

SUMMARY OF ASSESSMENT OF PUBLIC COMMENT FOR AMENDMENT TO 6 NYCRR PARTS 701 AND 703

The Department of Environmental Conservation (Department or DEC) proposed amendments to 6 NYCRR Parts 701 and 703 to address water quality in Class I and Class SD saline waters. The proposal appeared in the December 3, 2014 New York State Register.

The public comment period for this proposal was open from December 3, 2014 until March 16, 2015. A public hearing was held in Manhattan, NY on March 9, 2015. Written comments for this rulemaking were received from approximately 25 parties. In addition, approximately 20 people spoke at the public hearing. Major areas of comment included: the need to clean up the waters through the proposed rule; the rule does not go far enough to protect waters; standards for pathogen indicators as an average value is not sufficiently protective; monitoring should be conducted where people use the waters; standard should be for enterococcus rather than coliform human powered boating is primary contact recreation which should be designated as a best use, some waters are not appropriate for primary contact recreation and should not be required to be suitable for it, and the cost estimates for the rule are too low. A synopsis of these issues and the Department's response is provided below. The full Assessment of Public Comment is available on the DEC website at <http://www.dec.ny.gov/regulations/103760.html>.

Many comments support the proposed rule, although some assert that the proposal does not go far enough to improve water quality for primary contact recreation. The Department acknowledges and appreciates these comments. This rulemaking represents a significant step forward in improving water quality by requiring that all remaining Class I and Class SD waters in New York State must now meet the swimmable goal of the federal Clean Water Act (CWA).

Some comments object to the standard for coliform being an average value (geometric mean) rather than a never-to-exceed maximum concentration of this pathogen indicator. While average values are used, the proposed and final standards also include a level not to be exceeded.

Some comments want the waters to be monitored near shore, where people are exposed to pathogens while paddling or otherwise recreating in the shallower waters, rather than relying on monitoring data from deeper waters that are likely to be less polluted. For water quality purposes, it is not possible or scientifically necessary to monitor all locations at all times. Monitoring is done through a combination of sampling locations and models, including some near shore locations, to provide the best information available on water quality. Beaches are separately monitored by health agencies.

Many comments address the particular pathogen indicator that should be required for Class I and Class SD waters, expressing a preference for enterococcus instead of coliforms. The Department acknowledges that the US EPA 2012 Recreational Water Quality Criteria, required to be adopted for coastal recreation waters, is for enterococcus for salt waters. DEC will consider proposing enterococcus standards in a future water quality standards rulemaking. However, adopting enterococcus now, for only certain classes of waters, would result in a patchwork of standards

and indicators that would be impractical to implement or enforce. Thus, in the current rulemaking, the coliform standards are being adopted for consistency with the other saline water classes, SA, SB, and SC.

Many comments address the need to designate Class I and Class SD waters with the best use of primary contact recreation, noting that they are used extensively for human powered boating (including Dragon boating). They describe human powered boating as primary contact recreation - people are exposed to waters, including polluted waters. This rulemaking addresses their concern by providing equivalent protection. By requiring the quality of Class I and Class SD waters to be suitable for primary contact recreation, and adopting standards for coliforms to protect that activity, Class I and Class SD waters will be protected as though the waters were formally designated with that best use.

New York City raises a concern in their comments that the cost estimates in the Regulatory Impact Statement (RIS) for this rulemaking are inaccurately low. The Department based its cost estimates on data provided by New York City in the City's Waterbody/Watershed Facility Plans (WWFPs) and Long-Term Control Plans (LTCPs). The data provided by New York City in its WWFPs and LTCPs is the most accurate and relevant data available to DEC for this purpose. The Department used this data to develop its cost estimates based on generally accepted engineering practices for projects at the planning stage. No new or revised cost estimates were submitted by New York City with their comments. However, even if new costs estimates were made available to DEC, the Department maintains, as articulated in the RIS for the proposed rulemaking, that the rulemaking does not impose any additional costs on New York City or regulated persons above what is currently required.

Having reviewed the public comment, the Department has concluded that no changes to the proposal are necessary and that the rulemaking should be adopted as proposed.