

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

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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, :

No. 400236-2014

for a Judgment Pursuant to Article 78 of the Civil Practice Law :
and Rules and CPLR Section 3001 :

against :

JOSEPH J. MARTENS, as Commissioners of the New York :
State Department of Environmental Conservation, and the NEW :
YORK STATE DEPARTMENT OF ENVIRONMENTAL :
CONSERVATION, :

Respondents. :
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**RESPONDENTS' MEMORANDUM OF LAW IN
OPPOSITION TO THE AMENDED VERIFIED PETITION
AND IN SUPPORT OF RESPONDENTS' COUNTERCLAIMS**

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June 13, 2014

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PRELIMINARY STATEMENT

This Article 78 proceeding concerns a challenge to the respondents' well-founded disapproval of the petitioners' long-term control plan to reduce water pollution caused by combined sewer overflows, or CSOs, in northeastern Queens.

In that corner of Queens, an attractive stream called Alley Creek flows through parkland into Little Neck Bay, a part of the East River. Parts of the residential and commercial area surrounding Alley Creek are served by a combined sewer system operated by petitioners (collectively, the "City") that gathers both sanitary sewage from homes and businesses and stormwater from rainfall and snowmelt for treatment at the Tallman Island wastewater treatment plant. When there is enough rainfall, the combined flow exceeds the treatment capacity of the plant, and the City sends large volumes of the pathogen-laden raw sewage/stormwater mixture directly from the sewers into Alley Creek without any treatment; those events are known as CSOs.

For decades, the respondents (collectively, "DEC") have worked to get the City to reduce such CSO pollution in Alley Creek and elsewhere in the City. Currently, under mutually agreed administrative consent orders, the City is required to submit to DEC 11 documents known as long-term control plans ("plans"), including 10 for specific City waterbodies that receive CSOs and one comprehensive city-wide plan. Under the law, the purpose of such plans is for the City to identify control measures that would reduce CSO pollution. Upon DEC approval of the plans, DEC would then incorporate the selected CSO controls as terms of the City's water pollution permits.

Pursuant to a schedule in the consent orders, the City last summer submitted the first of these long-term plans, the one for the Alley Creek/Little Neck Bay watershed, and then

submitted a revised plan in November 2013. DEC disapproved the revised plan in December 2013, and that disapproval is the subject of this litigation.

Because DEC had several rational and well-supported reasons for rejecting that plan, the Court should deny the City's Article 78 petition:

First, DEC reasonably determined that the City's proposed long-term CSO control plan unlawfully failed to identify CSO controls that would either clean up Alley Creek enough to allow full fishable/swimmable use or, if that were not attainable, clean up Alley Creek enough to allow fishable/swimmable use on a seasonal basis and/or in certain areas of Alley Creek. Under the applicable regulations, fishable/swimmable use is shorthand for primary body contact recreation (*e.g.*, swimming, wading) and protection of aquatic life. Currently, however, Alley Creek is too polluted with fecal matter from the City's sanitary effluent and other contamination, to allow fishable/swimmable use.

Second, in determining that the City's proposed plan was inadequate, DEC specifically found that the plan unlawfully failed to evaluate a full range of disinfection measures that the City could use to reduce or even eliminate pathogens in the CSOs entering Alley Creek. High pathogen levels associated with fecal matter are the main reason that Alley Creek does not meet the full fishable/swimmable standard. DEC disapproved the Alley Creek plan because the plan only considered a \$550 million disinfection alternative, which the City found to be prohibitively expensive but neglected to consider or adopt a \$4.1 million disinfection alternative that would provide the same significant reduction of pathogens as the \$550 million measure.

Third, DEC further determined that the plan failed to adequately characterize and model the CSOs and other discharges into Alley Creek and Little Neck Bay. Characterization and modeling of the CSO and other pollution entering the creek and bay is required under the

governing legal authority because reliable information about how much pollution is going into Alley Creek and where it is coming from is absolutely necessary to prepare a sound CSO long-term control plan. DEC reasonably rejected the Alley Creek plan because there were “significant discrepancies” between actual 2013 data and the City’s modeling estimates that undermined DEC’s confidence in the accuracy of the City’s modeling and characterization work.

In challenging DEC’s rejection of its proposed long-term plan, the City alleges that DEC relied on improperly promulgated or yet to be promulgated state water quality regulations because, according to the City, the current state regulations do not require the City to achieve fishable/swimmable use in Alley Creek either in whole or in part. The City’s focus on state-promulgated regulations simply misses the mark. Under the federal Clean Water Act, DEC’s regulation of pollutant discharges to such water bodies as Alley Creek, can be no less stringent than the requirements set by federal law. In 2001 Congress amended the Clean Water Act to require evaluation and implementation through long-term CSO control plans of measures that would either achieve full swimmable/fishable use of the subject water body or as close to that full use as could be reasonably achieved. The two-step analytical framework DEC used here to evaluate the City’s selection of CSO controls in the Alley Creek plan is fully consistent with the applicable law. Undaunted by DEC’s reliance on the overarching federal law, the City claims that DEC is misinterpreting the federal requirement. But the City’s claim is without merit. DEC’s application of the federal requirement is not only supported by the language of the governing legal authority but it is also fully supported by the Environmental Protection Agency (“EPA”), the federal agency charged with implementing the Clean Water Act.

Accordingly, the City’s petition should be denied in its entirety. In addition, the Court should declare that the two-step analytical framework governs the selection of CSO controls in

long-term CSO control plans to clarify the requirements the City must meet for the other plans that the City will submit in the future. Finally, because the administrative consent orders provide for the award of stipulated penalties against the City if DEC properly disapproved the plan, the Court should also award those penalties as demanded in DEC's counterclaim.

BACKGROUND

I. ALLEY CREEK AND COMBINED SEWER OVERFLOWS

A. Alley Creek, Little Neck Bay, and Their Watershed

Alley Creek is located in the northeastern part of Queens, near the Nassau County border. It flows in a northwesterly direction for several miles between the communities of Douglaston and Bayside. The creek eventually drains into Little Neck Bay, which is located on the south side of the East River. R0018, R0040¹ (maps).

Within the City, a watershed area of about 4,900 acres, or about 7.6 square miles, drains into Alley Creek and Little Neck Bay. R0039. Alley Creek constitutes one of the few remaining undisturbed marsh systems in the City. R0075. The area immediately adjacent to Alley Creek is mostly parkland, including Alley Pond Park. This 624-acre park includes ponds, wetlands and forests, which City residents use for fishing, canoeing, camping and other outdoor recreation. R0075; R0085. The Alley Pond Educational Center, located near the mouth of the creek, provides an extensive environmental education program, including outreach to City schools. R0085. The rest of the watershed is largely residential, although there are some commercial areas. R0039; R0041-R0042.

¹ Citations to "R____" are to the Administrative Record submitted with this memorandum of law.

B. Combined Sewers and Separate Sewers

In many urban areas, usually in older parts of cities, including New York City, there is only one sewer system that gathers both sanitary sewage from homes and businesses, and stormwater from rainfall and snowmelt. Most of the time, cities send the entire flow in these combined sewer systems through municipal wastewater treatment plants that remove much of the contamination. But when a rainstorm or heavy snowmelt hits, and the combined stormwater and sewage flow is too great for the capacity of the treatment plant, a city may intentionally discharge some of the raw sewage/stormwater mixture – without any treatment – directly to local streams, ponds, lakes or bays. This is known as a combined sewer overflow, or CSO. *See, e.g., Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006); EPA, Combined Sewer Overflows, at [http://cfpub.epa.gov/npdes/home.cfm?program_id=5](http://cfpub.epa.gov/npdes/home.cfm?program_id=5;);

In other urban areas, often in newer parts of cities and suburbs, there are two separate sewer systems: one for sanitary wastes and another for stormwater. The fact that the two sewer systems are separate, however, does not mean that the conveyed stormwater is relatively clean. Stormwater even in the separate storm sewers is often contaminated by sanitary sewage, because sometimes sanitary lines from residential and commercial structures are improperly connected to the storm sewer rather than to the sanitary sewer, an act known as an “illicit connection.” The discharges to storm sewers from illicit connections or other human activities are sometimes referred to as “dry weather discharges,” as they will continue to create a discharge from a storm sewer system even without recent rainfall or snowmelt. *See, e.g., EPA, Illicit Discharge Detection and Elimination Program*, at <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=111>. The stormwater also picks up other pollutants, such as spilled oil, pathogens from

pet waste, or ordinary street litter, as the stormwater drains across the land and pavement into the separate storm sewer system. *See, e.g.*, New York State Dept. of Env'tl. Conservation, Stormwater, at <http://www.dec.ny.gov/chemical/8468.html>. Separate storm sewers do not drain to wastewater treatment plants, and often receive no treatment at all, so that whatever contaminants are in the stormwater are discharged directly into the local waterbody into which the storm sewer drains.

Many of the City's watersheds receive CSOs from the City's over 400 combined sewer discharge structures, which are known as outfalls. *See, e.g.*, R1063-R1083 (identifying waterbodies); Affidavit of Joseph DiMura (June 12, 2014) ("DiMura Aff.") ¶ 9 (citing R1791 and stating number of outfalls). The Alley Creek/Little Neck Bay watershed is one of those watersheds: it includes some areas served by combined sewers, and some areas served by separate storm and sanitary sewers. R0018 (map).

The combined sewers in the Alley Pond/Little Neck Bay watershed are connected to the Tallman Island wastewater treatment plant. R0039. So when the volume of the mixed sewage and stormwater is low enough, the entire flow receives treatment at that plant. But that is not always the case. Six combined sewer outfalls drain into Alley Creek. R0051. The City has estimated that in 2008, those CSOs added approximately 132 million gallons of mixed sewage and stormwater to Alley Creek, and separate storm sewers added approximately 293 million gallons of contaminated water to the creek. R0137 (Table 6-2).

II. STATUTES, REGULATIONS AND GUIDANCE GOVERNING CSO POLLUTION CONTROL

A. The Clean Water Act and Water Quality Standards

The Clean Water Act is the federal statute governing water pollution throughout the nation. In the Act, Congress set a general objective "to restore and maintain the chemical,

physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve that objective, Congress set a national goal that, “wherever attainable,” water quality that “provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water” would be achieved by 1983. 33 U.S.C. § 1251(a)(2). This provision, set out in section 101(a)(2) of the Act, is often referred to as the Clean Water Act’s “fishable/swimmable” use standard.

Consistent with those objectives, Congress required that each state set water quality standards for all surface waters in the state. 33 U.S.C. § 1313(a). Water quality standards include two components, designated uses and water quality criteria, that operate in tandem. 33 U.S.C. § 1313(c)(2)(A). Designated uses are, as the name suggests, the best uses assigned to a particular waterbody, such as a source of public drinking water, a location for swimming or fishing, or habitat for fish, shellfish or wildlife. *Id.*; *see also* EPA, Designated Uses, at www.water.epa.gov/scitech/swguidance/standards/uses.cfm. The water quality criteria are the specific technical standards needed to protect particular designated uses. *See* EPA, Water Quality Criteria, at www.water.epa.gov/scitech/swguidance/standards/crit.cfm.

Thus, as an example, the designated use for a lake may be “primary contact recreation,” which includes direct, intentional human contact with water through swimming, wading, or other activities. *See, e.g.*, R1282; *see also* EPA, Recreational Water Quality Criteria, at <http://water.epa.gov/scitech/swguidance/standards/criteria/health/recreation/>. The associated water quality standard for that designated use would set the maximum concentrations of certain types of bacteria in the water consistent with preventing illness in the adults and children who participate in those activities. R1282. Primary contact use is consistent with the Clean Water Act’s fishable/swimmable goal. R1282. The Clean Water Act requires states periodically to

review the existing water quality standards and revise them if appropriate. 33 U.S.C. § 1313(c)(1).

By regulation, EPA has set out a process, known as a “use attainability analysis,” for determining the highest attainable use for a given waterbody. *See generally* 40 C.F.R. § 131.10(g). A use attainability analysis is “a structured scientific assessment of the factors affecting the attainment of uses specified in Section 101(a)(2) of the Clean Water Act, 33 U.S.C. § 1251(a)(2) (the so called “fishable/swimmable” uses).” EPA, What is a UAA?, at http://water.epa.gov/scitech/swguidance/standards/uses/uaa/about_uuas.cfm; *see also* 40 C.F.R. § 131.3(g).

To make such assessments, a use attainability analysis examines whether conditions exist that would make it impossible to attain the water quality necessary for a particular use. *See, e.g.,* R1247 (use attainability analyses provide information sufficient “to determine that the designated use is not attainable and also provide the basis for adopting an alternative use and the criteria to protect that use”). Thus, for example, if naturally occurring pollutant concentrations would interfere with a particular use, that use would not be attainable. 40 C.F.R. § 131.10(g)(1). Similarly, if “[h]uman caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place,” the use would not be attainable. 40 C.F.R. § 131.10(g)(3). Finally, if attaining the use would require pollution controls more stringent than those otherwise required by the Clean Water Act, and those more stringent controls would cause “substantial and widespread economic and social impact,” then the use would not be attainable. 40 C.F.R. § 131.10(g)(6). Thus, part of a use attainability analysis necessarily involves examining a variety of controls to determine which controls would produce pollution reductions necessary to allow a particular use. A use

attainability analysis may determine that the current designated use should be made more stringent or less stringent. R1261 (data and analyses may support “more or less stringent standards”); Ephraim S. King, EPA Office of Science and Technology, Memorandum – Improving the Effectiveness of the Use Attainability Analysis (UAA) Process at 2 (Mar. 13, 2006) (“A credible UAA can lead to refinements or changes in use that lead to either more or less protective criteria. The goal is that the new use is more accurate.”), *available at* http://water.epa.gov/scitech/swguidance/standards/handbook/upload/king_memo.pdf.

The regulations create a rebuttable presumption in favor of full fishable/swimmable use. *Idaho Mining Assoc. v. Browner*, 90 F. Supp. 2d 1078, 1087-92 (D. Idaho 2000). They require that a use attainability analysis be performed “whenever” the designated uses for the water do not meet the fishable/swimmable requirement of Clean Water Act section 101(a)(2). 40 C.F.R. § 131.10(j)(1); *see also* EPA, Designated Uses (“A use attainability analysis must be conducted for any water body with designated uses that do not include the “fishable/swimmable” goal uses identified in . . . section 101(a)(2) of the Act,” *at* www.water.epa.gov/scitech/swguidance/standards/uses.cfm).

If full fishable/swimmable use cannot be attained, the regulations and guidance allow designation of subcategories of use or seasonal uses to reflect the specific conditions in a given waterbody. *See* 40 C.F.R. § 131.10(c) & (f); R1282. For example, a modified use might allow swimming except during or after a CSO event when pathogen levels are elevated. R1222. A use attainability analysis can support adoption of such subcategories. R1282. However, any alternative use level should be “as close as possible” to the full section 101(a) fishable/swimmable use. R1247.

For saline waters in New York State, DEC has five categories of designated uses, referred to as classes. *See* 6 N.Y.C.R.R. § 701.10-701.14. Alley Creek is saline because it is subject to tidal flows from Little Neck Bay. R0075. It currently has a saline water quality designation of Class I, or “class one,” R0071, representing protection of aquatic life and secondary contact recreation such as boating, 6 N.Y.C.R.R. § 701.13. Little Neck Bay currently has a higher saline water quality designation of Class SB, R0071, representing protection of aquatic life and primary contact recreation, or in other words, fishable/swimmable use, 6 N.Y.C.R.R. § 701.11.

Consistent with the different designated uses for these two classes, the two classes have different numeric water quality criteria. Pathogens are the water quality issue of most concern for human contact. Affidavit of Linda Allen, Ph.D. (June 12, 2014) (“Allen Aff.”) § 14. Thus, the fecal coliform standard for Class SB swimmable waters, a maximum of 200 cells per 100 milliliters, is ten times less than the standard for Class I incidental contact waters, which is a maximum of 2,000 cells per 100 milliliters. 6.N.Y.C.R.R. § 703.4.

B. NPDES/SPDES Permitting

As the principal tool for reducing pollution entering the nation’s waters, Congress included in the Clean Water Act a nationwide water pollution permitting system, known as the National Pollution Discharge Elimination System, or NPDES. *See generally* 33 U.S.C. § 1342. Under this program, no “point source” can discharge pollutants to the waters of the United States unless it is covered by a permit that sets out restrictions, known as effluent limitations, on the discharge. 33 U.S.C. § 1342(a)(1). With certain exceptions not relevant here, a point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel conduit, well, [or] discrete fissure,” 33 U.S.C. § 1362(14), and thus the City’s CSO outfalls are point sources subject to these permitting requirements. *See, e.g.*, R1515.

Upon review and approval by the federal Environmental Protection Agency (“EPA”), a state may administer its own permitting program within its boundaries in lieu of the federal NPDES program, in which case the state program is known as a State Pollution Discharge Elimination System, or SPDES. 33 U.S.C. § 1342(b). EPA in many cases sets the relevant technological standards, known as effluent limitations, that govern the amount of specific types of pollutants that can be discharged under a NPDES or SPDES permit in light of the designated uses of the receiving body of water. *See generally* 33 U.S.C. § 1311. But the statute expressly gives states the power to impose more stringent requirements than EPA requires. 33 U.S.C. § 1370.

New York State has enacted provisions that implement and go beyond the requirements of the Clean Water Act in Article 17 of the state Environmental Conservation Law and in DEC regulations. *See, e.g.*, E.C.L. § 17-0815(7) (authorizing DEC to include in SPDES permits any provisions necessary to meet the requirements of the Clean Water Act). Based on these state statutes and regulations, EPA approved DEC’s water pollution program in the 1970s, *see* DiMura Aff. ¶ 18, and since then DEC has regulated discharges in the state by issuing SPDES permits, *see, e.g.*, E.C.L. § 17-0801.

C. NPDES/SPDES Permitting for CSOs

Because of the size of their discharges and their intermittent nature, controlling pollution from CSOs has been a challenge across the nation for decades. In 2000, Congress added a provision specifically concerning CSOs, section 402(q), to the Clean Water Act. 33 U.S.C. § 1342(q); *Friends of the Earth*, 446 F.3d at 146. Section 402(q) addressed two issues: CSO permits, and the relationship between CSO permitting and water quality standards.

1. The 1994 CSO Control Policy

Section 402(q) addresses CSO permits, but does not set out express standards for them. Instead, section 402(q)(1) states that each CSO permit issued after December 2000 “shall conform to” a 1994 guidance document that EPA had published, known as the CSO Control Policy (the “CSO Control Policy”). 33 U.S.C. § 1342(q)(1) (referencing R1513-R1524, the EPA policy published as *Combined Sewer Overflow (CSO) Control Policy*, 59 Fed. Reg. 18,688 (Apr. 19, 1994)).

As an overall goal, the CSO Control Policy seeks to ensure that sewer operators implement CSO controls that meet both “the objectives and requirements” of the Clean Water Act. *Friends of the Earth*, 446 F.3d at 147 (quoting R1514). As a means to that end, the CSO Control Policy set out a two-stage process for developing CSO permits: first, sewer operators would obtain initial permits requiring implementation of certain technology-based measures, known as the nine minimum controls, and second, they would develop long-term CSO control plans that would be incorporated in subsequent permits. R1517; R1522; Affidavit of Gary Kline, P.E. (June 13, 2014) (“Kline Aff”) ¶ 16.

For the long-term control plans, the CSO Control Policy sets out several necessary elements. R1517-R1520. The first element is “[c]haracterization, [m]onitoring and [m]odeling of the [c]ombined [s]ewer [s]ystem.” R1517. This element requires the system operator to thoroughly examine data about the system, the overflows and the receiving waters to develop a “thorough understanding of its sewer system the response of the system to various precipitation events, the characteristics of the overflows, and the water quality impacts that result from CSOs.” R1517. The policy states that the plan “may need to consider information on the contribution and importance of other pollution sources in order to develop a final plan.” R1517.

Another element of long-term control plans is “[e]valuation of alternatives.” R1518-R1519. Under the policy, plans should “evaluate alternatives for attaining compliance with the [Clean Water Act], including compliance with water quality standards and protection of designated uses.” R1514. To accomplish this, plans should “consider a reasonable range of alternatives” with a sufficient level of detail to “make a reasonable assessment of cost and performance.” R1518.

A third element of the long-term control plans is “[m]aximizing [t]reatment” at the existing wastewater treatment plant. R1519-R1520. The goal here is both to eliminate or minimize overflows and to ensure that any combined flows receive at least some treatment at the plant. R1519.

The CSO Control Policy allows operators to meet the long-term control plan requirement in two ways. The first way, known as the “presumption” approach, presumes that the sewer operator’s long-term plan complies with the Clean Water Act if the plan meets certain default criteria regarding reduction in the frequency of CSOs or the amount of contamination contained in them. R1518-R1519.

Alternatively, the second way to meet the long-term control plan requirement is through a “demonstration” approach, in which the operator must demonstrate that its plan meets a number of requirements. R1519. Among other things, the CSO controls selected in the plan must “provide the maximum pollution reduction benefits reasonably attainable.” R1519.

The policy acknowledged the tight connection between CSO long-term control plans and setting water quality standards, stating that one of the “key principles” of the policy was the “[r]eview and revision, as appropriate, of water quality standards . . . when developing CSO control plans to reflect the site-specific wet weather impacts of CSOs.” R1515; *see also* R1514

(indicating an objective that “development of the CSO permittees’ long-term CSO control plans are coordinated with the review and possible revision of water quality standards on CSO-impacted waters”). In this regard, the policy notes that the end result of the CSO permitting policy should be “cost effective CSO controls that ultimately meet appropriate health and environmental objectives. R1514.

2. The 2001 CSO/WQS Guidance

In another part of Clean Water Act section 402(q), Congress asked EPA to further address the relationship between CSOs and water quality standards by directing EPA to prepare guidance “to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.” 33 U.S.C. § 1342(q)(2). In July 2001, EPA complied by issuing a document entitled *Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews* (the “2001 CSO/WQS Guidance”). R1208-R1285.

The 2001 CSO/WQS Guidance seeks to coordinate CSO long-term control plans and water quality standards review, *see, e.g.*, R1210 (purpose of the guidance is to “lay a strong foundation for integrating CSO long-term control planning with water quality standards review”), and the guidance in effect describes a two-stage, integrated process: first, the long-term control plan determines the level of CSO control that would allow the highest attainable use of the relevant waterbody, and second, the state uses the pollution reductions from the controls selected in the plan as the basis for a rulemaking to make that highest attainable use the legally protected use for that receiving waterbody. “One objective of integrating CSO control planning and water quality standards reviews is . . . to help collect information and conduct analyses, whenever possible, which will support both processes.” R1229; *see also id.* (CSO monitoring programs should “[s]upport the review and revision, as appropriate, of water quality standards”).

Consistent with this objective, a long-term control plan and a water quality standards review have a number of common components, including “[w]ater quality monitoring and modeling,” “[d]etailed descriptions of existing and designated uses,” “[a]nalyses of the potential for use attainment,” and “[a]nalyses of control costs.” R1258; *see also* R1230 (a wide variety of data supporting water quality standards review can be gathered during the long-term control plan process, including data regarding pollutant loadings from other sources, such as storm water sewers, that enter the same water bodies as the CSOs, and data regarding the “cost versus performance” and the “financial impact” of CSO control options).

In developing long-term control plans, the guidance instructs sewer operators to “examine a range of CSO control alternatives and evaluate the potential CSO reductions and water quality improvements from each alternative.” R1226. “For each CSO control level examined,” the plan process “evaluates the constructability, costs, performance, water quality benefits, and protection of sensitive areas. The [plan] also identifies other sources of pollution impacting the CSO receiving water which may preclude the attainment of water quality standards, regardless of the level of CSO control.” R1260; *see also* R1227 (“[t]he analysis of control alternatives should be sufficient to make a reasonable assessment of costs and the expected performance of the various alternatives”).

The guidance indicates that use attainability analyses for waterbodies subject to CSO discharges should contain substantially similar information and analysis as the long-term control plans. Components of the use attainability analysis include “[a]n analysis of pollutant sources and loads to identify the pollutant loading reductions necessary to attain the use” and “[e]conomic analyses to evaluate whether the cost of controls beyond [the technologically based controls required under other provisions of the Clean Water Act] would result in substantial and

widespread economic and social impact and, if so, identification of the *most protective attainable use* with the *maximum affordable level* of CSO control.” R1283 (emphasis added). This is consistent with the language in the CSO Control Policy requiring that long-term control plans must “provide the maximum pollution reduction benefits reasonably attainable,” which the 2001 CSO/WQS Guidance substantially repeats. R1519; R1228.

Under the guidance, the end result of the long-term control plan process is a plan that “contains adequate data and information to support the selection of CSO controls and identify needed revisions to the water quality standards.” R1262. The guidance invokes the Clean Water Act section 101(a)(2) goal of providing fishable/swimmable water quality wherever attainable. R1221; R1232. The guidance also states that when “primary contact recreation is not feasible, [or] is not feasible all the time,” there can be alternatives to full swimmable/fishable use, such as a subcategory of recreational uses that would allow less protective uses at certain times “on a case-by-case basis.” R1234.

III. THE EVENTS LEADING TO THIS LITIGATION

A. The Administrative Consent Orders

In 1992, DEC entered into an administrative consent order with the City to address CSO permitting for all of the City’s over 400 combined sewer outfalls. DiMura Aff. ¶ 19. In light of the City’s inability to meet the requirements of that order and subsequent developments, DEC and the City entered into various amended administrative consent orders in subsequent years. *Id.* The City’s current CSO obligations are set out in the 2005 and 2012 orders. *Id.* (referring to R1047-R1094; R1103-R1166). Citations to the 2005 consent order in this brief are to provisions that were not superseded by subsequent consent orders and therefore remain in effect.

The 2005 administrative consent order set out multi-step processes and schedules for the City to prepare and submit separate long-term control plans for the Alley Creek/Little Neck Bay watershed and 10 other long-term control plans regarding other City waterbodies suffering from CSOs. R1052. One of the necessary elements for each of the plans under the 2005 consent order was “Characterization, Monitoring, and Modeling of the Combined Sewer System.” R1111. Another necessary element was “Maximizing Treatment at the Existing [Wastewater] Treatment Plant.” R1111. As discussed in Background section II.C.1 above, the CSO Control Policy required that plans contain both of these minimum elements. R1517; R1519.

In the 2012 consent order, the City and DEC agreed that the City would include in each of the plans a long-term control plan goal statement. R1051. DEC and the City agreed to the language of that statement, which made reference to the Clean Water Act’s fishable/swimmable use goal and required the City to perform a use attainability analysis to examine whether the fishable/swimmable goal could be met in Alley Creek or other City waterbodies:

[w]here 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 [long-term control plan] will not achieve existing water quality standards or the Section 101(a)(2) goals, the [long-term control plan] will include a Use Attainability Analysis examining whether applicable water body 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.

R1088-R1089 (emphasis added).

The 2005 consent order also included a dispute resolution provision. That provision stated that, upon receipt of a DEC disapproval determination for a long-term control plan, the City could file an Article 78 proceeding in State Supreme Court, New York County. R1120. The City and DEC agreed that, if in such a proceeding “the submittal is found to have been

properly disapproved, then penalties and interest shall be assessed [against the City] from the date of DEC's Determination." R1120.

The 2005 consent order sets out two schedules of stipulated penalties for breach of the order's requirements, one for missing deadlines, and one for other types of noncompliance. For the former category of noncompliance, which includes missing deadlines for submitting approvable long-term control plans, the penalties are:

- \$ 3,500 per day, for the 1st through 30th day of noncompliance;
- \$ 5,000 per day, for the 31st through the 40th day of noncompliance;
- \$ 7,500 per day, for the 41st through 50th day of noncompliance;
- \$10,000 per day, for the 51st through 60th day of noncompliance; and
- \$25,000 per day, for each day of noncompliance beyond the 60th day.

R1117 (paragraph V.B).

B. The City's Long-Term Control Plan Submissions for Alley Creek and Little Neck Bay, and DEC's Responses

On July 2, 2013, the City submitted to DEC a long-term control plan for the Alley Creek/Little Neck Bay watershed. *See generally* R0376-R0594. This Alley Creek plan was the first of the long-term control plans to be submitted pursuant to the schedules in the 2012 order. R1052. Consistent with the 2012 order, the July plan included the long-term goal statement acknowledging that the City, as part of the plan, was required to perform a use attainability analysis to assess the highest attainable use of Alley Creek. R0402.

In a September 12, 2013, letter, DEC responded that the July plan "was not approvable as submitted." R0368. DEC identified four main defects in the plan relating to selection of alternatives and the characterization of the waste water being discharged to the watershed. R0402.

On November 12, 2013, the City submitted a revised long-term control plan for the Alley Creek/Little Neck Bay watershed. *See generally* R0005-R0262. Consistent with the 2012 order,

the November control plan again acknowledged that the plan was required to assess the highest attainable use of Alley Creek. R0033.

In a December 12, 2013 letter, DEC disapproved the November plan, finding that the City had failed to adequately address the four defects that DEC had identified in September 2013. R0001-R0003. Those four continuing defects were:

1. Failure to Identify the Highest Attainable Use

One reason that DEC rejected the plan was because the plan failed to identify the highest attainable use for Alley Creek. R0002. In its September 2013 letter, DEC had noted that the CSO Control Policy and the fishable/swimmable provision of the Clean Water Act, 33 U.S.C. § 1251(a)(2), require that, “wherever attainable,” the control strategies in the long-term control plan be consistent with attaining the fishable/swimmable use, and if attaining that use was not possible, the selected control strategies be consistent with the highest attainable use of the waters. R0369. DEC had indicated that the July plan failed to meet that standard and failed to either indicate that the fishable/swimmable standard was attainable or, if not fully attainable, *i.e.*, 365 days a year in every portion of the Creek, identify the highest use attainable. R0369. For example, swimmable use on a seasonal basis in certain areas of the Creek could be the highest attainable use. Kline Aff. ¶¶ 17, 24.

In its December 2013 letter, DEC determined that the November plan still failed to identify the highest attainable use for Alley Creek. R0002. In the November plan, the City had stated that the Class SB fishable/swimmable standard was not attainable, and therefore concluded that Class I was the highest attainable use. R0253; R0256. In response, DEC reiterated that even if the full Class SB fishable/swimmable standard were not attainable, the City had not demonstrated that uses beyond Class I were not attainable. R0002.

2. Failure to Consider the Full Range of Disinfection Alternatives

Consistent with the City's obligation to evaluate alternatives to determine the highest attainable use, DEC determined that the City had rejected an important, low-cost alternative: killing the pathogens in CSO discharges using chlorine disinfection. R0002. By way of background, as part of earlier CSO control efforts, the City had installed a five-million-gallon CSO retention tank. R0055. The purpose of the tank was to store combined sewage and stormwater temporarily during storms while the flow was too large for the wastewater treatment plant, and then subsequently feed the stored waters through the treatment plant when the flow had returned to lower levels. Retaining the contaminated water reduced the volume of the CSOs, but there were still some CSOs from the tank. R0055; R0115.

In its September letter, DEC noted that the City had eliminated chlorination of the retention tank overflows as a CSO control alternative. R0368. DEC stated that chlorination had:

the potential to significantly reduce or eliminate the CSO pathogen loads to Alley Creek and Little Neck Bay, and improve attainment with water quality standards for bacteria in both the SB classified waters of Little Neck Bay and the I waters of Alley Creek. Disinfection of a single point intermittent discharge from CSO storage tanks must be thoroughly evaluated as part of any [long-term control plan] analysis to achieve the "highest attainable use" of waterbodies.

R0368. DEC also noted that the City had orally agreed that the City's long-term control plans would consider disinfection of overflows from storage tanks. R0368-R0369.

In its December letter, DEC acknowledged that the City had further considered chlorination, but determined that "the City still did not consider a full range of the feasible disinfection alternatives." R0002. DEC noted that City had considered an expensive alternative to provide chlorination and dechlorination² at the retention tank plus construct a new pumping

² Adding chlorine to the water kills pathogens, but the chlorination process can sometimes result in toxic effects on aquatic life. So in some cases chlorination is combined with

station, sewer main and combined sewer outfall, at a total cost of approximately \$550 million. R0002; *see also* R0207; Allen Aff. ¶¶ 23-24. DEC faulted the City, however, for failing to consider as a separate alternative the chlorination/dechlorination system *without* the new pumping station and outfall. R0002. That alternative would only cost \$4.1 million. R0207 (Table 8-14, line labeled “Disinfection System PBC”); Allen Aff. ¶ 24. Had the City included this low-cost disinfection alternative in its analysis, it would have been clear that the low-cost alternative was cost-effective, as it would achieve the same substantial reduction of pathogen discharges from the retention tank as the high-cost alternative, but at 1/100th of the cost. Allen Aff. ¶¶ 34-38.

In a November 2013 letter, the City indicated that one of the reasons it had removed disinfection as an alternative was that it believed the chemicals used in the disinfection process would create new water quality issues. R0308-R0310. In a subsequent November meeting, DEC told the City that this would not be a problem, as any such new impacts would be short lived and limited in area, and DEC could grant a waiver to address them, so that the less expensive system would be acceptable. Allen Aff. ¶¶ 39-46.

3. Failure to Adequately Characterize and Abate Dry Weather Flows to the Storm Sewer System

A third reason DEC rejected the City’s November plan is because the City had failed to adequately characterize the sources of water quality impairment in Alley Creek. R0002-R0003. As part of its effort to characterize the pollution entering Alley Creek and Little Neck Bay, the City performed computer simulation modeling of the discharges from the combined sewer and storm sewer systems. *See, e.g.*, R0132-R0143; R0493-R0511. In its September 2013 letter,

a subsequent chemical dechlorination process that removes the chlorine from the water after it has killed the pathogens. *See, e.g.*, R1304.

DEC had noted that the City contended that Alley Creek could not fully attain Class SB fishable/swimmable use due to a variety of sources of pollution, including CSOs and stormwater. But at the same time, the City had not specified whether the modeling used to characterize the system reflected abatement of the dry weather sources of contamination – namely, illicit sanitary connections to the separate stormwater sewers, which introduce fecal matter into the stormwater discharges to Alley Creek. *See, e.g.*, R0369. DEC also indicated that the City needed to provide additional information on the characterization of these sources and whether the attainment levels presented in the plan were based on abatement of all dry weather sources. R0369.

By the time of DEC’s December letter, its concerns about the City’s inadequate characterization proved true. DEC noted that there were “significant discrepancies” between actual 2013 water quality monitoring results and the water quality estimates the City’s had included in the plan. R0002. These discrepancies, and the City’s failure to track down illicit discharges, “undermine[d]” DEC’s confidence in the City’s computer simulation modeling characterization analyses, and until the City fixed those characterization and modeling deficiencies, the plan was not adequate. R0003.

4. Failure to Demonstrate Compliance with the Wet Weather Capacity Requirement for the Tallman Island Treatment Plant

A fourth reason DEC gave for rejecting the Alley Creek/Little Neck Bay plan was the plan’s failure to demonstrate the validity of an assumption relating to the wet weather treatment capacity of the Tallman Island wastewater treatment plant. The City, in its computer simulation modeling for both the July and November plans, had assumed that the Tallman Island plant would be able to handle a wet weather flow amount that was twice as large as its dry weather flow design capacity, a concept that is referred to as “two times design dry weather flow” or “2xDDWF.” *See, e.g.*, R0133; R0134; R0231; R0494; R0495; R0567. Not only was 2xDDWF

a modeling assumption in the City's characterization work, which is one of the elements required in long-term control plans, but the ability of a wastewater treatment plant to handle a greater flow during wet weather events can facilitate another required element of those plans, the maximization of treatment at the existing wastewater treatment plant, also known as a "POTW." R1517; R1519-R1520 (identifying minimum elements); R1111 (same).

In its September letter, DEC noted that the City had relied on the 2xDDWF assumption in the modeling, but had not demonstrated that the City was, in the real world, in compliance with the 2xDDWF requirement. R0369; R0371. The City responded that the ability of the Tallman Island plant to meet this requirement did not affect CSOs in Alley Creek or Little Neck Bay. R0312. DEC in turn replied that the 2xDDWF criterion was a requirement of the existing SPDES permit for the Tallman Island plant, and that the City had not established, to DEC's satisfaction, that the requirement was being met, as presented in the modeling for the long-term control plan. R0002.

There has been a recent development regarding the 2xDDWF issue. As noted above, the 2xDDWF criterion was also a requirement of the City's existing SPDES permit for the Tallman Island treatment plant. Thus, the dispute over the City's compliance with that requirement related to both the long-term control plan and the existing permit. On May 8, 2014, DEC and the City entered into an administrative consent order that resolved that dispute, so that the City will meet the 2xDDWF requirement to DEC's satisfaction. DiMura Aff. ¶¶ 30-31.

C. The Original and Amended Petitions for Review

Under the 2005 administrative consent order, the City had 45 days from the time it received DEC's December 12, 2013 final determination regarding the Alley Creek/Little Neck Bay long-term control plan to file an Article 78 petition challenging that determination, a period

that ended on January 27, 2014. R1120. The State agreed to extend that period by 37 days to March 5, 2014, and the City filed its verified petition that day. The City subsequently served an amended verified petition on March 27, 2014. This brief, and the accompanying affidavits, respond to that amended verified petition.

STANDARD OF REVIEW

To prevail in this Article 78 proceeding, the City must prove that DEC's rejection of the City's November long-term control plan was "made in violation of lawful procedure, . . . affected by an error of law or . . . arbitrary and capricious or an abuse of discretion." C.P.L.R. § 7803(3); *Grossman v. Rankin*, 43 N.Y.2d 493, 502 (1977) (Article 78 petitioner bears the burden of proof).

When a state agency implements a federal law, "the formulation of policy and the making of rules . . . is a determination that falls within the purview of the states' interpretive authority," *Goodwin v. Perales*, 88 N.Y.2d 383, 392 (1996) (quoting *Rodriguez v. Perales*, 953 F.2d 33, 40-41 (2d Cir. 1992)). In this situation, the "agency's interpretation of the statutes it administers should be upheld if not unreasonable or irrational." *Id.* (quoting *Matter of Rodrigues v. Perales*, 86 N.Y.2d 361, 367 (1995)); see also *Matter of City Council of City of Watervliet v. Town Bd. of Town of Colonie*, 3 N.Y.3d 508, 518 (2004) ("[b]ecause DEC is entitled to deference in its construction and application of environmental conservation statutes, [the court's] standard of review is limited to whether DEC's interpretation is unreasonable or irrational"); *Non-Emergency Transporters of NY, Inc. v. Hammons*, 249 A.D.2d 124, 127 (1st Dept. 1998).

An agency's decision is only arbitrary and capricious if it is taken "without sound basis in reason" or without "regard to the facts." *Wooley v. New York State Dept. of Correctional Servs.*, 15 N.Y.3d 275, 280 (2010); *Matter of Pell v. Board of Educ. of Union Free Sch. Dist.*, 34 N.Y.2d

222, 231 (1974). “In an Article 78 proceeding, in determining whether an agency action is arbitrary and capricious, where the judgment of an agency involves factual evaluation in the area of an agency’s expertise, the Court must afford great deference to the agency’s judgment.” *Ward v. N.Y.S. Dept. of Env’tl. Conservation*, No. 402174-2004, 2005 N.Y. Misc. LEXIS 676 (Supr. Ct., N.Y. Cty. Apr. 8, 2005) (citing *Flacke v Onondaga Landfill Systems, Inc.*, 69 N.Y.2d 355, 363 (1987)).

ARGUMENT

I. DEC REASONABLY DISAPPROVED THE ALLEY CREEK PLAN BECAUSE THE PLAN FAILED TO IDENTIFY CSO CONTROLS THAT WOULD ALLOW EITHER FULL FISHABLE/SWIMMABLE USE OR THE HIGHEST ATTAINABLE USE

There is no merit to the City’s argument that DEC erred when it disapproved the Alley Creek plan for failure to identify CSO control measures that would achieve either full fishable/swimmable use of Alley Creek or, if that was not attainable then, the highest attainable use of the creek. To the contrary, DEC’s disapproval was rational because a reasonable interpretation of the governing legal authority and the 2012 administrative consent order require that the plan comply with that two-step analytical framework, and the plan did not.

A. DEC’s Two-Step Analytical Framework Is a Reasonable Application of the Governing Legal Authority

EPA’s CSO Control Policy, as adopted into the 2001 amendments to the CWA, the use attainability analysis regulations, and EPA’s 2001 CSO/WQS Guidance all support DEC’s use of a two-step analysis to determine whether the CSO controls selected in a long-term control plan are adequate: the plan must first evaluate whether CSO controls could attain full fishable/swimmable use, and if not, then the plan must identify the controls that would allow the

highest attainable use. As explained below, EPA has expressly approved the framework DEC applied here.

1. DEC Reasonably Reads the CSO Control Policy to Impose the Two-Step Analytical Framework

The two-step analytical framework is a rational implementation of the CSO Control Policy. That policy requires that sewer operators include in their long-term control plans CSO controls that meet both “the objectives and [the] requirements of the Clean Water Act.” R1514; *see also* R1515 (controls that meet “the objectives of the CWA”). This statement from the CSO Control Policy has effectively the same force as a statute, because the Clean Water Act requires that CSO permits “shall conform to” the policy. 33 U.S.C. § 1342(q)(1). Thus, CSO permits must meet the *objectives* of the statute as well as the formal requirements.

The overriding objective of the Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and to meet that objective, the Act specifies that “wherever attainable,” water quality should meet the highest level of cleanliness – the full fishable/swimmable use goal under section 101(a)(2) of the Act. 33 U.S.C. § 1251(a)(2) (“wherever attainable” water quality that “provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water[,] be achieved” by 1983). The plan should then include “cost effective CSO controls that ultimately meet appropriate health and environmental objectives.” R1514. At the same time, the policy requires that the controls be selected to “provide the maximum pollution reduction benefits reasonably attainable.” R1519.

The two-step framework DEC applied here reasonably implements these provisions of the CSO Control Policy. As the first step, DEC requires that the sewer operator evaluate CSO controls and their performance to determine if, through the use of cost-effective controls, the full

fishable/swimmable use of the waterbody is “attainable.” Kline Aff. ¶ 19. This first step is consistent with both the policy’s emphasis on attaining full fishable/swimmable use wherever attainable and the policy’s application of the cost-effectiveness criterion to meet that “health and environmental objectives.”

As the second step, if the full fishable/swimmable use is not attainable using cost-effective controls, DEC requires that the sewer operator select CSO control alternatives that achieve the highest attainable use. That highest attainable use could be fishable/swimmable use on a partial basis – for example, achieving fishable/swimmable use only at certain times, or only in certain locations. Kline Aff. ¶ 17. In selecting the controls that would lead to the highest attainable use, the sewer operator cannot limit the alternatives to those that are cost-effective, but must go beyond cost-effective controls if necessary to achieve the highest attainable use. Kline Aff. ¶ 25.

This second step is also consistent with the CSO Control Policy and its emphasis on reaching full fishable/swimmable use. In sum, the second step provides that when full fishable/swimmable use is not attainable, DEC reasonably requires the sewer operator to propose controls that provide progress toward that objective, even if it may require measures beyond cost-effective controls. The policy’s express language establishes the requirement that sewer operators to go beyond cost-effective controls: when, for example, a sewer operator chooses the “demonstration” approach to preparing a long-term control plan, the operator must select control options that “provide the *maximum* pollution reduction benefits reasonably attainable.” R1519 (emphasis added). Not only does this requirement contain no cost-effectiveness limitation, the use of the phrase “provide the maximum pollution reduction benefits reasonably attainable” negates any such limitation and indicates that the control program should go beyond cost-

effectiveness to make the water as clean as reasonably possible, even if that is not clean enough for fishable/swimmable use in all locations at all times. Going beyond the cost-effectiveness limitation does not eliminate consideration of costs. Such consideration is implicit in the predicate underlying the second step – making the water as clean as is “reasonably” possible. This is what DEC’s second step does.

EPA has approved DEC’s two-step framework for selecting CSO controls to be included in such plans as a correct implementation of the CSO Control Policy:

EPA supports NYSDEC’s position that, wherever possible, the [long-term control plan] 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 [long-term control plan] must then be developed to attain the highest attainable use. To this end, as part of the [long-term control plan] 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 [water quality] criteria should be identified.

Kline Aff., Exhibit A at 1. EPA indicated that, in making this statement, it was “reiterate[ing]” the agency’s existing position regarding the basis for designing long-term control plans. *Id.*

2. The Two Step Analytical Framework Reasonably Implements the 2001 CSO/WQS Guidance

The two-step analysis DEC used here is also consistent with the 2001 CSO/WQS Guidance. The general goal of that guidance was to integrate the CSO long-term control plan process and the water quality review process, with the objective of collecting information and performing analyses in the long-term control process that would support a DEC water quality standard review process. *See* Background section II.C.2 above. The two processes have a number of common components, including water quality monitoring and modeling, descriptions of existing and designated uses, analyses of the potential for attaining other uses, and analyses of

control costs. R1258. Water quality data regarding discharges from CSO and storm sewer systems, as well as data regarding the cost, performance and financial impact of CSO control measures, could be gathered during the long-term control plan process and then used in the water quality review process. R1230. In particular, “[f]or each CSO control level examined” in a long-term control plan, the plan should “evaluate[] the constructability, costs, performance, [and] water quality benefits.” R1260.

Under the guidance, use attainability analyses to evaluate the highest attainable use contain substantially the same information and analysis. That information and analysis would include analyses of pollutant sources and loads to identify the reductions in pollutants necessary to attain a given use, and economic analyses of whether the costs of such controls would result in substantial and widespread social impact. R1283. If certain levels of controls would produce such impact, the analyses would identify the “most protective attainable use,” R1283, and the alternatives selected should provide the “maximum affordable level” of CSO control, R1283.

DEC’s two-step framework for evaluating CSO controls is consistent with the 2001 CWO/WQS Guidance. Under DEC’s first step, the sewer operator gathers data regarding water quality and control measures, and analyses whether the full fishable/swimmable use can be attained. If not, then under the second step, the sewer operator uses the data it gathered to analyze what controls would produce the “highest attainable use,” which is the same as the “most protective attainable use” specified in the 2001 CSO/WQS Guidance. Under either step, the plans would provide information about CSO control measures that would either attain the full fishable/swimmable use or the highest attainable use that would contribute to DEC’s review of water quality standards to see if they should be changed.

Moreover, the guidance supports the requirement that, under the second step, the plan must select controls that go beyond cost effectiveness, because the guidance indicates that any alternative use short of full fishable/swimmable use should be “as close as possible” to the full section 101(a) fishable/swimmable use, R1247, and provide the “maximum affordable level” of CSO control, R1283. Again, there is no mention of a cost-effectiveness limitation here.³

B. In the 2012 Administrative Consent Order, the City Agreed to Perform a Use Attainability Analysis to Determine the Highest Attainable Use, Including the CSO Controls Associated with That Use

Because the City agreed in the 2012 administrative consent order that it would undertake a use attainability analysis to “assess” the highest attainable use for Alley Creek, it also necessarily agreed to identify the control measures that would achieve that use because as shown in below and in Argument section II.A above, and as logic dictates, a use attainability analysis must evaluate the controls needed to attain the uses being considered. In the 2012 order, R1051, the City and DEC agreed to a goal statement containing the following requirements, to be set out in each of the City’s long-term control plans:

[w]here 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 [long-term control plan] will not achieve existing water quality standards or the Section 101(a)(2) goals, the [long-term control plan] will include a Use Attainability Analysis examining whether applicable water body 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.

R1088-R1089 (emphasis added); *see also* Amend. Ver. Pet. ¶ 94 (acknowledging that the City agreed to perform a use attainability analysis that “will assess the waterbody’s highest attainable

³ Although the cost effectiveness criterion does not limit the selection of CSO controls in this step, the costs of the possible CSO controls stills plays a role in the selection process.

use”). Thus, the plain language of the 2012 consent order requires that the City perform a use attainability analysis to determine the highest attainable use in its long-term control plans.

The parties’ agreement that the City would determine the highest attainable use through a use attainability analysis in those plans is consistent with DEC’s two-step analytical framework for selecting CSO control measures in those plans. “A use attainability analysis must be conducted for any water body with designated uses that do not include the ‘fishable/swimmable’ goal uses identified in . . . section 101(a) of the Act.” EPA, Designated Uses, *at* <http://water.epa.gov/scitech/swguidance/standards/uses.cfm>. The use attainability regulations create a rebuttable presumption in favor of that full fishable/swimmable use. *Idaho Mining Assoc. v. Browner*, 90 F. Supp. 2d 1078, 1087-92 (D. Idaho 2000).

Consistent with that rebuttable presumption, however, the use attainability regulations acknowledge that in some cases the full fishable/swimmable use cannot be met. The regulations therefore allow lesser uses, including subcategories of use or seasonal uses to reflect the specific conditions in a given waterbody. *See* 40 C.F.R. § 131.10(c) & (f); R1222; R1282. If the current water quality standard is less than full fishable/swimmable use, then the analysis may conclude that designated uses should be upgraded. R1261 (data may support “more or less stringent standards”); Ephraim S. King, EPA Office of Science and Technology, Memorandum – Improving the Effectiveness of the Use Attainability Analysis (UAA) Process at 2 (Mar. 13, 2006) (“A credible UAA can lead to refinements or changes in use that lead to either more or less protective criteria. The goal is that the new use is more accurate.”), *available at* http://water.epa.gov/scitech/swguidance/standards/handbook/upload/king_memo.pdf.

To determine whether the full fishable/swimmable goal can be met or whether some lesser use is the highest attainable use, a use attainability analysis examines whether natural or

man-made conditions exist that would make it impossible to attain the water quality necessary for a particular use. A use attainability analysis is a “a structured scientific assessment of *the factors affecting the attainment of uses* specified in Section 101(a)(2) of the Clean Water Act (the so called "fishable/swimmable" uses).” EPA, What is a UAA? (emphasis added), at http://water.epa.gov/scitech/swguidance/standards/uses/uaa/about_uuas.cfm; *see also* 40 C.F.R. § 131.3(g). Among those factors, the analysis examines if “[h]uman caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place,” the use would not be attainable. 40 C.F.R. § 131.10(g)(3). Also, if attaining the use would require pollution controls more stringent than those otherwise required by the Clean Water Act, and those more stringent controls would cause “substantial and widespread economic and social impact,” then the use would not be attainable. 40 C.F.R. § 131.10(g)(6). Thus, a use attainability analysis necessarily involves examining a variety of pollution controls to determine if human contributions “cannot be remedied” or if the controls would cause such economic and social impact.

A use attainability analysis performed under these regulations is consistent with DEC’s two-step framework for selecting CSO controls. The regulations’ rebuttable presumption in favor of full fishable/swimmable use corresponds to the first step, which puts the burden on the sewer operator to perform an analysis to determine whether the waterbody for some reason cannot attain full fishable/swimmable use.

The regulations’ acknowledgement that the full fishable/swimmable use may not be possible to meet in some circumstances corresponds to the second step. More specifically, the regulations’ standard for determining if man-made conditions preclude attainment of the full fishable/swimmable use – that the conditions “cannot be remedied” or the remedy would cause

“substantial and widespread economic and social impact” – corresponds to DEC’s second-step requirement that sewer operators select controls that go beyond cost effectiveness if there are in fact controls that can “remed[y]” CSO pollution and thereby reasonably bring the water quality closer to the full fishable/swimmable use.

In response to the plain language of the goal statement requiring the City to perform a use attainability analysis, quoted at the beginning of this subsection, the City notes that in the goal statement the parties agreed to use the verb “assess” in rather than the original verb “propose,” and argues that this change indicates that the City has no obligation to identify the CSO controls that would allow the highest available use. Amend. Ver. Pet. ¶ 95. But as shown in this subsection and in Argument section II.A above, and as logic dictates, a use attainability analysis must evaluate the controls needed to attain the uses being considered: one cannot determine whether a use is attainable, or which use is the highest attainable use, without evaluating which CSO controls are reasonably available and what effects they would have on the water quality if used. Thus, the shift from “propose” to “assess” did not have the significance the City ascribes to it, and in agreeing to assess the highest attainable use in each long-term control plan, the City agreed to identify the controls needed to achieve the highest attainable use.

C. DEC Reasonably Determined that the City Failed to Determine the Highest Attainable Use, Including the CSO Controls Associated with that Use

As explained in Argument section IV.B below, DEC concluded that the Alley Creek/Little Neck Bay plan did not establish that full fishable/swimmable use could not be met given that the City did not set out an adequate program to find and control illicit discharges of sewage to Alley Creek through the storm sewer system. Even if the plan had established that the full fishable/swimmable use was out of reach, however, the plan failed on another ground: it did not determine the highest available use, that is, it did not evaluate whether CSO controls could

allow some intermediate use between the full fishable/swimmable use and the current Class I standard in Alley Creek.

As explained in Background section II.A above, one of the overriding goals of the Clean Water Act is improving water quality to the full fishable/swimmable use level “wherever attainable.” 33 U.S.C. § 1251(a). When the full fishable/swimmable goal is *not* attainable, however, the governing authority indicates that a long-term control plan or use attainability analysis should do the next best thing by determining the highest attainable use. *See* R1247 (any alternative use should be “as close as possible” to the full section 101(a) fishable/swimmable use). Such alternative uses could be swimmable use during certain seasons, or at certain locations, or at all times except during and after CSO events. 40 C.F.R. § 131.10(c) & (f); R1222; R1282.

Consistent with this authority, DEC rejected the plan on the following grounds:

The revised [long-term control plan] 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.

R0002. DEC’s rejection was reasonable on the facts: nowhere in the plan, whether through a use attainability analysis or otherwise, does the City address whether it could implement controls to attain fishable/swimmable use on a partial basis, for example, limited to certain times or certain locations within the creek. Kline Aff. ¶¶ 39-42.

II. THE STATE DID NOT VIOLATE THE STATE ADMINISTRATIVE PROCEDURE ACT, THE STATE ENVIRONMENTAL CONSERVATION LAW OR THE FEDERAL CLEAN WATER ACT BY REQUIRING THE CITY TO USE THE TWO-STEP ANALYTICAL FRAMEWORK IN ITS LONG-TERM CONTROL PLAN

There is no merit to the City’s claim that the State’s disapproval of the Alley Creek/Little Neck Bay plan violated the procedural requirements of state and federal law by applying an

“unpromulgated rule” requiring attainment of a higher designated use for Alley Creek than under existing water quality standards. City Br. at 10-15. DEC has not required the City to meet any “unpromulgated” water quality standards. Instead, as explained in Argument section I above, DEC rejected the plan for failure to comply with the requirements for long-term control plans as reflected in the Clean Water Act, which by its plain language requires compliance with EPA’s CSO Control Plan and the administrative consent orders.

A. DEC Did Not Reject the Plan for Failure to Meet a New Water Quality Standard for Alley Creek

The City’s argument relies on two premises: first, that DEC rejected the Alley Creek/Little Neck Bay plan because it failed to comply with a purported new water quality standard for Alley Creek, and second, that the purported new water quality standard was invalid because DEC did not promulgate it through a full rulemaking process, including opportunities for notice and comment, as required by the federal Clean Water Act, the State Environmental Conservation Law, and the State Administrative Procedure Act. City Br. at 10-13 (citing Clean Water Act § 303(a)(3)(A) & (B), 33 U.S.C. § 1313(a)(3)(A) & (B), Environmental Conservation Law § 17-0301(6), and State Administrative Procedures Act §§ 202(1), 202-a).

That argument fails because the first premise is not true: DEC has not established any new water quality standard for Alley Creek. As the record indicates, DEC rejected the Alley Creek/Little Neck Bay plan because it did not meet the requirements for long-term control plans and use attainability analyses that would indicate either that the full fishable/swimmable use was attainable, or if not, what the highest attainable use would be:

The revised [long-term control plan] 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 [long-term control plan] does not adequately identify the highest [attainable] use for Alley Creek.

R0002. Thus, DEC did not apply any purported new water quality standard.

Indeed, DEC could not have applied a new water quality standard as none exists. As the City acknowledges, Alley Creek remains a Class I waterbody, City Br. at 13, and DEC has never said otherwise, although DEC may change the designated use for Alley Creek in the future through normal rulemaking procedures.⁴ Neither the City's amended verified petition nor the City's brief ever identifies what the new purported water quality standard is, instead making repeated references to an unspecified "highest attainable use." As explained in Argument section I above, however, the long-term plan/use attainability analysis process attempts to define the highest attainable use and the measures needed to get to that use, if the full fishable/swimmable use is not attainable, and DEC applied that criterion. Thus, contrary to the City's contention, DEC did not reject the plan because it failed to meet a given water quality standard. DEC rejected the plan because it failed to meet the requirement that long-term control plans and use attainability analyses evaluate whether CSO controls could achieve full fishable/swimmable use in Alley Creek, or if not, identify the highest attainable use that could be achieved in Alley Creek.

The City also argues that the highest attainable use criterion itself constitutes a "general principle" that DEC may not use without adopting it through a rulemaking. City Br. at 12-13. But the highest attainable use is not a new legal standard: it is shorthand for what the 2000 amendments to the Clean Water Act, the CSO Control Policy adopted by law in those amendments, and the existing use attainability analysis regulations already require. As described

⁴ DEC agrees that if it does propose new water quality standards, it must follow relevant statutory rulemaking requirements.

above, the policy and regulations oblige the City here to evaluate alternatives for CSO control to determine whether the full fishable/swimmable use can be met, and if not, what the highest available use is. In particular, the 2001 CSO/WQS Guidance explicitly uses the term “most protective attainable use.” R1283. So DEC has done nothing other than apply existing authority, and did not create any new “general principle” that requires rulemaking.

B. DEC Did Not Unlawfully Fail to Apply the Existing Water Quality Standard for Alley Creek

The City argues that DEC, in focusing on the highest available use, has failed to apply the existing water quality standards for Alley Creek, City Br. at 13-15, but that argument is based on a misunderstanding of the various requirements under the CSO Control Policy. One requirement for long-term control plans is that they meet the “objectives” of the Clean Water Act, *Friends of the Earth*, 446 F.3d at 147 (quoting R1514), which include the fishable/swimmable goal, 33 U.S.C. § 1251(a)(2).

A separate requirement is that the plan satisfy the existing water quality standards for the receiving waters. *See, e.g.*, R1514 (plans should “evaluate alternatives for attaining compliance with the [Clean Water Act], *including* compliance with water quality standards and protection of designated uses” (emphasis added)). The policy sets out, of course, a number of other requirements for long-term control plans, such as the sewer operator’s obligation to undertake a public participation process. R1518.

The City identifies no obligation for the permitting entity, DEC, to affirmatively mention each such requirement in any determination regarding a submitted long-term control plan, and there is no such obligation. Instead, DEC has the discretion to determine which requirements it believes the City has not met, and within that subset of requirements, DEC has the discretion to not mention an unsatisfied requirement if DEC determines that the failure was of lesser

importance. Thus, there is nothing unlawful in DEC failing to mention compliance with existing water quality standards for Alley Creek if it either determined that the existing standards were met or decided not to rely on any noncompliance issue.

Implicit in the City's argument is the premise that the CSO Control Policy does nothing more than require sewer operators to comply with existing water quality designations. City Br. at 16. But the plain language of the CSO Control Plan sets out separate obligations to meet existing water quality standards *and* to satisfy *objectives* of the Clean Water Act, such as the fishable/swimmable use "wherever attainable." Indeed, if the City were correct, and all that was required was that the sewer operator designate control that meet existing water quality standards, that simple principle is already embodied in Clean Water Act section 302, 33 U.S.C. § 1312, and E.C.L. section 17-501, and there would accordingly have been no need for Congress to add section 402(q) in 2000 or for EPA to issue the detailed policy and guidance documents regarding long-term plans and water quality standard revisions discussed above.

III. REQUIRING THAT THE PLAN DETERMINE THE CONTROLS NECESSARY TO ATTAIN FULL FISHABLE/SWIMMABLE USE OR THE HIGHEST ATTAINABLE USE DOES NOT CONFLICT WITH FEDERAL LAW OR EPA GUIDANCE

The City makes three arguments as to why DEC's two-step analytical framework is contrary to federal law and guidance. City Br. at 16-20. None of those arguments has merit.

A. DEC's Determination Follows Federal Law and EPA Guidance

The City first argues that nothing in federal law or EPA guidance supports DEC's determination that the plan must meet the highest attainable use. City Br. at 16. But as already explained in Argument section I above, even if the CSO Control Policy, the use attainability regulations, and the 2001 CSO/WQS Guidance do not expressly require that long-term control plans select CSO controls that allow the highest attainable use, those authorities all support

DEC's reasonable determination that those plans identify controls that would allow the highest attainable use if the full fishable/swimmable use is not attainable.

DEC's Two-Step Analytical Framework Incorporates Cost-Effectiveness in the Selection of CSO Controls in a Long-Term Control Plan to the Extent Called for in the Governing Law and Guidance

The City insists that because the CSO Control Policy references cost-effective control measures, that is the sole criterion for selecting CSO controls for a long-term control plan. City Br. at 16-18. But the City never acknowledges that the policy sets out another criterion – “provide the maximum pollution reduction benefits reasonably attainable” – in the section specifically describing the duties of sewer operators. R1519. The latter maximization criterion materially differs from the cost-effectiveness criterion, and the City never attempts to reconcile how the two criteria work together.

As explained in Argument section I.A above, however, DEC's two-step framework does reasonably harmonize the two criteria, giving meaning to the cost-effectiveness criterion in the first step and the maximization criterion in the second step. Moreover, since the City agreed to perform a use attainability analysis in its long-term control plans, and since the use attainability regulations nowhere mention cost effectiveness, the City's position that the cost effectiveness criterion governs the review of the use attainability analysis in its plan lacks any support.

The Court need not, and should not, consider the affidavit of LaJuana Wilcher on this issue that the City submitted. Affidavit of LaJuana S. Wilcher (Apr. 28, 2014). Ms. Wilcher has never worked for either DEC or the City, or in any capacity regarding Alley Creek or Little Neck Bay, and as a result has no factual knowledge relevant to this case. Instead, she is an attorney in private practice in Kentucky that the City is paying to offer written opinions on the legal standard for selecting CSO controls. Wilcher Aff. ¶ 5. Indeed, Ms. Wilcher acknowledges that all she is

offering is her “opinion” regarding what the law requires. *Id.* Because what the requirements are is a legal question for the Court, not a factual question for witnesses, the Court should not rely on her testimony. *See, e.g., Ross v. Manhattan Chelsea Assoc.*, 194 A.D.2d 332, 333 (1st Dept. 1993); *Marquart v. Yeshiva Machezikel Torah D’Chaisidel Belz*, 53 A.D.2d 688, 689 (2d Dept. 1976).

In any event, because Ms. Wilcher was not present at EPA when the agency issued the final CSO Control Policy, she does not have authority to speak to EPA’s “intent” when it issued that final policy.⁵ Moreover, her affidavit did not address how to reconcile the cost effectiveness language in some parts of the policy with the “provide the maximum pollution reduction benefits reasonably attainable” language elsewhere in the policy, and as a result fails even to address the question before the Court.

C. Compliance with Current Water Quality Standards Is One Criterion for Selecting CSO Control Measures, But Not the Only One

The City’s other argument on this point is that long-term control plans need to meet existing water quality standards and to go no further. *See, e.g., City Br.* at 16 (“the water quality goal for [long-term control plans] is compliance with existing water quality standards”); *id.* at 19 (“the discussion above demonstrates that the goal of [a long-term control plan] is compliance with existing water quality standards”). But as shown in Argument section I.A above, the CSO Control Policy expressly states that long-term control plans shall meet the “objectives” of the Clean Water Act, such as the providing for the fishable/swimmable use “wherever attainable,” as well as the “requirements” of the Act, such as compliance with existing water quality standards.

⁵ In her affidavit, Ms. Wilcher does not state when she left EPA, but it was apparently in 1993, before EPA issued the 1994 CSO Control Policy. *See* Martindale.com, LaJuana S. Wilcher Lawyer Profile, at <http://www.martindale.com/LaJuana-S-Wilcher/4832409-lawyer.htm>.

IV. DEC REASONABLY REJECTED THE CITY'S LONG-TERM CONTROL PLAN FOR A NUMBER OF OTHER REASONS

A. DEC Reasonably Rejected the Plan Because It Failed to Evaluate or Select an Inexpensive Disinfection Alternative

The City contends that DEC unlawfully disapproved the Alley Creek/Little Neck Bay plan because DEC applied the wrong legal criterion to the question of whether to evaluate and select alternatives that would disinfect CSOs, and because the City had a valid reason for not selecting any disinfection alternative. City Br. at 21-24. But DEC's determination was reasonable because the plan failed to fully consider or select a low-cost disinfection alternative that met even the cost effectiveness criterion that the City believes governs, and because DEC had already indicated that the City's reason for not selecting disinfection was not sufficient.

There were at least two disinfection alternatives before the City as it prepared the Alley Creek/Little Neck Bay plan. One alternative cost \$4.1 million, while the other cost \$550 million. Allen Aff. ¶¶ 23-24. Both alternatives would have significantly reduced the pathogens in any CSOs from the Alley Creek retention tank to the same extent. Allen Aff. ¶¶ 37-38.

DEC disapproved the Alley Creek/Little Neck Bay plan because the City did not fully consider the \$4.1 million disinfection alternative. R0027 (figure not including the \$4.1 million Disinfection Alternative 1); R0209-R0211 (figures not including that alternative); Allen Aff. ¶¶ 23. Disapproval of the plan on this ground was reasonable. The City's neglect of this low-cost alternative failed to satisfy DEC's two-step analytical framework requiring that the City go beyond cost-effective measures if, as here, the City had determined that Alley Creek could not attain full fishable/swimmable use. Moreover, given the low cost of the second alternative, it was reasonably attainable, and the City's failure to fully consider or adopt that alternative therefore did not "provide the maximum pollution reduction benefits reasonably attainable"

under the plain language of the CSO Control Policy. Finally, because the low-cost alternative would remove pathogens to the same extent as the much higher cost alternative, but at less than 1/100th of the cost, the low-cost alternative was cost effective, and thus met even the criterion that the City believes governs. Allen Decl. ¶¶ 34-38.

The City does not mention the low-cost alternative in its brief, and does not contest the DEC's conclusion that there were disinfection alternatives that the City failed to consider or adopt. Instead, the City argues that DEC's disapproval irrationally insisted on disinfection notwithstanding the fact that disinfection would result in exceedances of existing water quality standards for residual chlorine. City Br. at 21-24. But the City never acknowledges that DEC told it that such exceedances would be acceptable, and that DEC would be willing to issue a variance for them, because they would only be temporary in nature and limited in location. Allen Aff. ¶¶ 39-46.

In this Article 78 proceeding, it is the City's burden to prove that DEC's choice – accepting possible temporary, localized chlorine exceedances in return for very substantial elimination of pathogens in the CSOs – was an irrational trade-off. Because the City neither addresses DEC's communications on that point or in any other way challenges the rationality of that trade-off, the City failed to meet its burden.⁶

DEC Reasonably Rejected the Plan Because It Failed to Adequately Characterize and Abate Dry Weather Sources of Contamination

The record demonstrates that DEC reasonably disapproved the Alley Creek plan on the additional ground that the plan's characterization and abatement analyses were inadequate. As

⁶ In a footnote, the City argues that there is some purported inconsistency between DEC requirements that the City reduce chlorine discharges in other contexts and DEC's requirement here that the City disinfect the Alley Creek CSOs through chlorination. City Br. at 23, n.6. Because the City provided neither factual nor opinion evidence to support this contention, the Court need not and should not address it.

noted in Background section II.C.1 above, one element of long-term control plans is “[c]haracterization, [m]onitoring and [m]odeling of the [c]ombined [s]ewer [s]ystem.” R1517. This element requires the system operator to thoroughly examine data about the system, the overflows and the receiving waters to present a “thorough understanding of its sewer system, the response of the system to various precipitation events, the characteristics of the overflows, and the water quality impacts that result from CSOs.” R1517.

DEC had well-supported grounds for concluding that the City had failed to perform adequate characterization and modeling in its Alley Creek plan. In its September 2013 letter regarding the July Alley Creek plan, DEC stated that the City needed to “provide additional information” on characterization of various sources of impairment to Alley Creek, including dry weather flows. R0369; R0372. DEC’s suspicions about the City’s characterization and modeling work proved prescient. In October 2013, DEC obtained some 2013 water quality data and discovered that there were “significant discrepancies” between that data and the modeling results in the Alley Creek plan, namely, that the fecal coliform levels in the data were much higher than those in the plan. R0002; Allen Aff. ¶¶ 71. DEC further noted that the City had not completed an adequate investigation into illicit discharges and as a result had not completed an adequate waste load analysis. R0002-R0003. DEC explained that such discrepancies “directly undermine[d]” its confidence in the modeling underlying the Alley Creek plan. R0003. DEC accordingly disapproved the plan for inadequate characterization and abatement of the dry weather flows. R0003.

The City does not meet its burden of proving that DEC’s determinations on this point were irrational. The City does not dispute that the coliform levels in the 2013 data were much higher than the computer model-generated data relied on in the plan. Instead, the City argues

that it was impossible for the modeling results, which were based on data from 2009 through 2012, to reflect the 2013 data. City Br. at 29-30. But that misses the point. If the City's modeling had accurately characterized the discharges into Alley Creek and Little Neck Bay, then there should have been no significant differences between the modeling results and the actual data. Here, however, the undisputed "significant discrepancies" between the modeling results and the actual conditions indicate that something was wrong in the assumptions the City used in the modeling. Modeling is only useful for CSO planning purposes to the extent it can produce accurate estimates of actual conditions. In sum, the City is arguing that DEC cannot rely on the City's modeling because it will not match actual results. In that light, DEC's disapproval of the plan is perfectly logical.

The City also argues that the "significant discrepancies" were due to some temporary, unidentified source. City Br. at 31. Again, that contention proves that DEC's determination was rational: if the City's program had adequately characterized, tracked down and abated illicit connections, there would not have been unknown sources creating such large discrepancies. In any event, the City did not in fact identify the actual source of the discrepancies.

The City further contends that it was irrational for DEC to reject the Alley Creek assumption that all illicit connections would be removed because that was the same assumption used in previous modeling work. City Br. at 32. But the City provides no evidence that the conditions for that previous modeling were similar to those here, where the actual data varied significantly from the modeling results.

In addition, the City argues that it provided a great deal of characterization and modeling work for the plan. City Br. at 29-30. But voluminous information is irrelevant if it is unreliable.

Finally, the City argues that it in fact recognized the need to do additional work on its characterization and modeling, City Br. at 31, and DEC's decision to deny the City an extension of time to do that work was arbitrary and capricious, *id.* at 29. As a preliminary matter, this is a concession that DEC was correct regarding the inadequacy of the City's characterization work. In any event, however, DEC's denial of the extension was not arbitrary or capricious. The City fails to note a number of points. First, the parties had been discussing the relevant issues for years, so there was no reason why the City should not have had adequate characterization and modeling in the July plan, let alone the November revised plan. R0001-R0002. Second, the State had already officially given the City an additional 60 days to submit a revised plan after DEC's September letter critiquing the July plan, which resulted in the City having over four months to prepare its revised November plan. R0001-R0002. There was no irrationality in DEC deciding not to grant any further extensions to a deadline that the City had known about for years to accomplish a task that the City had known about for years.

C. DEC Reasonably Rejected the Plan Because It Failed to Show Compliance with the 2xDDWF Requirement, But in Any Event, That Issue Is Now Moot

DEC's disapproval of the plan based on the City's failure to demonstrate compliance with the 2xDDWF requirement was rationally based on the requirements of the CSO Control Policy, but the issue is now moot because it has been resolved pursuant to a May 8, 2014 administrative consent order between the City and DEC. As discussed above, one element of long-term control plans is characterization, monitoring and modeling of the combined sewer system to obtain a thorough understanding of the system, its inputs, its outputs, and its effects on the receiving waters. R1517.

As part of its characterization, monitoring and modeling work, the City had assumed in the plan that the Tallman Island plant met the 2xDDWF requirement. *See, e.g.*, R0133; R0134; R0231; R0494; R0495. Not only did the City rely on 2xDDWF as an assumption in the modeling work, which is one of the elements required in long-term control plans, but the ability of a wastewater treatment plant to handle a greater flow during wet weather events can facilitate another required element of those plans, the maximization of treatment at the existing wastewater treatment plant. R1517, R1519-R1520 (identifying minimum elements); R1111 (same).

In its September letter, DEC noted that the City had relied on the 2xDDWF assumption in the modeling, but had not demonstrated that the City was, in the real world, in compliance with the 2xDDWF requirement. R0369, R0371-R0372. The City responded that the ability of the Tallman Island plant to meet this requirement did not affect CSOs in Alley Creek or Little Neck Bay. R0312. DEC in turn replied that the 2xDDWF criterion was a requirement of the existing SPDES permit for the Tallman Island plant, and that the City had not established, to DEC's satisfaction, that the requirement was being met, as the City assumed in the modeling for the long-term control plan. R0002.

But irrespective of whether DEC correctly rejected the plan on this ground, the issue is now moot. The 2xDDWF requirement was also a requirement of the City's existing SPDES permit for the Tallman Island treatment plant, and on May 8, 2014, the State and the City entered into an administrative consent order that resolved that dispute. *DiMura Aff.* ¶¶ 30-31.

Accordingly the issue is moot. *See, e.g., Keyspan-Ravenswood, Inc. v. Public Service Comm'n*, 7 A.D.3d 837. 838-39 (3d Dept. 2004).

V. THE COURT SHOULD DECLARE THAT THE TWO-STEP ANALYTICAL FRAMEWORK COMPLIES WITH APPLICABLE LAW AND GOVERNS THE SELECTION OF CSO CONTROLS IN THE CITY'S LONG-TERM CONTROL PLANS

In its counterclaims, DEC requests that the Court enter a declaratory judgment requiring that the City, in its Alley Creek and other, future long-term control plans, satisfy DEC's two-step analytical framework for selecting CSO controls. Verified Answer, Objections in Point of Law, Return and Counterclaims ¶¶ 124-127. The City has requested that the Court enter a declaratory judgment preventing DEC from applying a highest attainable use criterion in reviewing those plans. Amend. Ver. Pet. ¶¶ 116-120; City Br. at 32-33. Thus, the parties agree that the circumstances here, where the City has submitted one plan and will in the future submit other plans, merit a declaration establishing the appropriate framework for decisionmaking.

The Court should enter the declaratory judgment that DEC seeks. As shown in Argument section I.A above, DEC's interpretation and application of the governing legal authority to require that the City satisfy the two-step framework is rational, and accordingly entitled to deference. As shown in Argument section III above, the City's arguments against that framework, and in support of the City's position, are meritless.

VI. THE COURT SHOULD AWARD STIPULATED PENALTIES

As shown above, DEC properly disapproved the Alley Creek plan, and as a result the Court should award DEC stipulated penalties as provided for in those orders. In the 2005 administrative consent order, the City agreed that, if this Court determined that DEC properly disapproved a long-term control plan, the City would be subject to penalties and interest running from the date of the disapproval. R1120. The City further agreed that in the event of such a violation, DEC "shall have Judgment against [the City], and [the City] consent[s] to entry of a Judgment" for stipulated daily penalties in the following amounts:

- \$ 3,500 per day, for the 1st through 30th day of noncompliance;
- \$ 5,000 per day, for the 31st through the 40th day of noncompliance;
- \$ 7,500 per day, for the 41st through 50th day of noncompliance;
- \$10,000 per day, for the 51st through 60th day of noncompliance; and
- \$25,000 per day, for each day of noncompliance beyond the 60th day.

R1117 (paragraph V.B). As of the date of this document, 182 days have elapsed since DEC's December 12, 2013 disapproval, and thus the total amount of such penalties to date is \$3,405,000. Accordingly, the Court should enter judgment against the City awarding stipulated penalties in that amount, plus additional penalties for days of noncompliance after the date of this filing and interest on all penalties.

CONCLUSION

For the reasons set out above, the Court should (1) deny the City's amended verified petition, (2) enter a declaratory judgment requiring the City to evaluate and identify the highest attainable use and associated CSO control measures in its CSO long-term control plans, and (3) award stipulated penalties to DEC for its noncompliance with the administrative consent orders for each day after December 12, 2013, when DEC sent its letter disapproving the Alley Creek/Little Neck Bay plan.

Dated: New York, New York
June 13, 2014

Respectfully submitted,

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