



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

FEB 14 2014

Mr. James Tierney, Assistant Commissioner
Water and Watersheds
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-3500

Re: **New York City CSO Long Term Control Plans and Water Quality Standards**

Dear Mr. Tierney:

As you know, the U.S. Environmental Protection Agency (EPA) is committed to improving water quality in communities impacted by combined sewer overflows (CSOs) and strongly supports the New York State Department of Environmental Conservation (NYSDEC) in its efforts to ensure that the New York City Department of Environmental Protection (NYCDEP) is taking necessary steps to implement the EPA's *1994 CSO Control Policy* to meet appropriate water quality standards. Specifically, we want to reiterate the U.S. Environmental Protection Agency's (EPA) position regarding the applicable water quality standards, including the designated uses and criteria to protect those uses that should be used as the basis for long term control plan (LTCP) design.

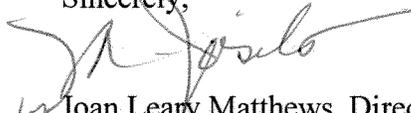
The 1994 CSO Control Policy states that water quality standards authorities should work to ensure that the development of the CSO permittees' LTCPs are coordinated with the review and possible revision of water quality standards on CSO-impacted waters. Further, permittees with CSOs are responsible for developing and implementing LTCPs that will ultimately result in compliance with the requirements of the CWA. EPA supports NYSDEC's position that, wherever 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. To this end, as part of the LTCP development process, NYSDEC and NYCDEP should work together to determine whether the "fishable/swimmable goals" of the CWA can be attained, and when the analyses show that the fishable/swimmable goal is not fully attainable, the highest attainable use and associated criteria should be identified. We envision that the resultant highest attainable use and level of protection would be established as the applicable standards by the State for each such water body. In these cases, a UAA would need to be completed to demonstrate that attaining the fishable and/or swimmable designated uses are not feasible based upon one or more of the six factors in 40 CFR 131.10(g) and to determine the highest attainable use.

EPA most recently articulated this position in its September 4, 2013 proposed rule, "Water Quality Standards Regulatory Clarifications." In summary, Section 101(a)(2) of the CWA

establishes the national goal that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water" be achieved by July 1, 1983. The EPA's longstanding interpretation is that the uses specified in section 101(a)(2) of the Act are presumed attainable unless a state affirmatively demonstrates through a UAA that 101(a)(2) uses are not attainable as provided by one of six regulatory factors in section 131.10(g). Further, if a UAA indicates that the current use is unattainable, the state will need to identify and assign the "highest attainable use," which should reflect the factors and constraints on the attainability of a use that were evaluated as part of the UAA process. EPA's regulations at 40 C.F.R. § 131.10(g) describe the factors used to support removal of a designated use or sub-categorization of use. The regulatory factors and the data analysis used to evaluate removing a use should also be used to determine the highest attainable use. Therefore, a UAA that effectively considers what is attainable in the future should guide the determination of the highest attainable use. EPA expects that a UAA will be sufficiently detailed both to fully inform public review of the revision and to lay out the data, analysis and logic that support the resulting highest attainable use. When adopting the highest attainable use, states must also adopt criteria to protect that use.

If you have any questions, please call me at (212) 637-3724.

Sincerely,



Joan Leary Matthews, Director
Clean Water Division

CC: Gary Kline, NYSDEC

New York State Department of Environmental Conservation

Division of Water

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Joe Martens
Commissioner

December 12, 2013

SENT VIA EMAIL

Mr. Keith Mahoney, P.E.
Regulatory Planning Division Chief
Bureau of Wastewater Treatment
New York City Department of Environmental Protection
96-05 Horace Holding Expressway
Corona, NY 11368

Re: Order on Consent (“CSO Order”), DEC Case #CO2-20110512-25 modification to DEC Case #CO2-20000107-8, Appendix A
I. Alley Creek CSO, E. Drainage Basin Specific LTCPs, 1. Submit Approvable Drainage Basin Specific LTCP for Alley Creek
DEC DETERMINATION

Dear Mr. Mahoney:

The New York City Department of Environmental Protection (City) submitted the Alley Creek Long-Term Control Plan (LTCP) on July 2, 2013 to the New York State Department of Environmental Conservation (Department) in accordance with the CSO Consent Order milestone Appendix A, I.1. The Department provided comments on the submittal in a letter dated September 12, 2013 informing the City that the LTCP was not approvable as submitted. The Department also directed the City to address four main threshold issues and submit a final approvable LTCP within 60 days of the September 12th comment letter date.

On November 8, 2013, the City submitted a request for a six month extension for submittal of the revised LTCP until May 12, 2014. Before the Department acted on this request, on November 12, 2013, the City submittal of a revised LTCP to timely meet the 60 day deadline for resubmission established in the Department’s September 12 comment letter. On November 15, 2013 the Department acknowledged receipt of both the revised LTCP and the extension request but assumed the extension request was withdrawn. On November 15, 2013, the City confirmed in a separate letter that it still desired the extension. This letter provides the Department’s Determination pursuant to paragraph VII of the CSO Consent Order (#CO2-20110512-25), regarding both the City’s extension request as well as the revised LTCP submittal,

First, the Department has determined that an extension request is not justified. As noted above, the City was required to fully address the threshold issues for the LTCP within 60 days of the receipt of the Department’s comment letter. Because the threshold issues outlined in the Department’s comments had been the subject of significant previous discussion with the City, in

some cases dating back years, the City has had ample time to conduct the analyses and field work required to complete the LTCP. As such, 60 days was deemed adequate to revise the LTCP to make it approvable, and the Department hereby denies the City's extension request submitted on November 8, 2013.

Second, the Department has determined that the revised LTCP does not adequately address the four threshold issues outlined in Department's comment letter. While the City did provide some new information in the revised LTCP, the threshold issues have not been resolved to the Department's satisfaction. As such, the Department hereby disapproves the revised LTCP submitted on November 12, 2013, and provides the following specific justification for the disapproval with reference to the four threshold issues.

The first threshold issue was the lack of consideration of adequate alternatives, in particular disinfection of the CSO overflow from the retention facility. Although the City did consider this alternative further within the revised LTCP, the City still did not consider a full range of the feasible disinfection alternatives. The City did not consider disinfection at the retention facility in conjunction with dechlorination, which would be a much more cost-effective alternative than the disinfection at the retention facility along with construction of a new pump station and outfall valued at over \$500 million. Thus, the evaluation of alternatives in the revised LTCP is still considered inadequate.

The second threshold issue was providing a strategy for demonstrating that the wastewater treatment plants covered by the LTCP are operating at 2xDDWF in accordance with the SPDES permit CSO best management practices (BMPs) (BMP #3). 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.

The third threshold issue was the water quality endpoint and highest attainable use. The revised LTCP still did not clearly identify the highest attainable use for Alley Creek. 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. Thus, the revised LTCP does not adequately identify the highest attainment use for Alley Creek.

The fourth threshold issue was inadequate characterization and abatement of dry weather sources of impairment to Alley Creek and Little Neck Bay. 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 re-

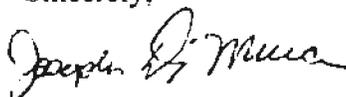
quired under its SPDES permit and as a result, it has not completed an adequate waste load analysis under the LTCP. These shortcomings directly undermine the Department's confidence in the analyses presented in the LTCP. The Department expects the City to expeditiously track down and eliminate any direct discharges of raw sewage. Until that is completed, the City has not completed adequate characterization and abatement of dry weather sources for the waterbodies.

Pursuant to Paragraph VII.A, Dispute Resolution in the 2005 CSO Consent Order, if the City disagrees with the Department's Determination, then the City and Department may enter into informal negotiations to resolve the dispute and the time to conclude the informal negotiations shall terminate 45 days from the day that the City receives this Department's Determination. At the same time, pursuant to Paragraph VII.B of the CSO Consent Order, the City may challenge the Department's Determination in an Article 78 proceeding but must do so within 45 days of receiving the Determination.

If the City disagrees with the Department's Determination presented herein, the Department is willing to extend the time period for informal negotiations as set forth in paragraph VII.A and the time period to commence an Article 78 proceeding as set forth in Paragraph VII.B of the CSO Consent Order for an additional fifteen (15) days, so that both time periods are for a total of 60 days from the date of this letter, until February 10, 2014. These extensions are conditioned on the City making all due efforts to work towards addressing any comments that have not been fully addressed in the revised LTCP, and maintaining adequate progress.

If you have any questions regarding this letter, please contact Mr. Gary Kline, P.E., Section Chief, NYC Municipal Compliance Section at 518-402-9655 or gary.kline@nyc.gov.

Sincerely,



Joseph DiMura, P.E.
Director, Bureau of Water Compliance
Division of Water

cc: All sent via email
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