

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

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In the Matter of the Application of	:
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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,	:
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Petitioners,	:
	:
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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No. 400236-2014
AFFIDAVIT OF
JOSEPH DIMURA, P.E.

State of New York)
) ss:
County of Albany)

Joseph DiMura, being duly sworn, deposes and says:

1. I am the Director of the Bureau of Water Compliance within the Division of Water of respondent New York State Department of Environmental Conservation (collectively with respondent Joseph Martens, "DEC"). As the director of that bureau, I ensure statewide compliance with the New York State Pollutant Discharge Elimination System ("SPDES") permitting programs for wastewater treatment plants and other sources of water pollution in the state, including combined sewer overflows ("CSOs").

2. I have an Associate's degree in engineering science from Hudson Valley Community College, New York; a Bachelor of Science in Environmental Engineering from

Rensselaer Polytechnic Institute; and a license from the New York State Department of Education as a professional engineer since 1982.

3. This action concern an Article 78 challenge by petitioners (collectively, the “City”) to DEC’s December 12, 2013, determination to disapprove the City’s long-term control plan to address CSOs in the Alley Creek and Little Neck Bay watershed (the “Alley Creek plan”).

4. I submit this affidavit in support of DEC’s response to the amended verified petition and DEC’s counterclaims in this action. In this affidavit, I discuss DEC’s determination to disapprove the Alley Creek plan, and the consistency of that determination with DEC’s review and decisionmaking regarding other CSO long-term control plans.

5. I base this affidavit on my general personal knowledge as Director of the Bureau of Water Compliance; my personal knowledge from participating in both DEC’s decisions to enter into a number of administrative consent orders with the City regarding CSO discharges and DEC’s monitoring of the City’s compliance with those orders; my personal knowledge from participating in DEC’s analysis and decisionmaking regarding the Alley Creek plan, including discussions between DEC and the City and discussions with Gary Kline, Linda Allen and others on my staff; and my review and analysis of the two versions of the Alley Creek plan and other documents and records associated with the Alley Creek plan and the issues the plan raised.

I. CSOs and Attainment of the Clean Water Act’s Fishable/Swimmable Goal

6. The Clean Water Act requires that each state set water quality standards for each waterbody within its borders. 33 U.S.C. § 1313(a). For the purpose of setting these standards, the Act sets as a 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 is known as the fishable/swimmable use goal.

7. In 1994, the federal Environmental Protection Agency issued the *Combined Sewer Overflow (CSO) Control Policy*, R1512-R1524, to establish a consistent national approach for controlling discharges from CSOs. The policy requires that municipalities prepare long-term control plans to address CSO discharges, R1517, and specifically states that such plans must comply with the “requirements and objectives” of the Clean Water Act. R1515. DEC interprets this language to require that long-term control plans comply with the objectives and goals of the Clean Water Act, including the goal of meeting the fishable/swimmable use “wherever attainable” under section 101(a)(2) of the Act, 33 U.S.C. § 1251(a)(2).

8. According to my bureau’s records, there are 76 sewer systems in New York State that generate CSOs. Together, these systems have approximately 914 CSO outfalls. R1795.

9. The City owns 14 of the 76 CSO sewer systems, and the City’s systems currently have 410 of the 914 CSO outfalls in the state. R1791 (data from first 14 lines).

10. Of the 504 CSO outfalls not owned by the City, only three discharge to waters with a classification that does not currently meet the fishable/swimmable goals of the CWA. R1791 (data from all lines except the first 14 lines). That is a compliance rate of approximately 99.4 percent. Thus, outside of the City, municipalities have achieved the fishable/swimmable use goal of the Clean Water Act, consistent with the CSO Control Plan.

11. Ten of the DEP sewer systems discharge to waters which are designated as water quality Class I or Class SD. Due largely to CSOs, these Class I and Class SD waters have high levels of pathogens and as a result are not suitable for primary contact recreation such as swimming or wading.

12. In total, 379 of the 410 City CSOs currently discharge to Class I and Class SD waters, not to the full fishable/swimmable Class SB waters. R1791 (data from first 14 lines). That is a compliance rate of approximately 7.6 percent. Thus, the City has not come near to achieving the fishable/swimmable use goal of the Clean Water Act in the waters receiving CSOs, notwithstanding the directive in the CSO Control Plan.

II. CSOs and Disinfection

13. All of the 62 CSO sewer systems outside the City have submitted their long-term control plans. In the City, the City has only submitted the first of its eventual 11 long-term control plans, the one for Alley Creek and Little Neck Bay that is the subject of this lawsuit.

14. One means of reducing CSOs is retention tanks. The purpose of these tanks is to capture and store high-volume combined sewer flows that exceed the capacity of the sewers or treatment systems during rainstorms or other high water flow events, instead of discharging those high flows as CSOs. Then, after the storms have passed and the flows in the sewers have returned to a lower level, the contaminated waters stored in the tank can be pumped back into the sewers and sent to the wastewater treatment plant, thus avoiding CSOs.

15. Retention tanks are not necessarily large enough to contain all high flow events, however. As a result, municipalities must sometimes still release CSOs from retention tanks.

16. To reduce or eliminate the pathogens in those CSOs, municipalities can disinfect the water in the tanks by using chlorination or other technologies.

17. Of the 10 CSO retention tanks in the state that are not owned by the City, all use disinfection on at least a seasonal or other partial basis.

III. DEC's Review of CSO Long-Term Control Plans

18. The SPDES program encompasses approximately 20,000 permitted facilities and activities, including CSOs. SPDES permits that authorize discharge to navigable waters must, at a minimum, meet all of the requirements of New York State law and the National Pollutant Discharge Elimination System under the Clean Water Act. DEC received authorization to regulate water pollution sources under its SPDES program in the 1970s and has implemented its SPDES permitting system since then.

19. In 1992, DEC and the City entered into an administrative consent order to address the City's obligation to control its CSOs under the Clean Water Act and the state Environmental Conservation Law. Since that time, in light of the City's inability to meet the requirements of that order and subsequent developments, DEC and the City have entered into a number of subsequent revisions to that original order, including the 2005 and 2012 administrative consent orders that currently govern the City's preparation of long-term control plans. R1047-R1094; R1103-R1166.

20. As Director of the Bureau of Water Compliance, I am responsible for approval or disapproval of all reports, plans and studies that the City submits to satisfy the requirements of those consent orders.

21. DEC has a two-step analytical framework for evaluating whether a long-term control plan has evaluated and selected appropriate CSO controls. Under that framework, an approvable plan will either (a) select reasonable and cost-effective alternatives to improve water quality to achieve the fishable/swimmable use goals of the Clean Water Act; or (b) if the submission provides data and analysis showing that the fishable/swimmable use goals of the Clean Water Act cannot be met, evaluate and select reasonable and effective CSO control

alternatives that are would to incrementally improve attainment toward the fishable/swimmable use goals of the Clean Water Act on a partial basis – seasonally, temporally and/or geographically – if possible.

22. This framework, and the bases for DEC adopting it, are set out in more detail in the June 13, 2014 affidavit of Gary Kline submitted in this action.

23. DEC has applied this framework to every CSO long-term plan since 1994, when the CSO Policy was issued.

IV. DEC's Review and Disapproval of the Alley Creek Plan

24. On behalf of DEC, I disapproved the City's final Alley Creek plan on December 12, 2013. R0001-R0004. There were several grounds for the disapproval, including these: (a) the plan failed to meet the requirements of DEC's two-step framework for selecting CSO controls because the plan did not evaluate whether the Clean Water Act's fishable/swimmable goal could be met on at least a partial basis in Alley Creek, and therefore did not evaluate what the highest available use of Alley Creek was; (b) the plan failed to consider the full range of disinfection alternatives; and (c) the plan failed to adequately characterize and model the CSOs and other contaminant discharges into Alley Creek.

25. In determining that the plan failed to identify the highest attainable use or the CSO controls that would produce that use, and therefore did not meet the requirements under DEC's two-step analytical framework for long-term control plans, I relied on my own review of the record, and on discussions with, and analysis provided by, Gary Kline and other members of my staff. Mr. Kline's affidavit explains the basis for DEC's use of the two-step framework and how DEC applied that framework to the Alley Creek plan.

26. I note in addition, however, that, as indicated in paragraph 23 above, DEC applied the same framework for selecting CSO control measures in long-term plans to the Alley Creek plan as it has applied to other plans.

27. In determining that the plan failed to consider the full range of disinfection alternatives, and that the plan failed to adequately characterize and model the pollutant discharges into Alley Creek, I relied on my own review of the record, and on discussions with, and analyses provided by, Linda Allen and other members of my staff. Dr. Allen's June 12, 2014 affidavit submitted in this action explains the bases for DEC's determinations on these two points.

28. I note in addition, however, that, as indicated in paragraph 17 above, a number of other municipalities in the state have implemented disinfection of CSO retention tank discharges as a CSO control measure.

29. Finally, I note that, from DEC's perspective, the City's unwillingness to take further steps to reduce CSO discharges in the Alley Creek plan is particularly troubling given that, as indicated above, CSO-receiving waters in the City are much further from reaching the goal of full fishable/swimmable use than the CSO-receiving waters elsewhere in the state.

30. Another ground on which DEC disapproved the Alley Creek plan was the City's failure to demonstrate compliance with a requirement that the Tallman Island wastewater treatment plant would be able to handle a wet weather flow that was twice as large as its dry weather flow design capacity. This requirement is known as "two times dry weather flow," or "2xDDWF." R0002.

31. On May 8, 2014, DEC and the City entered into an administrative consent order that resolved the 2xDDWF issue for the Tallman Island plant, pursuant to which the City has agreed to meet the requirement to DEC's satisfaction.

Joseph DiMura
Joseph DiMura

Sworn to before me
this 12th day of June, 2014

/s/ Philip J. Lodico
NOTARY PUBLIC