SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

In the Matter of the Application of:

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION; CARTER H. STRICKLAND, AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and THE CITY OF NEW YORK,

Petitioners,

For a Judgment Pursuant to CPLR Article 78

-against-

JOSEPH J. MARTENS, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

---------- x

VERIFIED PETITION

Index No.: 400236/14

Petitioners NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, CARTER H. STRICKLAND, as Commissioner of the New York City Department of Environmental Protection and THE CITY OF NEW YORK, by their attorney **ZACHARY W. CARTER**, Corporation Counsel of the City of New York, as and for their Verified Petition pursuant to Article 78 of the New York Civil Practice Law and Rules, allege as follows:

NATURE OF THE PROCEEDING

1. Petitioners bring this special proceeding to challenge the determination of Respondent New York State Department of Environmental Conservation ("DEC"), dated December 12, 2013, disapproving the Alley Creek Combined Sewer Overflow Long Term

Control Plan ("LTCP") submitted by the New York City Department of Environmental Protection ("DEP") on November 12, 2013. The disapproval was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion. Accordingly, DEC's determination should be vacated.

2. DEC's rejection of the LTCP arises from a dispute over a fundamental legal issue as to the applicable requirements for an approvable LTCP. Specifically, the law is clear that the LTCP should identify for implementation *cost-effective* CSO abatement projects that *result in attainment of Water Quality Standards ("WQS").* *See* EPA's 1994 CSO Control Policy, 59 Fed. Reg. 18,688 (April 19, 1994), and Clean Water Act section 402(q), 33 USC § 1342(q).

3. Disregarding the clear statement of law, Respondents seek to require DEP to implement CSO abatement projects that will result in the *highest attainable use* of the waterbody. As explained more fully below, each waterbody in the state has a designated use (e.g. swimming, boating, fishing, fish survival), as adopted under State regulation, that reflects, among other things, the physical characteristics of the waterbody, the historic use of waterway for industrial, transportation or recreational use, and the levels of pollutants in the waterway. *See* ECL § 17-0301(3); 6 NYCRR § 702 *et. seq.* Based on these characteristics, the best use of some waterbodies may be recreation in or on the water (e.g. swimming), while best use of other waterbodies may be a lower use that does not support recreation. The best use of each waterbody is reflected in each waterbody's WQS as adopted by the state. *Id.*

4. Under federal regulation, the financial threshold for whether a use is *attainable* is whether achieving that use of the waterbody will result in "widespread social and economic impact" to the public. *See* 40 CFR § 131.10(g)(6). Therefore, DEC's insistence that a

LTCP must achieve the highest attainable use of a waterbody, and thus commit to CSO abatement projects up to the point of widespread social and economic impact to the citizenry, clearly violates the CSO Policy directive that a LTCP is to propose cost-effective CSO projects that will result in attainment of WQS.

5. In order to resolve this fundamental legal issue underlying this proceeding, Petitioners also seek a declaratory judgment resolving this issue as set forth more fully below.

PARTIES

6. Petitioner New York City Department of Environmental Protection ("DEP") is a mayoral agency of the City of New York, organized under Section 57 of the New York City Charter, with its headquarters in Queens County. DEP operates the City's 14 Wastewater Treatment Plants ("WWTPs"), which treat combined wastewater and stormwater generated within the City.

7. Petitioner City of New York ("City") is a municipal corporation existing under the laws of the State of New York and organized under the New York City Charter. The City of New York owns the 14 WWTPs.

8. Petitioner Carter H. Strickland is Commissioner of the New York City Department of Environmental Protection.

9. Respondent New York State Department of Environmental Conservation ("DEC") is an executive agency of the State of New York with jurisdiction to enforce the environmental laws of the State pursuant to the Environmental Conservation Law ("ECL"), Title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York ("NYCRR"), and Orders issued thereunder. Pursuant to Article 17 of the ECL and 6 NYCRR Part 750, *et seq.*, DEC is authorized to regulate the discharge of pollutants from point sources

into the waters of the State in conformity with the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq*.

10. Respondent Joseph J. Martens is the Commissioner of the New York State Department of Environmental Conservation.

JURISDICTION

11. This Court has jurisdiction over this matter pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") §§ 7801, 7802 and 7803, and as set forth by agreement of the parties under the Administrative Consent Order between DEP and DEC, dated January 14, 2005 ("2005 CSO Consent Order"), as subsequently modified by additional orders executed in 2008, 2009 and 2012, under which this dispute has arisen. (A copy of the 2005 CSO Consent Order, along with a 2005 Memorandum of Understanding between DEC and DEP, is submitted as Exhibit 1 to the Verified Petition.) See 2005 CSO Consent Order, Exhibit 1 § VII.B, p. 18.

VENUE

12. Venue of this proceeding in New York County is appropriate under CPLR § 506(a) and (b) and by agreement of the parties under the 2005 CSO Consent Order. See 2005 CSO Consent Order, Exhibit 1 § VII.B, p. 18.

STATEMENT OF FACTS

The City's Combined Sewer System

13. Almost two-thirds of New York City's sewer system, like those in many older municipalities throughout the country, is a combined system in which the sewer pipes are designed to, and do, convey both sanitary sewage wastewater and stormwater runoff. In dry weather, virtually all of New York City's sewage is treated at one of DEP's 14 wastewater

treatment plants ("WWTPs"). During rainfall, however, the added volume of stormwater can exceed the design of WWTPs. One of the dangers of exceeding that capacity is that the excess combined wastewater flow can wash out the biological organisms that break down and treat waste at the WWTPs. Accordingly, combined sewer systems are equipped with relief structures, or combined sewer outfalls, which are designed to protect the biological treatment process in the WWTPs. During rainfall events that exceed the capacity of the system to convey and treat combined flows, discharges of stormwater runoff mixed with untreated sewage are conveyed through these outfalls directly into waterbodies in and around New York City. These discharges are called "combined sewer overflows" or "CSOs."

14. The City's CSO discharges are regulated under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and the New York State Environmental Conservation Law ("ECL"), as well as under provisions of permits issued by Respondent DEC. These State Pollutant Discharge Elimination System ("SPDES") permits are issued to each of the City's WWTPs, and regulate, among other things, the quality of the wastewater discharged from the plants and the discharge of CSOs into waterbodies during wet weather. The City's SPDES permits also require compliance with water quality standards promulgated by the State of New York.

15. The CWA requires each state to establish waterbody classifications and accompanying water quality criteria for the waters within its jurisdiction. 33 U.S.C. § 1313. The DEC Water Quality Standards Program sets the New York State ambient water quality standards and guidance values for surface waters and ground waters throughout the State. The program also classifies surface waters for their best use. The water quality standards program is a state program with oversight by the U.S. Environmental Protection Agency ("EPA").

16. The New York State Water Quality Standards Program is codified in Title 6 of the New York Code of Rules and Regulations (6 NYCRR). DEC water quality standards are found in 6 NYCRR Part 703. These standards can be either narrative (e.g., "none in amounts that will impair…") or numeric (e.g., " 0.001 µg/L"). DEC adopts these standards through a rulemaking process governed by State law. ECL § 17-0301.

17. All waters in New York State are assigned a letter classification that denotes their best uses. Letter classes SA, SB, SC, I, and SD are assigned to saline (marine) surface waters. Best uses include: swimming, boating, fishing, and shellfishing. The letter classifications and their best uses are described in 6 NYCRR Part 701. The classification of individual bodies of surface water is found in 6 NYCRR Chapter X (Parts 800 – 941). Changes or additions to these standards are made through a rulemaking process governed by State law. ECL § 17-0301.

18. Relevant to this proceeding are the water quality standards for two bacteria species, fecal coliform and enterococcus, that are commonly found bacteria in indicate the presence of sewage and pathogens. See revised Alley Creek LTCP ("November Alley Creek LTCP"), submitted along with a cover letter dated November 12, 2013 as Exhibit 2 to the Verified Petition, at Table 2-11, p. 2-34.

19. Alley Creek is designated as a Class I waterbody and is classified for boating and fishing uses. Little Neck Bay, into which Alley Creek flows, is designated as a Class SB waterbody and is classified for swimming, boating and fishing uses. These waterbody classifications were duly promulgated by DEC, pursuant to its rulemaking process, and approved by the EPA.

Tallman Island SPDES Permit

20. Discharges to Alley Creek and Little Neck Bay from the CSO outfalls that are owned by the City are authorized and regulated by the terms of the SPDES permit issued to DEP for the Tallman Island WWTP, located in the College Point section of Queens. (A copy of the Tallman Island SPDES Permit is submitted as Exhibit 3 to the Verified Petition.) There are other outfalls to Little Neck Bay that are not owned by the City of New York and are not governed by the Tallman Island SPDES Permit.

21. Section X of the SPDES permit requires DEP to prepare a Long-Term Control Plan ("LTCP") for its CSO discharges. See Tallman Island SPDES Permit, Exhibit 3, Section X. As noted in the permit, DEP's CSO Control Program is also governed by the terms of an administrative consent order with Respondent DEC. See Tallman Island SPDES Permit, Exhibit 3, Section X.

Governing Law and Regulations for CSO LTCPs

22. The requirements for what must be included in a CSO LTCP are set forth in the 1994 EPA CSO Control Policy and related guidance, the 2005 CSO Consent Order, and the 2012 CSO Consent Order.

23. The 1994 EPA CSO Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994) requires permittees with CSOs to develop and implement LTCPs that will ultimately result in compliance with the requirements of the CWA. Congress subsequently amended the CWA to provide that municipal CSO programs should be consistent with the 1994 EPA CSO Control Policy. *See* CWA § 402(q). As set forth in the policy, the LTCPs should consider the site-specific nature of CSOs and evaluate the cost effectiveness of a range of control strategies. 59 Fed. Reg. at 18,891. The selected CSO controls should be designed to allow cost-effective expansion or cost-effective retrofitting if additional controls are subsequently determined to be

necessary to meet water quality standards, *including existing and designated uses*. *Id*. (emphasis added).

24. In September 1995, EPA issued a document entitled *Combined Sewer Overflows: Guidance For Long-Term Control Plan* (1995 Guidance),[1] to provide additional guidance and technical support to assist municipalities in the development of technically feasible, affordable, and comprehensive LTCPs consistent with the objectives of the 1994 EPA CSO Control Policy. See 1995 Guidance at p. 1-6. The 1995 Guidance notes that "[a] primary objective of the LTCP is to develop and evaluate a range of CSO control alternatives *sufficient to meet WQS [water quality standards], including attainment and protection of designated uses* on CSO impacted receiving waters." 1995 Guidance at Section 1.6.3, p. 1-13 (italics added).

25. In July 2001, EPA issued a document entitled *Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews* (2001 Guidance),[2] to provide further guidance to assist municipalities and state regulators to coordinate long-term CSO control planning with review of existing state water quality standards. The 2001 Guidance makes clear that if a LTCP demonstrates that *current water quality standards* are attainable, no revision to existing water quality standards is necessary. See 2001 Guidance, at Figure 1, p. 38.

26. Accordingly, the 1994 EPA CSO Control Policy and subsequent federal guidance are clear that the benchmark for an approvable LTCP is compliance with existing water quality standards. If such compliance is not achievable, the 1994 EPA CSO Control Policy provides for the revision – *i.e.* the *downgrade* – of state water quality standards. See 1994 EPA

---

[1] This document is available at http://www.epa.gov/npdes/pubs/owm0272.pdf.

[2] This document is available at http://water.epa.gov/scitech/swguidance/standards/handbook/upload/2001_08_06_pubs_wqs_guide_final.pdf.

CSO Control Policy, 59 Fed. Reg. at 18,694-95; 1995 Guidance, at Section 1.6.3, p. 1-13; 2001 Guidance, at Figure 1, p. 38.

27. There is no requirement for a LTCP to propose an upgrade to state water quality standards to attain a higher use of that waterbody.

DEP's CSO Control Program and Consent Order Obligations

28. DEP first entered into an administrative consent order with DEC regarding CSOs in 1992. That order has been subsequently modified to incorporate additional requirements and to modify dates for various project deadlines, with modifications issued in 1996, 2005, 2008, 2009 and 2012. (Copies of the 2005 and 2012 CSO Consent Orders are submitted as Exhibits 1 and 4, respectively, to the Verified Petition. These two documents, referred to herein as "Consent Orders," set forth the current consent order requirements for DEP's CSO Control Program.) The CSO Consent Orders required DEP to first conduct waterbody specific facility planning to identify water quality improvement projects across the city which would lead to attainment of water quality standards in a cost-effective manner. As a result of these water-body specific facility plans, which were subject to DEC review and approval, DEP identified numerous water quality improvement projects. Under the Consent Orders, DEP is required to design and construct these projects which include outfall and sewer improvements, CSO retention facilities, regulator improvements, in-line storage facilities, storage tanks, tide gates, pumping stations, force mains, and separate certain combined sewers . Based upon the performance of these projects, and additional water quality and cost analyses, DEP is required to determine whether, and which, additional projects should be undertaken through waterbody-specific LTCPs. In the case of Alley Creek, pursuant to the DEC-approved facility plan, DEP constructed a 5 million gallon CSO tank. The Alley Creek LTCP was the first

LTCP due under the 2012 CSO Consent Order. See 2012 CSO Consent Order, Exhibit 4, Appendix A § 1.E.1.

29. The 2005 CSO Consent Order provides, "The Drainage Basin Specific LTCPs shall be developed in accordance with the *Guidance For Long-Term Control Plan*, EPA, September, 1995 and … be consistent with EPA's CSO Control Policy. The elements of the Drainage Basin Specific LTCPs required by this paragraph are: (1) Characterization, Monitoring, and Modeling of the Combined Sewer System; (2) Public Participation; (3) Consideration of Sensitive Areas; (4) Evaluation of Alternatives; (5) Cost/Performance Considerations; (6) Operational Plan; (7) Maximizing Treatment at the Existing POTW Treatment Plant; (8) Implementation Schedule; and, (9) Post Construction Compliance Monitoring Program." 2005 CSO Consent Order, Exhibit 1 ¶ III.C; see also 1994 EPA CSO Control Policy, 59 Fed. Reg at 18,691-94.

30. In connection with the 2005 CSO Consent Order, DEC and DEP signed a Memorandum of Understanding ("2005 MOU") that sets forth the regulatory framework for State water quality standards review, and the parties' expectations regarding coordination of the CSO long-term planning process with water quality standards reviews. (A copy of the 2005 MOU, along with the 2005 CSO Consent Order, is submitted as Exhibit 1 to the Verified Petition.)

31. Both the 2005 CSO Consent Order and the 2005 MOU make clear that DEP was to propose LTCPs that resulted in attainment of existing water quality standards, or, where attainment of existing standards was not feasible, DEP was to produce Use Attainability Analysis (UAA) to support a lower WQS that would be attainable through the implementation of the LTCP.

32. A UAA is a structured scientific report that examines physical, chemical, biological, and economic factors that prevent attainment of a given use for a waterbody. See 40 CFR § 131.3(g) and § 131.10(g).

33. The 2012 CSO Consent Order further specifies the required contents of the LTCPs. The Order includes an LTCP Goal Statement as Appendix C, and a Long Term Control Plan Outline as Appendix D. The Goal Statement also makes clear that the goal of the LTCPs is achievement of existing water quality standards. Specifically, the Goal Statement states, "As per EPA's CSO Control Policy, communities with combined sewer systems are expected to develop and implement LTCPs that provide for attainment of water quality standards and compliance with other Clean Water Act requirements. The goal of this LTCP is to identify appropriate CSO controls necessary to achieve waterbody-specific water quality standards, consistent with the 1994 EPA CSO Control Policy and subsequent guidance." See 2012 CSO Consent Order, Exhibit 4, Appendix C.

34. The 2012 LTCP Goal Statement also provides that DEP must prepare a UAA in certain circumstances. The Goal Statement's requirements with respect to UAAs go beyond what was required under the 2005 CSO Consent Order, as well as the requirements of the 1994 EPA CSO Control Policy. Specifically, the Goal Statement provides, "Where existing water quality standards do not meet the Section 101(a)(2) goals of the Clean Water Act (the "fishable/swimmable" goals), or where the proposed alternative set forth in the LTCP will not achieve existing water quality standards or the Section 101(a)(2) goals, the LTCP will include a Use Attainability Analysis examining whether applicable waterbody classifications, criteria, or standards should be adjusted by the State. The Use Attainability Analysis will assess the waterbody's highest attainable use, which the State will consider in adjusting water quality

standards, classifications, or criteria and developing waterbody-specific criteria." See 2012 CSO Consent Order, Exhibit 4, Appendix C.

35. Critically to this proceeding, although the 2012 LTCP Goal Statement requires DEP to submit a Use Attainability Analysis assessing the highest attainable use for a waterbody, it does not require DEP to construct projects that support any future rulemaking to adopt a different use, and does not require the LTCP to commit to projects to achieve the highest attainable use. Rather, it merely provides that the state may consider the UAA to promulgate revised water quality standards, which must be done through the proper regulatory notice and comment rulemaking process.

36. Although the 2012 LTCP Goal Statement expands upon the circumstances when a Use Attainability Analysis must be included in the LTCP, it clearly does not state that DEP will support a higher use than the lawfully adopted use, or that DEP must propose CSO controls that will achieve a higher use. Moreover, it in no way states that DEC may illegally circumvent the lawful rulemaking process for revising water quality standards, or that DEP waives its rights to comment on, or oppose any such future revision.

DEP's Commitment to CSO Abatement and Water Quality Improvement

37. Since 2002, DEP has invested approximately $1.9 billion in projects related to CSO control under the CSO Consent Orders with DEC. These and other completed projects have already resulted in a reduction of annual CSO volumes estimated at 5.666 billion gallons per year. These investments have also enabled DEP to increase the CSO capture rate from 18 percent in the 1980s to 73 percent today. In addition, DEP is currently obligated to construct many additional projects under the CSO consent order at an estimated cost of $1.5 billion.

38. These investments, along with additional DEP investments made through other water quality-related programs, have resulted in significant improvements to water quality in New York Harbor. As detailed in DEP's State of the Harbor Report 2012 (available at http://www.nyc.gov/html/dep/pdf/hwqs2012.pdf), New York Harbor is cleaner than it has ever been in more than a century of testing, even as the population of New York City continues to grow.

39. To date, DEP has invested more than $142 million to improve water quality in Alley Creek and Little Neck Bay alone. Implemented water quality improvement projects include a DEC-approved CSO retention facility and a 16-acre environmental restoration project, both completed in 2011. CSO retention facilities, such as the one at Alley Creek, are designed to capture CSO flows that would otherwise be discharged without any treatment to a waterbody. When it rains, the Alley Creek CSO retention facility collects up to five million gallons of combined wastewater that was previously discharged into Alley Creek and Little Neck Bay. Since the facility was built, Alley Creek CSOs have decreased from approximately 328 million gallons per year to 132.5 million gallons per year, an approximate reduction of 60 percent. The tank stores combined sewage during times when the treatment plant is pumping wet-weather flow rates. After the rainfall ends, retained CSO is pumped to the Tallman Island WWTP for treatment. The retention facility is not designed to perform any treatment, though it incidentally may remove some grit and floatables. DEP also invested in upstream sewer enhancements, including a new Tallman Island outfall (TI-025) to increase the sewer system's capacity and reduce sewer surcharging and street flooding.

<u>The Alley Creek Long-Term Control Plan</u>

40. The Alley Creek LTCP is the first of 11 drainage basin-specific LTCPs that DEP must submit pursuant to the 2012 CSO Consent Order. See 2012 CSO Consent Order, Exhibit 4 § VII.A, p. 14 and Appendix A § 1.E.1.

41. On July 2, 2013, DEP submitted the July Alley Creek LTCP to DEC for approval. (A copy of the July Alley Creek LTCP and DEP's July 2, 2013 letter of submission to DEC is submitted as Exhibit 5 to the Verified Petition.)

42. As required under the 1994 EPA CSO Control Policy (as further explained by the 1995 Guidance) and the 2005 and 2012 CSO Consent Orders, the July Alley Creek LTCP characterized the Alley Creek and Little Neck Bay waterbodies, identified baseline conditions in the waterbodies and considered and evaluated a range of CSO control alternatives that would lead to attainment of existing water quality standards.

43. On September 12, 2013, DEC determined that the July Alley Creek LTCP as submitted by DEP on July 2, 2013, was not approvable. (A copy of DEC's September 12, 2013 letter to DEP is submitted as Exhibit 6 to the Verified Petition.)

44. In its September 12, 2013 letter to DEP, DEC identified four threshold issues that it viewed as needing resolution before it would approve the Alley Creek LTCP. See September 12, 2013 DEC letter, Exhibit 6.

45. In the same September 12, 2013 letter, DEC instructed DEP to provide a written response to the threshold issues, as well as a revised Alley Creek LTCP, within 60 days of the date of the letter. See September 12, 2013 DEC letter, Exhibit 6, p. 3.

46. Following receipt of DEC's comments on the July Alley Creek LTCP, DEP revised the LTCP to incorporate many of the issues DEC raised.

47. In accordance with DEC's instructions, DEP provided DEC with a detailed written response to DEC's four threshold issues by letter dated November 4, 2013. (A copy of DEP's November 4, 2013 letter to DEC is submitted as Exhibit 7 to the Verified Petition.)

48. DEP submitted a revised Alley Creek LTCP on November 12, 2013. (A copy of the November Alley Creek LTCP and DEP's November 12, 2013 letter of submission is submitted as Exhibit 2 to the Verified Petition.)

DEC's Determination to Disapprove the November Alley Creek LTCP

49. On December 12, 2013, DEC issued a determination ("Determination") disapproving the November Alley Creek LTCP. (A copy of the Determination is submitted as Exhibit 8 to the Verified Petition.)

50. DEC's Determination is based on the alleged failure of the November Alley Creek LTCP to address the four "threshold issues" identified by DEC as reasons the July Alley Creek LTCP was not approvable. See Determination, Exhibit 8 pp. 2-3.

51. As explained below, each of the four grounds for DEC's disapproval of the November Alley Creek LTCP was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

52. Pursuant to the 2005 CSO Consent Order, Petitioners have 45 days to commence an Article 78 proceeding to challenge a determination of DEC to disapprove the Alley Creek LTCP. That time was subsequently extended by DEC to February 21, 2014.

Threshold Issue One – Analysis of Disinfection of Overflow from the CSO Facility

53. The first threshold issue, as characterized by DEC, is that DEP allegedly failed to adequately analyze disinfection over overflow from the Alley Creek CSO retention tank

as a potential CSO control measure. See Determination, Exhibit 8, p. 2. As explained below, DEC's statement that disinfection was not analyzed is clearly wrong, as the LTCP contains a thorough assessment of the potential benefits and adverse consequences of a disinfection system. Upon information and belief, DEC's first threshold issue is not based on a lack of analysis, as it alleges. Rather DEC merely disagrees with the LTCP's conclusion based on the analysis, that a CSO disinfection system should not be implemented. That disagreement is due to DEC's application of the wrong criteria for an approvable LTCP.

54. Accordingly, DEC's disapproval was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion because, as a matter of law, DEC applied the wrong standard for approvability of a LTCP and ignored the requirement that CSO control measures be cost-effective.

55. As set forth in EPA's 1994 CSO Policy, a LTCP should propose cost effective controls that will lead to compliance with existing Water Quality Standards as promulgated by DEC. See 1994 EPA CSO Control Policy, 59 Fed. Reg. at 18,691-94.

56. DEC ignores that governing principle, and glosses over the fact that without chlorination of CSO effluent, the LTCP will result in compliance with existing WQS. Instead, DEC seeks to require DEP to construct facilities to achieve a highest attainable use, which applies a threshold of "widespread social and economic impact" on the citizenry, contrary to the CSO Policy's cost-effectiveness criteria for selection of CSO controls to meet existing WQS.

57. The July Alley Creek LTCP submitted by DEP on July 2, 2013, used a three-step procedure to develop and evaluate various CSO control alternatives. DEP identified disinfection within the existing Alley Creek CSO Retention Tank as a possible CSO control

measure at Step 1, but screened out disinfection as an alternative at Step 2 because of concerns that disinfection would have negative impacts on wildlife in Alley Creek due to the residual chlorine that would be discharged to the waterbody as a result of the disinfection process. See July Alley Creek LTCP, Exhibit 5, pp. ES-11 to ES-12; 8-3 to 8-7.

58. In its September 12, 2013 letter rejecting the July Alley Creek LTCP, DEC requested that DEP revise its alternatives analysis to retain disinfection within the existing Alley Creek CSO Retention Tank as an alternative for further analysis under Step 3 of the three-part evaluation process. See September 12, 2013 letter, Exhibit 6, p. 1.

59. To address DEC's request, DEP submitted an updated alternatives analysis using the same three-step process in the November Alley Creek LTCP that evaluated CSO disinfection as a potential alternative through Step 3 of the alternatives analysis. See November Alley Creek LTCP, Exhibit 2, pp. ES-11 to ES-14, 8-7, 8-20 to 8-21.

60. DEP determined that CSO Disinfection would result in the discharge of chlorine in the order of 1,000 times the total residual chlorine ("TRC") water quality standards for Alley Creek and Little Neck Bay. In other words, the disinfection process, which would reduce discharges of pathogens, would result in violations of a separate water quality standard parameter for toxicity to the biota. To mitigate this impact, dechlorination – adding chemicals to remove the residual chlorine prior to discharge -- would be necessary as part of the disinfection process. A dechlorination system, however, would not remove all residual chlorine, and DEP's undisputed analysis demonstrates that the remaining level would still exceed water quality standards for TRC. See November Alley Creek LTCP, Exhibit 2, p. 8-21; 8-23; 8-27.

61. Moreover, introduction of sodium bisulfite, the chemical used to remove chlorine after the disinfection process, into Alley Creek would have its own environmental

consequences, including potential depletion of dissolved oxygen in Alley Creek, another state water quality standard.

62. While DEP evaluated CSO disinfection as an alternative, in the November Alley Creek LTCP, DEP rejected this alternative based on several factors, including: high levels of attainment of existing water quality standards with existing CSO controls; negligible improvement in attainment of the next highest class of water quality standards (as developed more fully below); elevated TRC toxicity and environmental risk; and difficulties in operation and maintenance of satellite CSO disinfection facilities. See November Alley Creek LTCP, Exhibit 2, Section 8; November 4, 2013 DEP letter, Exhibit 7, p. 3.

63. Notably, DEC has mandated DEP to reduce TRC from the effluent at DEP's 14 WWTPs. The potential cost of the chlorine abatement program ranges from hundreds of millions of dollars to over $1 billion.

64. Most WWTPs discharge the plant effluent to waterbodies that are substantially larger than Alley Creek, and which therefore have a much greater assimilative capacity. Most of those waterbodies have received those chlorine discharges for decades.

65. The existing Alley Creek CSO tank, in contrast, discharges to a small waterbody that has received chlorinated effluent not been subjected to chlorination. Based on the analysis set forth in the LTCP, it was determined that even with dechlorination, the levels of residual chlorine that would remain in the tank effluent would cause significant non-compliance with the applicable water quality standard for residual chlorine and potentially dissolved oxygen.

66. Significantly, the recommended projects in the LTCP will result in compliance with existing WQS, a point that DEC did not dispute. Chlorination of CSO, in

contrast, would likely cause non-compliance with WQS for residual chlorine and dissolved oxygen.

67. In compliance with the 1994 EPA CSO Control Policy, the 2005 CSO Consent Order, the 2005 MOU, and the 2012 CSO Consent Order, DEP conducted a robust evaluation of a variety of alternatives, including disinfection, and concluded in the November Alley Creek LTCP that disinfection was not recommended due to the toxicity it would cause, the fact that WQS are already attained, and the fact that chlorination of CSO would only provide a negligible improvement in the ability of the waterbody to achieve a higher water quality standard. Accordingly, DEC's determination to disapprove the LTCP on the failure to adequately consider a disinfection alternative, was arbitrary and capricious, and contrary to law.

68. Accordingly, DEC's rejection of the LTCP based on the first threshold issue was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion because, as a matter of law,

Threshold Issue Two - Wet Weather Flows at Tallman Island WWTP

69. The second threshold issue, as characterized by DEC, relates to the wet weather flows that are achieved at the Tallman Island WWTP. DEC's statement of this issue in its December 12, 2013 determination is per se in violation of lawful procedure, affected by an error of law and irrational, arbitrary, capricious and an abuse of discretion, as DEC concedes that this issue has no relevance to CSO control in Alley Creek.

70. As noted above, each WWTP has a rated dry weather capacity, and each plant is constructed to receive and treat additional flows during wet weather, up to a maximum wet weather flow. As shown in the Tallman Island SPDES permit, the Tallman Island WWTP

has a dry weather flow rating of 80 million gallons per day (mgd), and a wet weather flow of 160 mgd. See Tallman Island SPDES Permit, Exhibit 3 at Section IX, BMP #3.

71. DEP and DEC are engaged in a longstanding dispute on the proper interpretation of that SPDES permit provision. That dispute arose from DEC's attempt to hold DEP to a standard to which, upon information and belief, no other municipalities in the state are held.

72. However, as stated in DEP's letter responding to DEC's threshold issues with the Alley Creek LTCP, dated November 4, 2013, the Alley Creek drainage area is sufficiently remote that overflows from the sewers in that area are generally not related to operations at the Tallman Island WWTP. See DEP November 4, 2013 letter, Exhibit 7. That conclusion was based on a robust analysis of the sewer system.

73. DEC does not dispute this conclusion in its December 12, 2013 letter. Rather, it states: "The analysis provided in the City's transmittal letter for revised LTCP indicated that the ability of the WWTPs to operate at 2xDDWF has no impact on overflows for Alley Creek and Little Neck, Bay. *The Department does not feel that this argument is relevant because the WWTPs are required to operate at 2xDDWF under their permits regardless of impacts on individual outfalls.* Moreover, the Department has previously informed the City that it does not agree that it is in compliance with the CSO BMPs or that it is operating the plants in accordance with the Wet Weather Operating Plans, which is the City contention presented in the revised LTCP. Thus, the revised LTCP does not provide an adequate strategy to resolve the 2xDDWF issue." Id. at 2 (italics added).

74. Accordingly, DEC states that it is irrelevant that this alleged threshold issue is not related to the CSO discharges to Alley Creek or Little Neck Bay. Rather, DEC

concedes that it is a SPDES permit compliance issue. This SPDES issue is currently the subject of a separate dispute in a separate forum unrelated to the Alley Creek LTCP.

There is no basis to reject the Alley Creek LTCP, which is to address CSO discharges to Alley Creek and Little Neck Bay, based on an unrelated dispute over DEP's compliance with a SPDES permit provision. Accordingly, DEC's determination to disapprove the November Alley Creek LTCP on this basis is arbitrary and capricious, and contrary to law.

Threshold Issue Three - Highest Attainable Use

DEC's assertion that DEP did not identify the highest attainable use for Alley Creek is patently false.

75. DEC asserts in its December 12, 2013 determination that the Alley Creek LTCP does not assess the highest attainable use ("HAU") for this waterbody. This is incorrect as a matter of law, as the November Alley Creek LTCP clearly assesses the maximum level of attainment with Class B (primary contact) water quality criteria assuming complete removal of CSO discharges to the waterbody. Complete CSO removal is, by definition, the HAU.

76. As discussed above, there are five different classifications for saline waterbodies in New York State: SA, SB, SC, I and SD, and the uses associated with each are set forth in State regulations. The uses associated with SA and SB waterbodies are primary contact uses, which means, among other things, that waterbodies with those designations are safe for swimming. Alley Creek, as a Class I waterbody, is not currently designated for primary contact, and therefore does not meet the "fishable/swimmable" goals set forth in section 101(a)(2) of the CWA. A change to the Class I waterbody to a higher designation requires DEC to first comply with various State laws including the State Administrative Procedures Act including public notice and comment.

77. Accordingly, because Alley Creek is not designated as a "fishable/swimmable" (*i.e.*, Class SB or higher) waterbody, pursuant to the agreement between DEP and DEC, as embodied in the LTCP Goal Statement (2012 CSO Consent Order, Appendix C), DEP was required to include a Use Attainability Analysis for Alley Creek, assessing the highest attainable use of the waterbody. Importantly, because the LTCP results in compliance with existing water quality standards, it meets the criteria of an approvable LTCP under EPA's 1994 CSO control policy and subsequent guidance.

78. DEP included in the LTCP a rigorous analysis of the highest attainable use of Alley Creek, in order to satisfy DEP's obligations under the Goal Statement. See, generally November Alley Creek LTCP, Exhibit 2, at Appendix D.

79. In that analysis, the LTCP examined whether compliance with fishable/swimmable water quality criteria, as set forth in DEC's regulations for SB waterbodies, was attainable in Alley Creek. The analysis focused primarily on water quality criteria for bacteria, both in the form of fecal coliform and enterococci bacteria, two organisms for which water quality criteria have been established, and which are the limiting parameters preventing attainment of fishable/swimmable water quality in Alley Creek.

80. The LTCP demonstrates that with existing CSO controls, there would be only a 30% attainment with Class SB waterbody water quality criteria if that higher standard was legally required in Alley Creek (which it is not).

81. The LTCP then includes a thorough analysis of the maximum level of attainment with Class SB bacteria water quality criteria if complete CSO control (*i.e.* 100% CSO removal) were to be implemented, as required under the Goal Statement. That analysis demonstrated that even with complete elimination of all CSO discharges, attainment with SB

water quality criteria would increase from compliance 30% of the time under the baseline assumption, which includes existing CSO controls, to compliance only 40% of the time with the complete elimination of all CSO discharges to the waterbody and/or complete disinfection of all CSO discharges. LTCP at 6-22.

82. Accordingly, the LTCP assesses the Highest Attainable Use through its assessment of complete elimination or disinfection of all CSO. By definition, complete elimination or disinfection of CSO represents the highest attainable level of CSO control, and thus results in the highest attainable use.

DEC is Seeking to Circumvent the Rulemaking Process for Establishing Water Quality Standards, and This Violates Lawful Procedure

83. DEC's assertion that the Alley Creek LTCP did not assess the highest attainable use for Alley Creek was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

84. Although it is not entirely clear, DEC's December 12, 2014 determination appears to acknowledge that DEP's analysis of the highest attainable use is correct, as it does not dispute that a 40% attainment (a mere 10% improvement over the 30% attainment that will be achieved with current CSO controls) with SB (primary contact) water quality criteria is the highest attainable. Rather, it seems to state that DEP must assess compliance with some undefined criteria that does not currently exist in law: "The fact that further CSO reduction to this waterbody does not achieve full attainment with the Class SB standards does not mean that the highest attainable use should remain Class I for this waterbody." See Determination, Exhibit 8.

85. DEP assessed whether complete elimination of CSO would result in compliance with the State's adopted bacteria water quality criteria for primary contact, and

determined that the maximum attainable would increase from 30% compliance to 40%. Presumably, the bacteria criteria represent levels that have been determined by DEC to be acceptable to safely support primary contact (swimming). To the extent DEC's letter states that DEP should work outside the waterbody uses (SA, SB, SC, I and SD) that have been adopted through official regulatory processes, and to the extent it indicates DEP should work outside the acceptable bacteria levels that have been established by EPA and DEC, and devise some other criteria for a standard that is higher than the current secondary contract standard, DEC's expectation is unlawful, improper and infeasible.

86. If DEC believes that a new waterbody classification is appropriate for Alley Creek, or if DEC believes that new water quality criteria need to be developed, it must devise them pursuant to its delegated authority under the Clean Water Act. See 33 U.S.C. § 1313. The proper procedure for establishing water quality standards and classifications is through notice and comment rulemaking, and affected parties – including DEP, as well as ratepayers and the public – must have an opportunity to issue comments in support of or opposed to the proposed standards. DEC's attempt to force DEP to devise water quality standards, use classifications, or water quality criteria other than those that have been adopted through the rulemaking process is illegal. DEC's attempt to have DEP waive its right to comment on any future proposed water quality standards, classifications, or criteria is illegal.

87. As DEP determined that the highest attainable use for the Alley Creek waterbody is Class I, and that no level of CSO control would result in attainment of the next highest use (primary contact), DEC's claim that DEP did not assess the highest attainable use is clearly incorrect. Thus, DEC's disapproval of the Alley Creek LTCP on this basis was made in

violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

DEC's Claim that the Projects Implemented through the LTCP Must Result in the Highest Attainable Use is Incorrect as a Matter of Law

88. There is no law, regulation, policy or guidance that requires a LTCP that will result in compliance with existing water quality standards to go further and adopt infrastructure upgrades and other measures to improve water quality to the highest attainable use.

89. Similarly, nothing in the CSO Consent Orders, or in the Goal Statement itself, requires that a LTCP that would meet existing water quality standards must nonetheless propose projects that will result in the highest attainable use.

90. DEC's arguments that a LTCP must result in any water quality improvements that it deems attainable undermine two critical concepts at the core of EPA's CSO policy, namely: 1) the CSO Policy's emphasis on cost-effective CSO controls, as opposed to what is abstractly attainable; and 2) the fact that the only threshold water quality requirement is compliance with existing water quality standards. See 1994 EPA CSO Control Policy, 59 Fed. Reg. at 18,694.

91. Attainability is established through a UAA that examines physical, chemical, biological, and economic factors that prevent attainment of some use. See 40 CFR § 131.3(g) and § 131.10(g). The economic factors that are referenced are established by an analysis of whether more stringent controls "would result in widespread social and economic impact." 40 CFR 131.10(g)(6). Although not defined in regulation, widespread social and economic impact has elsewhere been determined by EPA in guidance as a threshold that will result in water rates to exceed 2% of median household income.

92. DEC is effectively taking a position that no LTCP is approvable if it does not result in the maximum pollutant reduction attainable, regardless of how miniscule the water quality benefits, and regardless of whether the LTCP achieves existing water quality standards established under state law. This is evident from DEC's statement that "The fact that further CSO reduction to this waterbody does not achieve full attainment with the Class SB standards does not mean that the highest attainable use should remain Class I for this waterbody." See Determination, Exhibit 8. This extra-legal and ad hoc approach to water quality, which disregards the water quality criteria and use classifications that DEC has itself established through lawful administrative procedures, is unsupported by governing federal and state authority, and will likely result in widespread social and economic impact to the residents of New York City.

93. Thus, DEC's position that the LTCP must propose CSO controls that are the highest attainable – i.e. up to the threshold of widespread social and economic on the citizenry – is in direct conflict with the clear statements in the governing EPA policy emphasizing a cost effectiveness the standard for CSO controls in a LTCP. See 1994 EPA CSO Control Policy, 59 Fed. Reg. 18,694; 1995 Guidance.

94. DEC's incorrect premise is articulated more clearly in the September 12, 2013 letter. The assertion that is most relevant to Alley Creek on this point is as follows: "In those cases where it has been adequately demonstrated that this goal [fishable/swimmable] is unattainable, the LTCP must then be developed with a water quality endpoint of attaining the highest attainable use of the waterbodies, and that this goal must be acknowledged within the LTCP is the correct interpretation of the LTCP Goal Statement and CSO Control Policy. Moreover, in the absence of full attainment of the CWA Section 101(a)(2) goal, the LTCP must

clearly identify the highest attainable use for both Alley Creek and little Neck Bay and develop and implement CSO control strategies that achieve the CWA goals." See DEC September 12, 2013 letter, Exhibit 6.

95. DEC's assertions in its September 12, 2013 letter are belied by the clear language of the Goal Statement: "The goal of this LTCP is to identify appropriate CSO controls necessary to achieve waterbody specific water quality standards, consistent with EPA's 1994 CSO Policy and subsequent guidance. Where existing water quality standards do not meet the Section 101(a)(2) goals of the Clean Water Act, or where the proposed alternative set forth in the LTCP will not achieve existing water quality standards or the Section 101(a)(2) goals, the LTCP will include a Use Attainability Analysis examining whether applicable waterbody classifications, criteria, or standards should be adjusted by the State. The Use Attainability Analysis will assess the waterbody's highest attainable use, which the State will consider in adjusting water quality standards, classifications, or criteria and developing waterbody-specific criteria. Any alternative selected by a LTCP will be developed with public input to meet the goals listed above." See 2012 CSO Consent Order, Exhibit 4, at Appendix C.

96. Notably, the final point of contention during negotiations of the LTCP Goal Statement was whether it would state that the LTCP would *assess* the highest attainable use, or would *propose* the highest attainable use. DEP insisted on the use of the neutral term "assess" instead of "propose," which could be read as an endorsement of a highest attainable use standard. DEP and DEC agreed to "assess". (A copy of the final revision to the Goal Statement, which was transmitted on or about August 11, 2011, showing the tracked change of the word propose, to the word assess, is submitted as Exhibit 9 to the Verified Petition.)

97. DEC is now attempting to force DEP to propose – and commit to achieving – what it is now assuming will be the highest attainable use for Alley Creek, contrary to existing water quality classifications in state law in violation of the carefully negotiated language of the Goal Statement. Accordingly, DEC's December 12, 2013 determination was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

Threshold Issue Four – Characterization and Abatement of Dry Weather Discharges

98. As to the fourth issue raised in DEC's Determination rejecting the November Alley Creek LTCP, DEC stated:

> "Characterization is a key requirement for development of a LTCP under the USEPA's CSO Control Policy, and the Department feels that the City still has not adequately characterized the sources of impairment. There are significant discrepancies between the 2013 Harbor Survey water quality monitoring results and other field sampling the City has conducted and the water quality model estimates presented in the revised LTCP. The City has not completed an adequate track-down of illicit discharges as is required under its SPDES permit and as a result, it has not completed an adequate waste load analysis under the LTCP. The Department expects the City to expeditiously track down and eliminate any direct discharges of raw sewage. Until that is completed, the City has not completed adequate characterization and abatement of dry weather sources for the waterbodies."

See Determination, Exhibit 8, pp. 2-3.

99. DEC's determination to disapprove the November Alley Creek LTCP based on this threshold issue was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion. DEC refers to no data that show DEP's water quality assessment is inaccurate. Moreover, DEP has an existing program to abate illegal connections to the City's sewer system.

100. To the extent DEC is stating in its December 12, 2013 Determination that DEP has insufficiently characterized the Alley Creek and Little Neck Bay waterbodies, DEC is

wrong. Section 2 (Waterbody/Watershed Characteristics) of the November Alley Creek LTCP submitted by DEP contains an extensive discussion on historical water quality data and targeted sampling performed specifically for the Alley Creek LTCP, the configuration of the sewer system in the Alley Creek and Little Neck Bay watersheds, and the characterization of sources of bacteria to these waterbodies, including dry weather discharges. DEC's vague and unsupported statements that the LTCP does not adequately characterize the waterbody do not support its rejection of the LTCP.

101. To the extent DEC is stating in its Determination that DEP has insufficiently tracked down and abated illicit discharges of sewage to Alley Creek, DEC is wrong. The November Alley Creek LTCP discusses DEP's efforts to investigate potential sources of dry weather discharges to Alley Creek and Little Neck Bay and rapidly abate them. See November Alley Creek LTCP, Exhibit 2, pp. ES-8 to ES-9, 2-23, 8-43. As part of DEP's plan to implement the cost-effective alternatives selected by the November Alley Creek LTCP, DEP is committed to and has proposed a schedule for quickly characterizing and addressing any additional unknown dry weather sources of bacteria to Alley Creek and Little Neck Bay. See November Alley Creek LTCP, Exhibit 2, Section 9.

102. In fact, the SPDES permit for Tallman Island WWTP, the WWTP to which the sewer system surrounding Alley Creek and Little Neck Bay, requires DEP to abate dry weather discharges, such as illicit connections to storm sewers, to these waterbodies. See Tallman Island SPDES Permit, Exhibit 3, Section XIII.2. DEP consistently complies with this permit requirement and expediently investigates illicit discharges that it discovers and has a robust program in place to survey the shoreline for evidence of illegal discharges.

103. DEP notes that under state law, DEC has a responsibility to enforce against any unpermitted direct discharges to waterways of the state, including Alley Creek.

104. In compliance with the CSO Control Policy, the 2005 Order, and the 2005 MOU, the November Alley Creek LTCP adequately characterized water quality in Alley Creek and Little Neck Bay and evaluated cost-effective CSO control alternatives that may be necessary to attain compliance with existing water quality standards in these waterbodies. Accordingly, DEC's determination to disapprove the LTCP on the basis of inadequate characterization and abatement of dry weather sources of pathogens to Alley Creek and Little Neck Bay was arbitrary and capricious, and contrary to law.

FOR A FIRST CAUSE OF ACTION

105. Petitioners repeat and re-allege ¶¶ 1 to 104 of the Verified Petition as if fully set forth herein.

106. Respondents' determination to disapprove the Alley Creek LTCP was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

FOR A SECOND CAUSE OF ACTION

107. Petitioners repeat and re-allege ¶¶ 1 to 106 of the Verified Petition as if fully set forth herein.

108. In compliance with governing law and the relevant Consent Orders, DEP's November Alley Creek LTCP conducted a robust evaluation of a variety of alternatives, including disinfection of CSO tank effluent, and concluded that disinfection was not recommended due to its potential to cause toxicity in the waterbody, due to the fact that existing

WQS are already achieved, and based on and based on the negligible improvement it would provide in attaining the next higher WQS.

109. Therefore, Respondents' disapproval of the November Alley Creek LTCP on the grounds that DEP failed to consider disinfection of CSO was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

FOR A THIRD CAUSE OF ACTION

110. Petitioners repeat and re-allege ¶¶ 1 to 109 of the Verified Petition as if fully set forth herein.

111. DEC's rejection of the Alley Creek LTCP based on an ongoing dispute over a SPDES compliance issue, which DEC concedes is not relevant to CSO discharges to Alley Creek or Little Neck Bay, was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

FOR A FOURTH CAUSE OF ACTION

112. Petitioners repeat and re-allege ¶¶ 1 to 111 of the Verified Petition as if fully set forth herein.

113. DEC is seeking to force DEP to endorse an unspecified higher use and/or unspecified water quality criteria for Alley Creek by illegally withholding approval of the November Alley Creek LTCP.

114. DEC's attempt to circumvent the administrative process for adoption and/or revision of water quality standards, water quality criteria, and/or water quality classifications deprives Petitioners of their ability to comment through a lawful rulemaking

process, and is in violation of lawful procedure, affected by an error of law, irrational, arbitrary, capricious and an abuse of discretion.

FOR A FIFTH CAUSE OF ACTION

115. Petitioners repeat and re-allege ¶¶ 1 to 114 of the Verified Petition as if fully set forth herein.

116. DEC's rejection of the Alley Creek LTCP, which satisfies the water quality requirements for approvability, namely, compliance with existing water quality standards, was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

FOR A SIXTH CAUSE OF ACTION

117. Petitioners repeat and re-allege ¶¶ 1 to 116 of the Verified Petition as if fully set forth herein.

118. DEC's rejection of the November Alley Creek LTCP, which satisfies the water quality requirements for approvability, namely, compliance with existing water quality standards, on the grounds that it must meet the highest level of pollutant control that is attainable – to the point of widespread social and economic impact on the citizenry – was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

FOR A SEVENTH CAUSE OF ACTION

119. Petitioners repeat and re-allege ¶¶ 1 to 118 of the Verified Petition as if fully set forth herein.

120. DEC's rejection of the Alley Creek LTCP on the grounds that it does not commit DEP to endorse an unspecified highest attainable use, not only for Alley Creek, but for

all CSO waterbodies, was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

FOR AN EIGHTH CAUSE OF ACTION

121. Petitioners repeat and re-allege ¶¶ 1 to 120 of the Verified Petition as if fully set forth herein.

122. Petitioners' November Alley Creek LTCP adequately characterized water quality in Alley Creek and Little Neck Bay and dry weather sources of bacteria to these waterbodies.

123. DEC's determination to disapprove Petitioners' Alley Creek LTCP on the basis that it did not adequately characterize the Alley Creek and Little Neck Bay waterbodies and abate dry weather discharges to these waterbodies was made in violation of lawful procedure, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion.

WHEREFORE, Petitioners respectfully request:

(1) that the Court issue an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules finding that Respondents' determination, dated December 12, 2014, that the Alley Creek Long Term Control Plan is not approvable, was affected by an error of law and was irrational, arbitrary, capricious and an abuse of discretion;

(2) directing Respondents to review Petitioners' Alley Creek Long Term Control Plan rationally, and to apply the governing legal requirements for an approvable LTCP;

(3) issuing a declaratory judgment that DEP's Alley Creek Long Term Control Plan is not required to select and implement CSO control measures that will achieve the "Highest Attainable Use" for Alley Creek and Little Neck Bay; and

(4) granting fees, costs, and such further relief as it deems just and proper.

Dated: New York, New York
February 21, 2014

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 356-2077

By:
WILLIAM S. PLACHE
Assistant Corporation Counsel
Environmental Law Division

Susan E. Amron,
Carrie Noteboom,
Devon Goodrich,
Of counsel

VERIFICATION

STATE OF NEW YORK)
: SS.:
COUNTY OF QUEENS)

VINCENT SAPIENZA, being duly sworn, deposes and says:

I am Deputy Commissioner for the Bureau of Wastewater Treatment at the New York City Department of Environmental Protection, a petitioner in the instant proceeding.

I have read the foregoing Petition in New York City Department of Environmental Protection vs. Joseph J. Martens, et al., and, upon information and belief, believe the contents thereof to be true. The source of my information and the basis for my belief as to all matters are as follows: information obtained from the books and records of the Department of Environmental Protection and other departments of the City government, and from statements made to me by certain employees of the City of New York.

VINCENT SAPIENZA

Sworn to before me this
20th th day of February 2014.

NOTARY PUBLIC

TANISHA N. MILLS
Notary Public, State of New York
No. 02MI6230724
Qualified in Queens County
Commission Expires 11/08/2014

Index No. _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Petitioners,

- against -

JOSEPH J. MARTENS, as Commissioner of the New York State Department of Environmental Conservation, et al.,

Respondents.

VERIFIED PETITION

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street
New York, NY 10007

Of Counsel: William Plache
Devon Goodrich
Tel: (212) 356-2077
LM No. 03EL030503

Due and timely service is hereby admitted.

New York, N.Y. ....., *2014*.

..... *Esq.*

Attorney for.....