federal court
- Punitive damages claims prohibited
- Cap on damages (“Designation” coverage); or a rebuttable presumption of dismissal from the lawsuit (“Certification” coverage)

Designation Protections

- Sellers/Providers receiving **Designation** but not Certification enjoy a cap on any resulting liability damages, which is required to be covered by terrorism insurance (amount set by DHS).
- If insurance does not cover the event, liability should be \$0.
- Can obtain **Designation** without **Certification**.

Certification Protections

- Sellers/Providers receiving **Certification** enjoy presumption that the seller/provider of ATT is **immediately dismissed** from the suit unless **clear and convincing** evidence that seller acted fraudulently or with willful misconduct in submitting data to DHS during application process
- If you obtain **Certification**, the Seller/Provider always obtains Designation as well.
- If you are denied Certification initially, you can re-apply at a later time.

SAFETY Act Basics

- Protections will apply even if, in DHS' view, the act of terror occurs outside the United States so long as the “harm,” including financial harm, is to persons, property or entities in the United States.
- The definition of “anti-terror technologies” is broadly defined to include both PRODUCTS and SERVICES.
- Technology must have a material anti-terrorism purpose (but does not have to be its only purpose)

SAFETY Act Basics (Cont'd)

- QATT can be sold to Federal, state or local governments, commercial customers, or foreign customers.
- SAFETY Act protections also flow down and benefit a Seller's subcontractors, vendors, distributors and customers.
- Importantly, a QATT can be deployed *internally* to protect an entity's facility, personnel, assets and/or the general public.
- Coverage usually awarded for 5 years from date of decision. However, DHS has also awarded SAFETY Act protections to apply retroactively to past deployments of substantially equivalent ATT.

Examples of Covered Products

- ❖ Radiation Portal Monitors
- ❖ Checked Baggage Inspection Systems
- ❖ Identification and Access Control Products
- ❖ X-Ray Screening, Bomb and Hazardous Materials Detection Systems
- ❖ Perimeter Intrusion Detection Systems

Examples of Covered Services

- ❖ Risk and Vulnerability Assessments
- ❖ Security Management Programs
- ❖ Physical Security Guard Services
- ❖ Security Systems Engineering Design and Integration Services
- ❖ Cargo Inspection Services

How Do You Get SAFETY Act Coverage?

YOU MUST APPLY FOR IT!

- Applicants Must Complete and Submit DHS' SAFETY Act **Application Kit** (can be found at www.safetyact.gov) .
- Generally, the DHS **Review** and **Approval** Process Takes About 120 days - - DHS has **100+** Experts From Academia, Federal Government, National Labs and FFRDC's To Review Applications.
- Applicants **Proprietary Data** Is Protected By DHS - - Reviewers Screened For Conflicts Of Interest, Sign Nondisclosure Agreements

The Block Designation:

**How to Obtain Presumptive SAFETY Act
Coverage for Work You May Be Doing Right
Now**

Programs Eligible for Presumptive SAFETY Act coverage

- DHS establishes “Block Designations” for certain anti-terrorism technologies that meet established performance standards or defined technical characteristics.
- Block Designation provides applicants a way to receive SAFETY Act Designation coverage using a streamlined application (also includes expedited review)
- Application for Block Designation can be found at www.safetyact.gov.
- Most recently, DHS has issued a “Block Designation” for Risk Assessments Performed Using the Environmental Protection Agency (“EPA”) Vulnerability Self Assessment Tool (“VSAT”) 6.0

Block Designation for EPA VSAT Tool (Cont'd)

A DHS Block Designation specifically applies to the performance of a risk assessment using EPA VSAT 6.0 when:

- ❖ It is performed under the direction and supervision of a Public Water System and/or Public Owned Treatment Works owner, manager, or certified operator responsible for a water, wastewater, or combined utility;
- ❖ It is conducted by qualified persons; and
- ❖ Performed, at a minimum, every five years.

Block Designation for EPA VSAT Tool (Cont'd)

- Block Designation does NOT cover “the development and implementation of facility security measures and programs to mitigate the risks and vulnerabilities identified through use of VSAT 6.0”
- Entities should seek **separate** SAFETY Act coverage for their facility security programs using the standard SAFETY Act process!
- In brief, an entity needs to be able to define the facility security program, describe the specifications for the program, and demonstrate its effectiveness.

Examples of Successful Facility Security Applications

The Dow Chemical Corporation / The Dow Chemical Facility Security

Services - A comprehensive set of services designed to enhance security and protect key assets. The Designation covers those Dow Chemical facilities where the Technology is deployed and that were determined by the Coast Guard to be compliant with the security guidelines established under the Maritime Transportation Security Act of 2002. Dow's Technology includes security vulnerability assessments, protection of secure assets, protection of proprietary information and cyber security, emergency preparedness and response services, and involvement of local communities in the deployment of the Technology. It also includes an ongoing security and audit process.

Brookfield Office Properties – Brookfield provides its World Financial Center Security and Emergency Program, a set of policies, procedures, and personnel which, when used together, are designed to deter, delay, and mitigate terrorist activity at the WFC located in NYC.

Examples of Successful Facility Security Applications (Cont'd)

U.S. Equities Asset Mgmt. / U.S. Equities Realty Partners – Provide Willis Tower Security and Life Safety Services, a security management program designed to plan for and respond to emergencies, control access to, conduct screening of packages and parcels entering, and provide for the evacuation of Willis Tower. Includes: physical security, security plans and procedures, emergency response; training, and coordination with Federal, State, and local law enforcement.

Queens Ballpark Company, LLC, (Subsidiary of the Mets) – Provides the Citi Field Security Program, an integrated security program composed of physical and electronic security measures, tools, procedures and personnel designed to detect, deter, prevent, respond to, and mitigate Acts of Terrorism at Citi Field during Major League Baseball Game Days, Non-Game Days, Non-Season Days, and Special Events. Includes 24/7 security coverage and incorporates systems and security practices as well as the selection and maintenance of electronic security measures and the hiring, vetting, training, and management oversight of its employees and contractors..

Questions?



New York City's Combined Sewer Overflow Program

Does Cost Still Matter Under the CSO Policy?

December 10, 2014

NACWA Webinar

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❖ Supply 1 billion gallons of water per day to 9 million New Yorkers

- ❖ 19 storage reservoirs and 3 controlled lakes
- ❖ 295 miles of aqueduct and tunnels
- ❖ 7,000 miles of water mains
- ❖ 109,000 fire hydrants

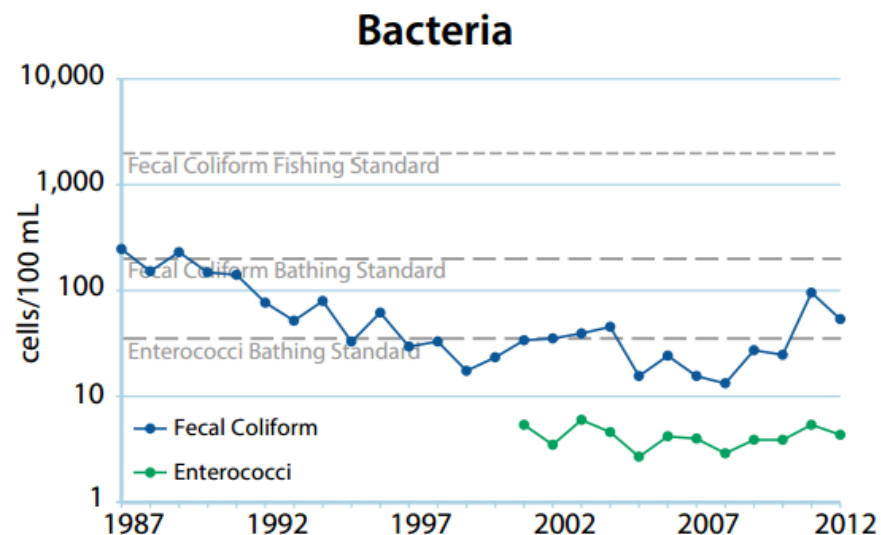
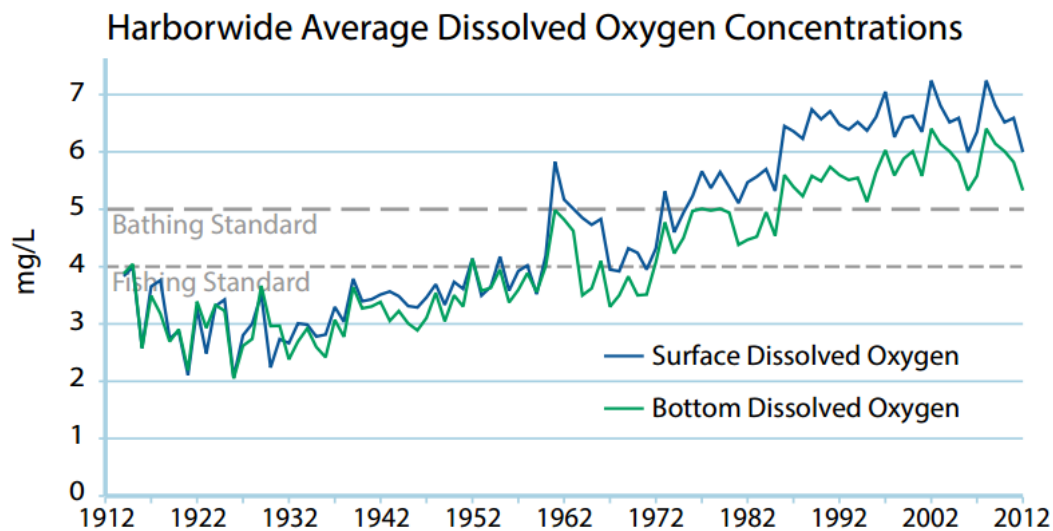
❖ Treat 1.3 billion gallons of wastewater per day

- ❖ 14 In-city treatment plants; 8 upstate
- ❖ 95 pump stations

❖ \$14 billion in active construction & design projects

Water Quality Investments

- ❖ Since 2002, DEP has invested over \$10 billion in water quality improvements
- ❖ Since the 1980's, DEP has reduced CSO discharges and improved wet weather capture from 17% to ~82%, resulting in significant improvements in harbor water quality



Diverse Sewersheds – Existing Water Quality Standards

❖ Multiple waterbodies

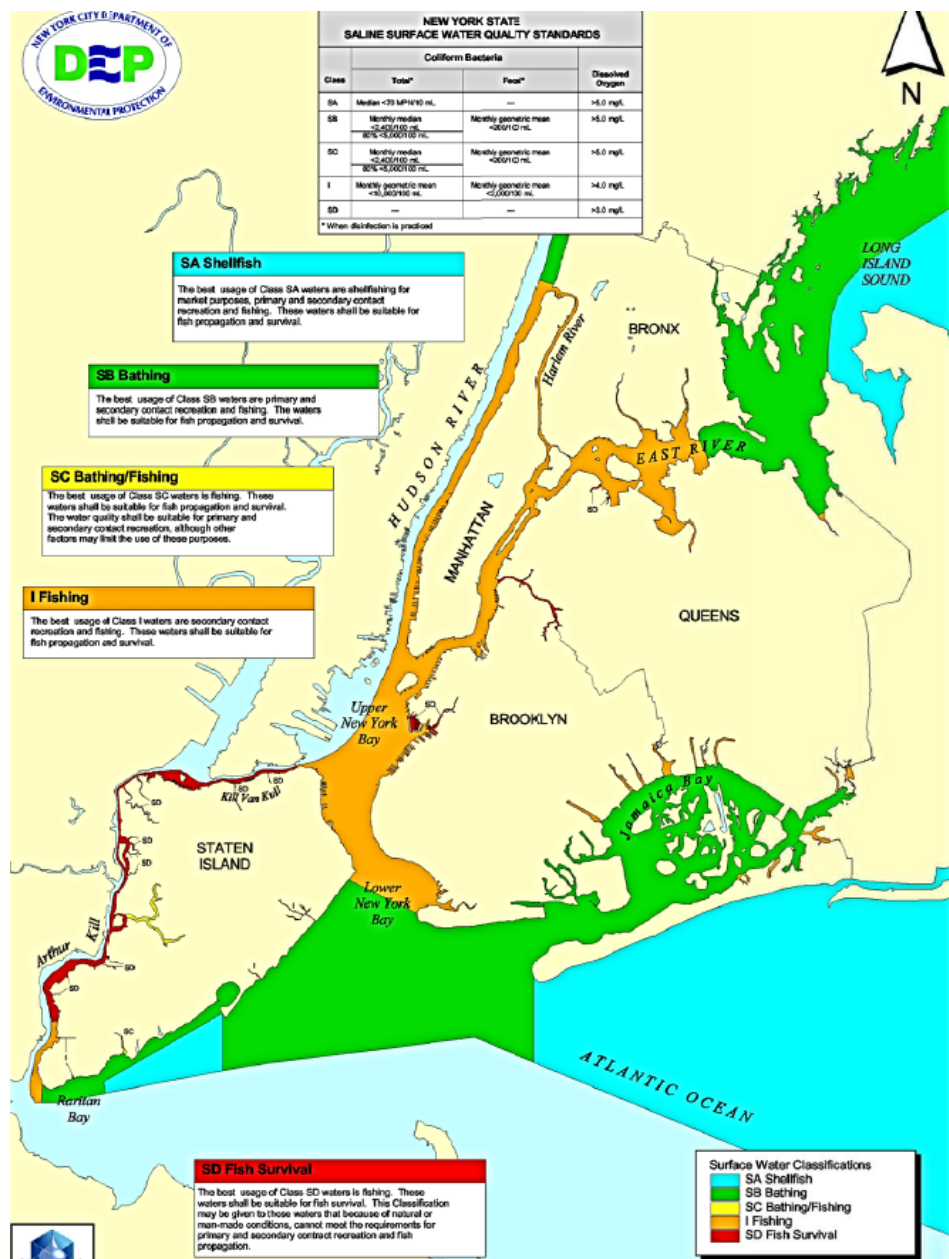
➤ 12 LTCPs

❖ Primary Contact - Fishable/Swimmable

Primarily open waterbodies with
flushing (blue/green areas)

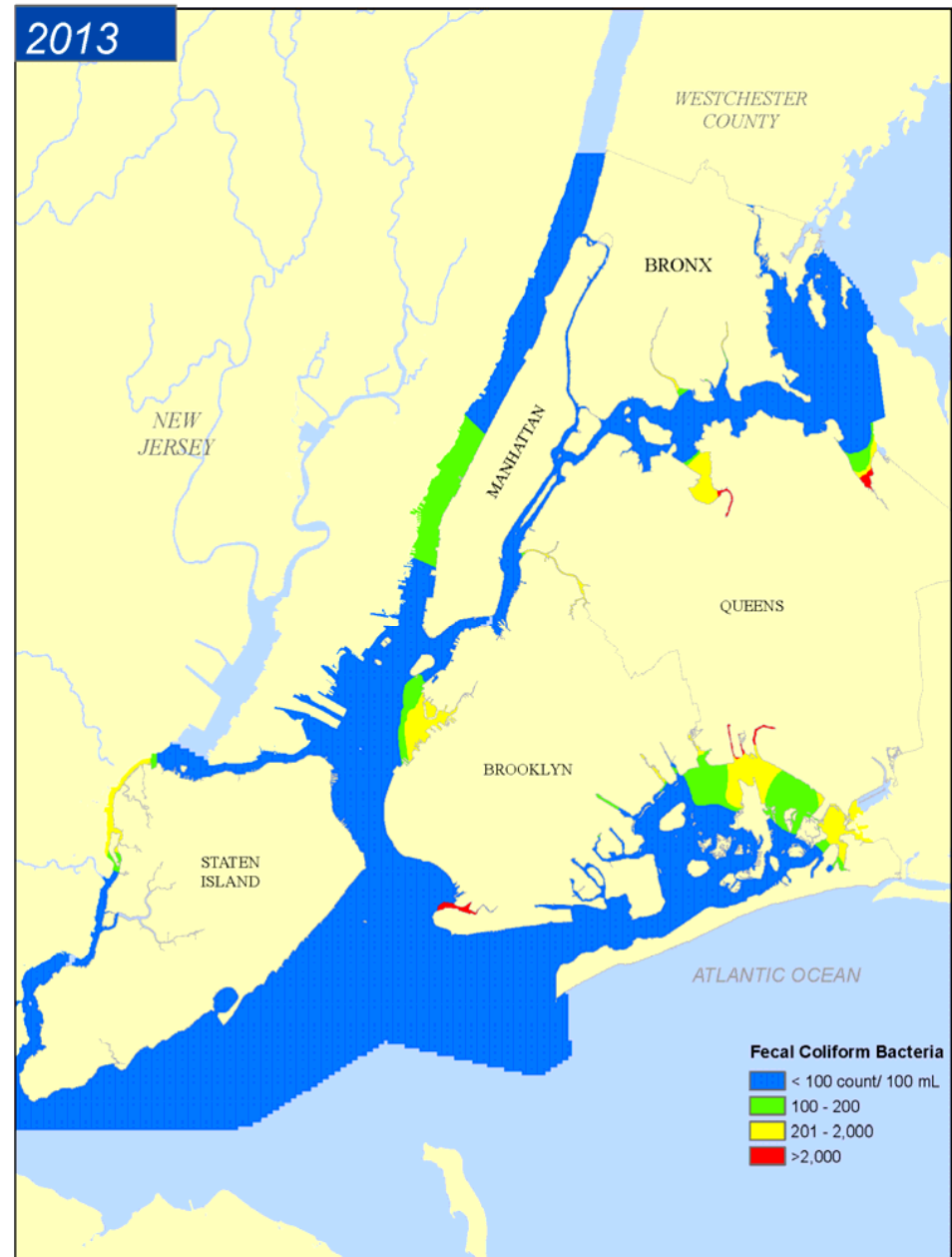
❖ Secondary Contact - Boating/Fishing

Primarily more tightly configured
waterbodies (tributaries)
(brown/red areas)



Diverse Sewersheds – Waterbody Features/Uses

- ❖ Different Levels of Current Compliance with WQS
 - Many at, or near, compliance with existing WQS
 - Some have significant gaps to meet fishable/swimmable CWA goal
- ❖ Different Characteristics
 - Open Waters
 - Tributaries
 - Multi-jurisdictional
 - Man-made alterations
- ❖ Different Uses
 - Recreational
 - Industrial



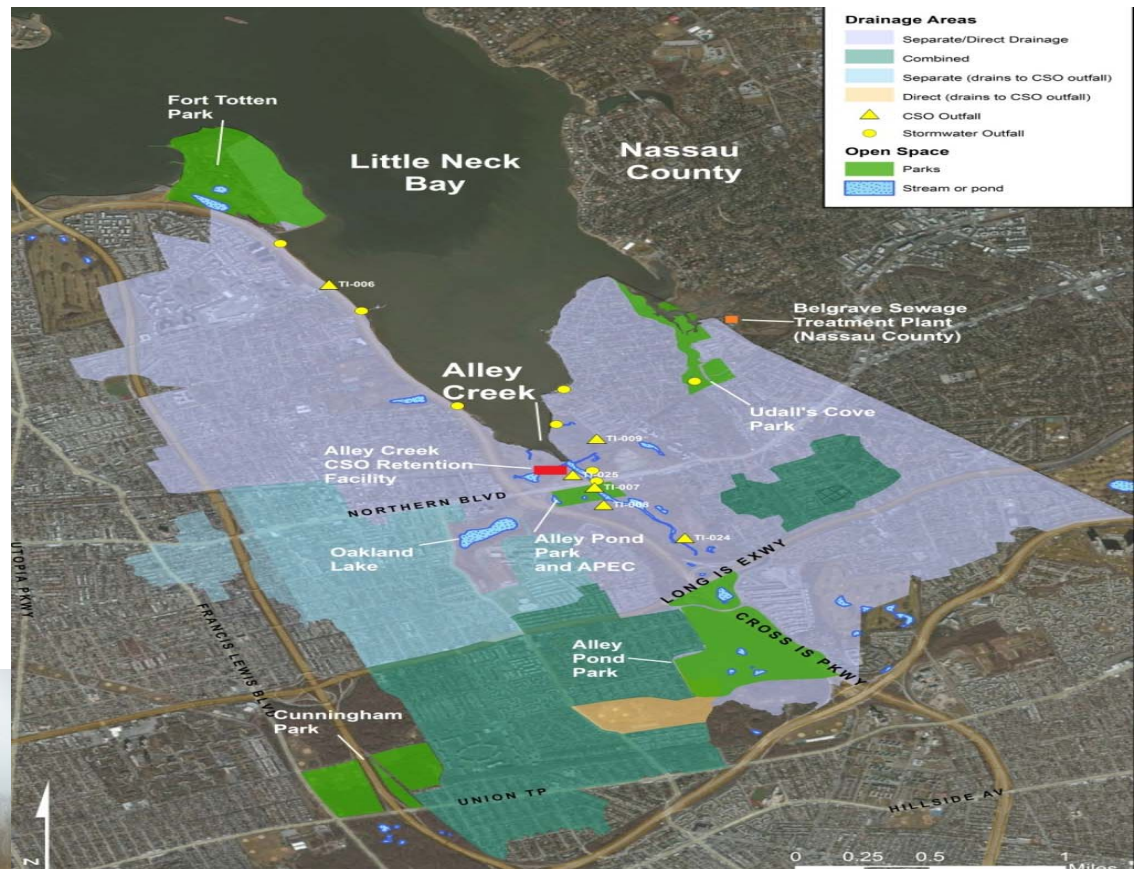
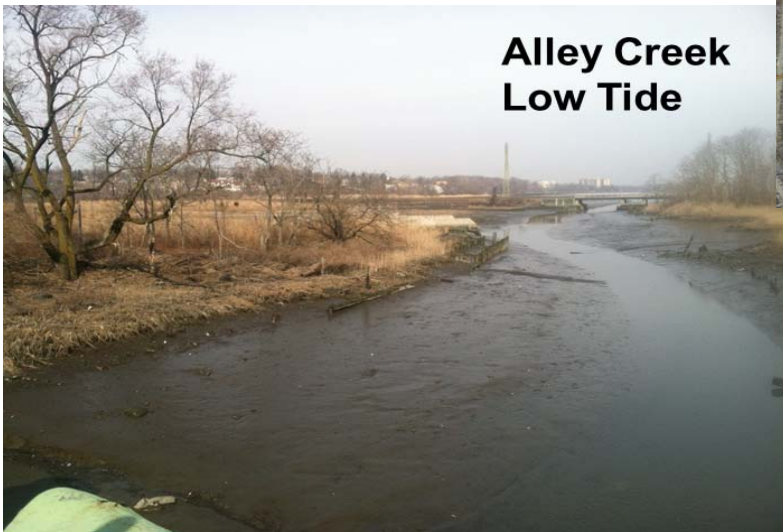
DEP's CSO Consent Order



- ❖ 1992 Initial CSO Consent Order (Administrative Order with State)
- ❖ **1994 CSO Policy/1995 and 2001 EPA LTCP Guidance**
 - LTCP is designed to identify projects to meet **existing water quality standards**
 - LTCP should consider **site-specific nature** of CSO and evaluate the **cost-effectiveness** of a range of controls.
- ❖ 2005 Modified CSO Consent Order
 - **Added requirement to prepare Long Term Control Plans**
 - DEP completed \$2.3 billion in capital costs – mix of different strategies
 - ✓ storage tanks
 - ✓ sewer system improvements
 - ✓ floatables control
 - ✓ dredging
 - ✓ aeration
- ❖ 2012 Modified Consent Order
 - Incorporated DEP's Green Infrastructure Plan
 - Aggressive schedule for development of 11 LTCPs (2013-2017)
 - **Agreed to submit a UAA for secondary contact waterbodies**

Alley Creek LTCP

- ❖ Class I waterbody (secondary contact)
- ❖ No waterbody access
- ❖ Primarily wetlands, very shallow at low tides
- ❖ Past investments \$142M
 - 5 million gallon tank
 - Pump station improvements
 - Ecological Restoration
 - 60% reduction in CSO



Alley Creek LTCP



- ❖ LTCP demonstrated attainment with existing secondary contact WQS
- ❖ State disapproved LTCP on several grounds including failure to select project based on highest attainable use
- ❖ State's disapproval relied on a "Two Step Framework"
 - Can cost effective controls meet CWA fishable/swimmable goals fully?
 - If not, LTCP must select controls that achieve maximum pollutant reduction reasonably attainable to improve partial attainment of CWA fishable/swimmable goals (beyond cost effective controls)
- ❖ Under State's analysis, the only benchmark is Fishable/Swimmable goal.
 - How much money must DEP spend to get to 'partial attainment' of fishable/swimmable if cost-effective is not the standard?
 - Substantial and widespread social and economic impact in each waterbody?

DEP challenged DEC's disapproval of Alley Creek LTCP (February 2014)

❖ Claims

- Violation of State APA
- Ignoring Lawfully Adopted WQS
- Violation of CWA/CSO Policy

❖ Relief Sought

- Declaratory Judgment
- State counterclaimed for declaratory judgment as well as for penalties

- ❖ EPA Region 2 (February 2014)

“[w]herever possible, the LTCP should be developed to comply with the ‘fishable/swimmable goals’ of the Clean Water Act (CWA), unless the requisite use attainability analysis (UAA) is conducted and adequately demonstrates that this goal is not attainable in which case the LTCP must then be developed to attain the highest attainable use.”

- ❖ NACWA raised concerns to EPA HQ (June 2014)

- ❖ EP HQ Response (August 2014)

“EPA, including all of its regional offices, remains committed to implementing the 1994 CSO Control Policy.... [The] analysis, often known as ‘knee of the curve’ analysis, is intended to help guide selection of controls. We remain committed to the use of a ‘knee of the curve’ for this purpose.”

The CSO Policy anticipates that LTCPs will be designed to meet [WQSs].... In a circumstance in which modifications to a WQS are being considered, it may be prudent for the LTCP to consider alternatives that meet currently applicable WQSs as well as those that are likely to apply in the future.”

Ramifications of Discounting Cost-Effectiveness



- ❖ Does requirement to go beyond CSO Policy cost-effective standard require spending to substantial and widespread economic and social impact?
- ❖ How will it impact DEP's ability to prioritize investments among waterbodies?
 - Early LTCP projects could account for significant costs, leaving fewer resources available for later scheduled LTCPs
 - Fails to account for diverse characteristics of 11 tributaries – actual uses
- ❖ Will it limit DEP's flexibility to prioritize investments in other water quality arenas?
 - State of Good Repair
 - Stormwater
 - Drinking Water
 - Climate Change/Resiliency

Questions?

For more info:

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