

Assessment of Public Comment (APC)

Adoption of BEACH Act Rule

Revisions to Parts 700, 703, and 890 of Title 6 of the New York Code of Rules and Regulations

Comment Period Feb 27, 2019 – April 15, 2019

**Comment 1: General support and opposition**

(Commenters 2, 4, 5, 6)

Two commenters commended DEC on the revised rule. Another commenter supports inclusion of *E. coli* and enterococci into the proposed standard as the commenter asserts they are better indicators of public risk in fresh and marine water, consistent with USEPA's 2012 Recreational Water Quality Criteria (RWQC) and based on sound scientific justification from epidemiological investigations. Another commenter expressed opposition that, other than the averaging period for pathogen indicator standards, DEC did not make changes requested in their comments on the original proposed rule.

Response to Comment 1:

These comments do not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

**Comment 2: Italicization of *E. coli***

(Commenter 2)

A commenter suggested that DEC change all references of *Escherichia coli*, listed under section 703.4, to be italicized, changing "E. coli" to "*E. coli*."

Response to Comment 2:

DEC agrees with the recommendation and has made this change in the text of the adopted rule.

**Comment 3: Proposed standards should apply to all classes of waters or all primary contact recreation waters**

(Commenters 1, 2, 4, 5)

Several commenters asked that DEC change all primary contact recreation water classes, or all water classes statewide, from total and fecal coliform bacteria parameters to *E. coli* or enterococci parameters.

### Response to Comment 3:

This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

### **Comment 4: *E. coli* is the only valid indicator**

(Commenter 3)

A commenter noted that indicators now in use include Total Coliforms, Fecal Coliforms, *E. coli*, Heterotrophic Plate Count (HPC) bacteria, and Enterococci, and stated that the published literature finds only *E. coli* associated with possible health risks. The commenter further stated that all the other “indicators” should be abandoned as there are now methods that specifically identify *E. coli*, which is the “gold standard” for assessing health risk. The commenter submitted several publications described as in support.

### Response to Comment 4:

In the original (March 21, 2018) proposed rule, DEC proposed standards for enterococci and *E. coli* as indicators, consistent with USEPA’s 2012 RWQC and the federal BEACH Act. This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

### **Comment 5: Efficacy of USEPA’s 2012 RWQC**

(Commenter 3)

A commenter called into question the efficacy of USEPA’s 2012 RWQC, providing several documents in support.

### Response to Comment 5:

In the original (March 21, 2018) proposed rule, DEC proposed standards for enterococci and *E. coli*, consistent with USEPA’s 2012 RWQC and the federal BEACH Act. This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

### **Comment 6: Validity of fecal coliforms as indicator**

(Commenter 3)

A commenter stated that fecal coliform is a “bogus indicator” developed to screen-out false positives; i.e., prevent the growth of Total Coliforms not associated with true fecal

contamination. The commenter further stated that there is an institutional mind-set to retain “fecal coliform” despite the published literature – a common trait of health regulators who don’t wish to embrace the correct indicators and alter the existing regulations. The commenter argued that as public health officials, DEC has the duty to apply microbial science when promulgating regulations and this means having credible public health knowledge.

Response to Comment 6:

In the revised rule, DEC did not propose new standards for fecal coliforms for any waters; standards were proposed in the original rule (March 21, 2018) and are being adopted for enterococci and *E. coli* to be consistent with the USEPA’s 2012 RWQC. This comment does not specifically pertain to the revisions proposed in the revised rule, but DEC would like to provide some clarifying comments on the subject. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

In response to several comments on both the original proposal and the revised proposal, DEC has withdrawn from the adopted rule all proposed revisions related to total and fecal coliform standards. Specifically, DEC has withdrawn its proposal to clarify the units of measurement in the minor clarifying amendments to 6 NYCRR § 703.4 (a) and (b). Although colony-forming units and/or most probable number are indeed the units of measurement that are used in application of these standards, such clarification is not necessary and as such the related clarifying language has been withdrawn from the adopted rule. As explained in the February 27, 2019 Assessment of Public Comment for the original proposal, the change is consistent with the units specified in the USEPA’s 2012 RWQC. However, the 2012 RWQC applies only to enterococci and *E. coli*, for which the adopted language does include this change.

In addition, as is discussed in greater detail below, DEC has withdrawn from the adopted rule its proposal to clarify the applicability of the existing total and fecal coliform standards as currently set forth under 6 NYCRR § 703.4 (c) that would have been renumbered under 6 NYCRR § 703.4 (e). Thus, in the adopted express terms, there are no revisions to 6 NYCRR § 703.4 subdivisions (a) through (c), and previously proposed subdivisions (c) and (d) are renumbered as (d) and (e), respectively.

**Comment 7: DEC has not resolved issues with the original rule**

(Commenter 5)

A commenter asserted that DEC has not resolved the issues with the original proposed rule, referring to their comments on the original rule proposed on March 21, 2018. The commenter stated that the revised rule does not meet USEPA’s clear directive that the State adopt standards consistent with 2012 RWQC for *all* primary contact recreation waters statewide and ignores USEPA’s specific rejection of the existing water quality criteria for Class I and Class SD waters because they are not consistent with the 2012 RWQC.

Response to Comment 7:

This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred DEC’s response to Comment 8

in the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

**Comment 8: DEC fails to adequately address how the proposed rule weakens existing standards**

(Commenter 5)

A commenter asserted that DEC does not adequately address how the proposed rule weakens existing standards by (1) creating a new primary contact recreation season and (2) providing an “end run around variance procedures.” The commenter further asserted that the existing standards have been applied year-round, not seasonally, and that the revised rule would make those standards apply only seasonally, which would weaken and actually eliminate the off-season standards.

Response to Comment 8:

DEC does not agree that the original or revised proposals weaken existing standards for total or fecal coliforms. However, to avoid confusion on this issue DEC has elected to withdraw the elements of the rule that the commenter highlights. Specifically, DEC has withdrawn from the adopted rule its proposal to clarify the applicability of the existing total and fecal coliform standards as currently set forth under 6 NYCRR § 703.4 (c) that would have been renumbered under 6 NYCRR § 703.4 (e). Thus, in the adopted express terms, there are no revisions to 6 NYCRR § 703.4 subdivisions (a) through (c), and previously proposed subdivisions (c) and (d) are renumbered as (d) and (e), respectively.

In addition, the adopted text of 6 NYCRR § 703.4 (f) mirrors the previously proposed subdivision (e), but DEC has withdrawn a portion of the proposed language that the commenter argued would allow the DEC to circumvent the variance procedure. Specifically, the commenter took issue with the language found under the revised proposed express terms that would have required the pathogen standards to be met “during the primary contact recreation season unless the permittee can demonstrate to the satisfaction of the Department that disinfection is not necessary to protect human health.” The adopted language requires the standards be met during the same period but does not include the phrase “unless the permittee can demonstrate to the satisfaction of the Department that disinfection is not necessary to protect human health.” This does not change the proposed rule in any substantive way from the original proposal, as it was never DEC’s intent to allow for a variance outside of the existing variance procedure under 6 NYCRR § 702.17.

**Comment 9: Revised rule weakens protections for Class SA waters compared to original proposed rule**

(Commenter 5)

A commenter asserted that in the revised rule DEC takes the additional step of weakening protections for Class SA waters that appeared in the original proposed rule by making them merely seasonal, unlike the year-round standards in the original proposed rule, referring to Revised Proposed Rule § 703.4(e). The commenter also stated that for all the reasons stated in the Original Comments and by other commenters, seasonal limitations for *any* of these waters is

inappropriate and unjustified. The commenter further noted that DEC responded to multiple complaints that the standards are too weak by making this proposed standard even weaker.

Response to Comment 9:

The revised rule requires the enterococci standard be applied to Class SA and SB coastal recreation waters on a seasonal basis from May 1 through October 31. The seasonal standards protect the primary contact recreation best use during the time of year this use takes place, and beyond. Class SA waters have an additional and existing best use of shellfishing for market purposes which requires year-round protection from certain pathogens. The existing total coliform standard of 70 Most Probable Number (MPN) applies year-round in Class SA waters, consistent with existing DEC regulation in 6 NYCRR Part 47, Certification of Shellfish Lands, and the National Shellfish Sanitation Program (NSSP). DEC recognized the application of the enterococci standards year-round was not appropriate to protect the Class SA best uses. The revised express terms of the rule correctly applies the enterococci standards *seasonally* to Class SA waters specific to the seasonal primary contact recreation best use the standards protects.

**Comment 10: Enforcement of coliform vs. enterococci standards for Class SA and SB waters**

(Commenter 5)

A commenter asserted that DEC claims that it is not repealing existing total and fecal coliform standards for Class SA and SB waters, but has not yet decided if it will enforce them or use new standards *in lieu* of the existing standards, which is not in accordance with the Clean Water Act; if DEC is not repealing the existing standards, then those standards must be met – it cannot arbitrarily “decide” not to enforce them and DEC must enforce all water quality standards.

Response to Comment 10:

This comment does not specifically pertain to the revisions proposed in the revised rule. DEC is not repealing the existing total and fecal coliform standards. Implementation of the new standards into SPDES permits as limitations will comply with all laws, regulations, and standards applicable to the receiving water to set effluent limits protective of the best uses.

**Comment 11: DEC’s Original Assessment of Public Comment was uninformative and non-responsive regarding variances**

(Commenter 5)

A commenter stated that DEC’s response to its original comment relating to the variances from the proposed standards was uninformative and non-responsive. Commenter noted that DEC stated that it is not circumventing variance procedures, and that the revised language “when implemented in permits would be subject to public review and comment.” Commenter further stated that DEC’s variance procedures require more than merely making a permit available for public comment, they require that the variance itself be subject to strict procedural and substantive requirements, including, as set forth in the Original Comments, a demonstration of infeasibility of meeting the standard, a public comment period on the proposed variance and

approval by USEPA. Commenter further stated that the Revised Proposed Rule continues to purport to allow DEC to make an exception to compliance with water quality standards based merely on an unexplained and unspecified “[demonstration] to the satisfaction of the Department that disinfection is not necessary to protect human health.” Commenter further stated that this is a circumvention of the above variance procedures, and the original Assessment of Public Comments fails to explain why that is not the case.

#### Response to Comment 11:

This comment only partially pertains to the revisions proposed in the revised rule. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov). As stated in the February 27, 2019 Assessment of Public Comment for the original proposal, it was never the Department’s intent to circumvent the existing variance procedure. The Department made revisions to the originally proposed express terms (6 NYCRR § 703.4 (e)) in an attempt to address this issue and clarify the situations in which the pathogen standards would apply and re-affirm that the existing variance procedure under 6 NYCRR § 702.17 remains the only procedure in which discharger variances are established.

The adopted text of 6 NYCRR § 703.4 (f) mirrors the previously proposed subdivision (e), except that DEC has withdrawn a portion of the proposed language that the commenter argued would allow the DEC to circumvent the variance procedure. Specifically, the commenter took issue with the language found under the revised proposed express terms that would have required the pathogen standards to be met “during the primary contact recreation season unless the permittee can demonstrate to the satisfaction of the Department that disinfection is not necessary to protect human health.” The adopted language requires the standards be met during the same period but does not include the phrase “unless the permittee can demonstrate to the satisfaction of the Department that disinfection is not necessary to protect human health.” This does not change the rule in any substantive way from the original proposal, as it was never DEC’s intent to allow for a variance outside of the existing variance procedure under 6 NYCRR § 702.17.

#### **Comment 12: Recreation season is not intrinsically seasonal**

(Commenter 5)

A commenter asserted that federal regulations only permit seasonal criteria where the designated use for the waterbody is also seasonal. Commenter stated that, given this regulatory context, DEC apparently had no other option than to claim that it interprets “the best usage of primary contact recreation, found under 6 NYCRR Part 701, to be intrinsically seasonal.” Commenter asserted that this claim ignores both the plain language of the water quality standard (which requires year-round protection) and the reality of the waters at issue, in which recreation on these waters occurs in the “off season.” Commenter further stated that DEC makes the unsupported claim that such recreation is not “primary contact.” Commenter asserted primary contact recreation occurs outside of the “recreation season” and those uses should be protected. Commenter concluded that absent DEC’s promulgation of an expressly seasonal use, the standards apply year-round.

#### Response to Comment 12:

This comment does not specifically pertain to the revisions proposed in the revised rule, but DEC would like to provide some clarifying comments related to seasonality herein.

In the adopted language, DEC has withdrawn the proposed term “primary contact recreation season” and is not adopting the associated definition in 6 NYCRR § 700.1. Instead, for greater clarity, DEC is setting May 1 through October 31 as the period during which the standards to protect primary contact recreation apply, as set forth in adopted 6 NYCRR § 703.4 (f). As also specified in 6 NYCRR § 703.4 (f), DEC can apply the standards outside of this period as needed to protect human health or the best usages of the waters. This could apply anytime during the year to protect the primary contract recreation best use.

DEC again notes that USEPA’s 2012 RWQC do not require states to adopt pathogen standards that apply year-round. In fact, USEPA’s Water Quality Standards Handbook (EPA-823-B-12-002, 2012) states that, “in many northern areas, body contact recreation is possible only a few months out of the year. Several States have adopted primary contact recreation uses, and the associated microbiological criteria, for only those months when primary contact recreation actually occurs.”

Primary contact recreation generally occurs in New York waters seasonally during the period from Memorial Day through Labor Day. The applicable period of the standards in 703.4(f) of this rule are established to protect the best use of primary contact recreation during the time period it is most likely to occur with an additional margin of safety on both ends of that period. This rulemaking does not change this best use. In any other instance where the Department determines it necessary to protect the best use of the waters outside of May 1 through October 31, the rule provides the Department the authority to apply the standards outside of this period. In addition, DEC recommends that people swim at beaches that are monitored for health and safety pursuant to the regulations of the New York State Department of Health. Such beaches are typically open and staffed from late May into September. The use of beaches or other areas for swimming when beaches are closed and or not supervised may be unsafe and is not recommended.

DEC implements protection of primary contact recreation through disinfection requirements in SPDES permits. The Department believes that this approach, implemented through the SPDES process, is protective of the primary contact recreation uses observed throughout the State, and is flexible enough to allow for expansion of the season on a case-by-case basis as necessary to protect human health.

DEC would also like to clarify that, pursuant to DEC policy (TOGS 1.3.3), DEC has traditionally implemented year-round disinfection into SPDES permits for publicly-owned treatment works that discharge to Class SA, A, AA, A-S, and AA-S, as well as those discharges into receiving bodies subject to the jurisdiction of the Interstate Environmental Commission (IEC). The adopted rule would not alter this practice.

**Comment 13: DEC cannot avoid promulgating standards suitable for primary contact recreation for all Class I and SD waters by re-characterizing a previous statement as an “error.”**

(Commenter 5)

A commenter asserted that all Class I and SD waters *must* have water quality criteria to protect primary contact recreation.

Response to Comment 13:

This comment does not specifically pertain to the revisions proposed in the revised rule, but DEC would like to provide some clarifying comments on the subject. In addition, the reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

Class I and SD waters are not designated for primary contact recreation. In November 2015, DEC amended 6 NYCRR Part 701 to require that in Class SD saline surface waters, “the water quality shall be suitable for primary and secondary contact recreation, although other factors may limit the use for these purposes.” The requirements for Class I waters were similarly amended to state, “the water quality shall be suitable for primary contact recreation, although other factors may limit the use for this purpose.” The “best usages” of Class SD and Class I waters were preserved in the 2015 amendments, and remain as “fishing,” and “secondary contact recreation and fishing,” respectively. DEC did not add a best use of primary contact recreation to the Class SD and Class I waters, but instead applied fecal coliform criteria to those waters in an effort to improve the quality of these waters towards achieving Congress’s goal in the Clean Water Act of rendering all the nation’s waters fit for swimming. DEC purposely used the term “suitable” instead of “best usage” because it was not DEC’s intent to impose criteria (e.g. enterococcus) required for waters whose best usage is primary contact recreation. The various commenters on the 2015 rulemaking generally understood that Class I and SD waters were not being designated for primary contact recreation and, through their comments, urged DEC to so designate those waters.

Prior to the 2018 proposed BEACH Act rulemaking, DEC examined all coastal waters to determine if any Class SC, I or SD waters should be upgraded to include a best usage of primary contact recreation. DEC concluded that both the water quality in Upper and Lower New York Bay should be capable of supporting primary contact recreation, and such waters are adjacent to primary contact recreation waters. Therefore, this rule reclassified these waters from Class I to Class SB.

The “error” mentioned in DEC’s February 27, 2019 Assessment of Public Comment refers to the fact that DEC erroneously based its response on the actual water quality of the Lower New York Bay and Upper New York Bay, rather than the classified designated use in its Assessment of Public Comments for the 2015 Rulemaking. In this rulemaking, DEC is re-classifying these waters and applying the USEPA’s 2012 RWQC.

**Comment 14: Revised rule weakens standards for Class I and SD waters**

(Commenter 5)

A commenter asserted that the Revised Proposed Rule continues to ignore all Class I and SD waters, and, indeed, actually weakens standards for those waters.

Response to Comment 14:

DEC does not agree that the original or revised proposals weaken existing standards for total or fecal coliforms for any waters, including Class I and SD waters. However, to avoid confusion on this issue DEC has elected to withdraw the elements of the proposed and revised rule that the commenter highlights. Specifically, DEC has withdrawn from the adopted rule its proposal to clarify the applicability of the existing total and fecal coliform standards as currently set forth under 6 NYCRR § 703.4 (c) that would have been relocated under 6 NYCRR 703.4 (e). Thus, in the adopted express terms, there are no revisions to 6 NYCRR § 703.4 subdivisions (a) through (c), and previously proposed subdivisions (c) and (d) are renumbered as (d) and (e) respectively.

**Comment 15: Support of express limitation of enterococci to coastal recreation waters during the primary contact recreation season**

(Commenter 6)

A commenter supports the express limitation of enterococci to coastal recreation waters during the primary contact recreation season.

Response to Comment 15:

This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

**Comment 16: Revised regulatory impact statement**

(Commenter 6)

A commenter noted that the updated potential estimated costs in the RIS may not reflect all of the potential costs necessary to comply with the revised proposed rule, which could have implications for 5 of NYC's 14 wastewater resource recovery facilities (WRRF): Coney Island, Rockaway, Jamaica, Owls Head, and Oakwood Beach WRRF, which all discharge to existing or newly reclassified SB coastal marine waters. Commenter further stated that if DEC intends to apply the new enterococci criteria through development of a WQBEL for one or more of those WRRFs, it is difficult for the commenter to evaluate cost implications for any necessary future capital investments or operation and maintenance in the absence of that WQBEL, and that cost implications for meeting any further WQBEL could vary greatly depending on the specific WRRF and the mixing zone assessment for the point source discharge to the receiving waterbody.

Response to Comment 16:

This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the Assessment of Public Comment for the original proposal, dated February 27, 2019, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

However, as noted in the February 27, 2019 Assessment of Public Comment on the original rule, the Department re-examined the costs to include a quantification of the laboratory costs for analysis for *E. coli* for dischargers to the Great Lakes and of enterococci to marine coastal recreation waters. Additional analytical costs of up to \$281,970 may occur. On February 27, 2019, DEC published a revised regulatory impact statement (RIS) for this rule to reflect the possibility of increased analytical costs. With the adoption of the rule, no changes to the revised RIS have been made on this point.

### **Comment 17: Support for proposed reclassification of Class I waters**

(Commenter 6)

A commenter stated that the revised proposed rule reflects DEC's ongoing recognition that tremendous strides have been made in improved water quality in New York City (NYC), and that NYC generally supports, where appropriate, upgrading water quality standards for NYC waterbodies, including opening of more water bodies to primary contact recreation. The commenter stated that the reclassification of Upper New York Bay and a portion of Lower New York Bay from Class I to Class SB reflects improved water quality to support primary contact recreation.

Response to Comment 17:

This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

### **Comment 18: WQBELs for New York City WRRFs**

(Commenter 6)

A commenter stated they presume DEC will follow longstanding DEC and USEPA technical guidance if it develops WQBELs for New York City WRRFs that discharge to Class SB marine coastal recreational waters. The commenter further stated that if DEC imposes an effluent limit for one of the applicable indicator bacteria on a discharge to a Class SB coastal recreation water, DEC should not require concurrent compliance with an effluent limit for other indicator bacteria on the same discharge. The commenter asserted that, based on DEC's response to comments on the 2018 proposed rule, the commenter believes that DEC does not intend to require such concurrent compliance.

Response to Comment 18:

This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov). The reader is also referred to the response to Comment 11, above.

## **Comment 19: Costs to New York City**

(Commenter 6)

A commenter stated that in the absence of a WQBEL for the new standard, it is not entirely clear if DEC would require the construction of new or the upgrade of existing dechlorination facilities for New York City. The commenter stated that cost implications for meeting any future WQBEL could vary greatly depending on the specific WRRF and any mixing zone assessment for such WRRF's treated effluent discharge to the receiving waterbody. The commenter asserted that construction costs of either new UV disinfection or dechlorination facilities may be higher than those estimated by DEC, and that operation and maintenance (O&M) costs may also be higher than those estimated by DEC.

### Response to Comment 19:

This comment does not specifically pertain to the revisions proposed in the revised rule and no additional response is needed herein. The reader is referred to the February 27, 2019 Assessment of Public Comment for the original proposal, available on the DEC website, or by request to [BeachRule@dec.ny.gov](mailto:BeachRule@dec.ny.gov).

Table of Commenters

Commenter No.	Commenter Organization	Commenter Name
1	G. Dichter Consulting, LLC	Gil Dichter
2	IDEXX Water	Jody Frymire
3	Private citizen	Martin J. Allen
4	Dr. Water Consulting, LLC	Mark LeChevallier
5	Pace Environmental Litigation Clinic, Inc.	Todd Ommen (transmitted by Erin Doran of Riverkeeper)
6	New York City Dept. of Env. Protection	Marcella Eckels