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November 8, 2016

Basil Seggos  
Commissioner  
New York State Dept. of Environmental Conservation  
625 Broadway  
Albany, NY 12233

**RE: Clean Water Goals and Actions for New York City's Combined Sewer System**

Dear Commissioner Seggos:

Clean water is an important concern for millions of New Yorkers. The bedrock law protecting our waterways – the Clean Water Act – imposes obligations in New York City that, while sometimes challenging to meet, can and must be met through meaningful collaboration among state and federal regulators, the City, citizen and community-based organizations, and local elected officials.

As, you know, there are many inter-related, time-sensitive matters currently before DEC that will have a substantial and lasting effect on the scope of the City's Clean Water Act compliance efforts. With DEC decisions on those matters now pending, we write to urge DEC to take certain specific actions with regard to combined sewer overflows (CSOs) to protect the waters of New York City today and for future generations.

Over the past decade, the City has made important progress toward achieving clean water goals. Large-scale infrastructure solutions, like the Newtown Creek Wastewater Treatment Plant and the innovative installation of hundreds of curbside rain gardens, are noteworthy examples.

The State DEC, the City DEP, and the federal EPA all play vital roles in our clean water future; not the least of which include management of combined sewer system discharges and the development of long term control plans to minimize and mitigate these overflows.

Yet, our shared city waters have a long way to go to meet the legal requirements of the Clean Water Act. The issues that burden the City are formidable, including antiquated combined sewer systems and the difficult regulatory, infrastructure, planning, and water quality decisions that must be made to address them.

Therefore, we submit the following principles and goals to guide a number of upcoming regulatory, policy, enforcement, and compliance decisions pending for New York City's combined sewer system.

## **WATER QUALITY STANDARDS**

While it is clear that there are a host of challenges in managing CSOs, solutions must be driven by the clear principles and rules of the Clean Water Act, and must be made with full community participation. The water quality standards that drive CSO decisions must be based on the Clean Water Act as well. Thus, the City must be required to meet EPA's 2012 Recreational Water Quality Criteria. These nationally-applicable standards are based on *Enterococcus spp.*, as opposed to the outdated use of fecal coliform-based testing methods. *Enterococcus* more accurately reflects primary contact recreation safety (compared to coliform and *E. coli*), is comparable across fresh, salt and brackish waters, and, perhaps most importantly, is a federally required minimum water quality criterion for waters like those in New York City that are polluted by CSOs. All CSO Long Term Control Plans (LTCPs) should be designed to meet the most up-to-date (and any future) water quality criteria for their receiving waters. There should be no grandfathering of old water quality criteria in these plans.

## **DISCOURAGING DISINFECTION & AERATION**

Disinfection and aeration are not solutions to the problem of CSOs; they simply mask the problem. In short, these actions fail to protect the public or improve the environment; they only serve to paint a picture of clean water success where impairment still persists. The City should prioritize capture and flow reduction over disinfecting sewage discharges or aerating waterways after CSO events – actions which introduce new pollutants into our environment and can detrimentally affect ecosystem productivity and public health. Capturing CSO pollution allows wastewater to be treated, ensures that floatables, organic, and inorganic solids are kept out of our waterways, and mitigates odors and public health burdens on communities. There are many co-benefits to capture, while there are only 'co-risks' to disinfection and aeration.

## **IMMEDIATE NEED FOR ACTION**

Actions taken under the City's LTCPs must meet fully the spirit and intent of the Clean Water Act, and actions spurred by state enforcement orders should include enforceable implementation timelines over shorter timeframes than the City has proposed. The City does not anticipate completing construction on many of the already-submitted LTCPs for almost a decade. For the waterways most in need of LTCP action, including Newtown Creek, Flushing Bay, and the Harlem River, the City has not yet finalized plans for submission, and it appears that proposed implementation schedules may not require action until the late 2030s, or beyond. This is unacceptable. Our waters are impaired now; they are being used for fishing, swimming, and boating now; they are burdening communities and affecting local economies now. As such, LTCP action should begin now. It is an unavoidable truth that the City does not have the resources to launch immediately all of the public works projects needed to address CSOs, but we ask that the state demand the fastest possible results.

## **IMPAIRED WATERWAYS**

As some of our organizations noted in comments on the state's most recent draft Section 303(d) impaired waters list, we are concerned that the state is being overly optimistic about its current

CSO and MS4 programs. The state's proposal excludes many of the City's most polluted waterways from the impaired waters list because of planned future implementation of LTCPs and a citywide MS4 stormwater management plan. The Clean Water Act is clear: if a waterway is impaired, it must be listed. Instead, the state is leaving off its 303(d) list waters where potential, future plans anticipate that a waterway might see improved water quality after a quarter century. Our main concern here is that the impaired waters list concludes that implementation of these LTCPs will lead to attainment of water quality standards when the LTCPs themselves often do not purport to attain these standards. Moreover, in waters where separate sewers, with CSOs, contribute to impairments, the City's separate stormwater permit does not require stormwater reduction sufficient to meet water quality standards. All of the City's impaired waterways should be placed on the 303(d) List, allowing the agencies and the public to utilize the full Clean Water Act toolkit, including the development of total maximum daily loads (TMDLs) and associated permit limits for all contributing point sources, to restore these degraded waterways.

## **GREEN INFRASTRUCTURE**

For many years, we have eagerly worked to support the City's green infrastructure (GI) efforts. Capture of stormwater before it enters a combined sewer system remains the best way to solve our CSO problems. DEP has done an admirable job of building bioswales in certain "target" CSO areas, with great success in the performance of these installations. However, that has been almost the extent of the program's success. The City has fallen significantly behind in meeting its overall GI targets, most recently estimating that it was less than halfway to its 2015 goal, and presenting DEC with only the vaguest of plans for how the City will close the gap in the years ahead. We have consistently noted that among the key shortcomings of the City's GI plan have been both the lack of large-scale projects and the failure to site small-scale projects throughout the city. We urge you to take a hard look not only at the DEP's efforts, but at whether the City of New York – including all of its agencies – is committed to installing and maintaining the types of GI that must be built in order to achieve what is required by DEC enforcement orders. As the City has long argued, effective and widespread implementation of green infrastructure can maximize both water quality benefits and the many environmental and social co-benefits that come with enhanced urban green spaces. We ask the State DEC to make GI a top priority in its oversight of New York City's waterways by ensuring that all permits, programs, and plans put a premium on the use of GI. New York City can and should be a leader in the nation in this field, but it is not yet realizing its full potential.

## **NUTRIENTS**

According to the EPA cover letter announcing the Long Island Sound Nitrogen Strategy, "[i]t is clear, based on monitoring and modeling that current and planned actions by the states will fall short of fully implementing the 2000 TMDL and will be insufficient to address other adverse impacts to water quality in Long Island Sound and its embayments and near shore coastal waters." The EPA continues by noting that it "has informed the states that, while it supports enhancement of [nitrogen] reduction efforts, the proposed level of activity, timeframes and specificity are insufficient to result in water quality standards attainment." In the Long Island Sound Nitrogen Strategy, EPA also notes that watersheds in the western Long Island Sound are

dominated by point sources and, therefore, called for further investments in pollutant load reductions from wastewater treatment facilities, stormwater MS4 areas and combined sewer overflow sources to get “significant reductions in the near-term.” While EPA has set a schedule to develop specific goals, this call for significant “near-term” reductions should be addressed. We ask that the state make nutrient reduction – and compliance with downstream TMDL requirements – a core aspect of LTCPs and future CSO enforcement orders.

## **FINANCIALS**

Each year, tens of billions of gallons of combined sewer overflow is discharged into the waters of New York City. This problem demands a proportionally significant response -- in terms of the level of effort, capital investment, innovation, and urgency – in order to meet the Clean Water Act’s “fishable swimmable” goals. Yet, whenever discussing long-term goals and timelines, the City DEP has consistently emphasized compliance costs as a primary constraint on its ability to make further capital investments in CSO control. No doubt, cost is an appropriate factor in determining the length of a CSO compliance schedules. In a wastewater system as old as, and on the scale of, New York City’s system, costs will inevitably be significant. And we acknowledge that, since the Clean Water Act took effect more than forty years ago, the City has spent significant sums of money on CSO reduction and other major water quality improvements. Nonetheless, we are convinced that the DEP’s current financial projections very likely overstate the future “burden” on New York City households, including low-income households, of increased spending on CSO controls. Moreover, DEP has not taken full advantage of policy tools that would more equitably allocate the costs of infrastructure investments among its ratepayers, as well as tools that would reduce the necessary level of public investment by better leveraging private investments to create more green infrastructure. DEC should require (and independently scrutinize) more reliable financial analyses, and insist that the City exhaust its opportunities to ameliorate cost burdens on ratepayers, before considering cost as a basis for approving decades-long compliance schedules or otherwise limiting DEP’s CSO control obligations.

## **INCLUSION OF MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DRAINAGE AREAS IN PLANNING EFFORTS**

In over a third of the City, the sanitary and storm sewer systems are separate. Over the past year, DEP has made progress developing its first-ever stormwater management plan, pursuant to its first ever MS4 permit, issued in 2015. This progress, however, does not go far enough toward integrating the City’s CSO and MS4 planning processes. Many waterways in the City are burdened by both MS4s and CSOs, as DEP emphasized in many of its proposed LTCPs. Enhanced MS4 pollution control measures must be included in the “toolkits” used by the City as it develops the LTCPs. The MS4 system causes and contributes pollution to the same City waterways; therefore, they must be held to the same water quality standards as CSO discharges, and should be integrated into CSO planning, enforcement, and compliance processes.

## **ADDRESSING ALL CSO SEWERSHEDS**

There are almost 500 CSO outfalls discharging combined sewage into our waterways and onto our shorelines during storm events. Some of these CSOs are triggered at low levels of rain,

others have higher triggers. Some drain large watersheds and discharge well over a billion gallons per year, others drain small areas (even down to just a few city blocks) and generally contribute a few hundred thousand gallons per year. To date, the DEP has focused solely on the largest CSOs, ranked by drainage areas and volume of discharge. This was clearly a good first step (as the agency tries to reduce the largest problems first), but we ask that the state begin to work with the City, our groups, and local communities to address all CSO sewersheds, no matter how small. Cleaning up pollution from these sources can also be cost effective, have immediate co-benefits, and will directly improve local quality of life. For these reasons, this should be a City priority, and we are asking that it also be a state priority.

## **TRANSPARENCY**

Earlier this year, we were told of a new draft CSO enforcement order between the City and the DEC. We now understand that, in place of that draft order, which was never released formally for public comment, a new one is being negotiated. We also have been told that there is a proposal to extend the submission deadline, under the existing order, of the Flushing Bay LTCP (which is now several months past-due). We have spent years commenting on proposed LTCPs which, once submitted to the state, await final public review and DEC approval for extensive periods of time. Despite being active stakeholder participants in the state's oversight of the City's CSOs, we – and even our local elected representatives – are constantly left in the dark as these plans languish. We ask for a new era of transparency – with respect to the development and review of LTCPs, CSO permitting and enforcement activities, and the development of local solutions to CSOs with community engagement and buy-in from the start. The state should avoid the practice of secretly negotiating consent orders with the City, particularly when there are significant questions of effective and timely compliance with the Clean Water Act. These agreements undermine public faith in the process when they are signed by the City and, for all intents and purposes, committed to before public review and comment.

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Over the past decade, there have been many encouraging signs of progress in the City's work toward clean water. However, there is much to be done. We are concerned that the approach being taken to curb CSO pollution in New York City is insufficient in scale, too narrow in scope, and proposes excessive and dangerous delays in implementation.

In response, we have offered the above principles and goals as our collective contribution to the process. These are our organizations' core values and expectations of what is needed to ensure the success of – and wide community support for – the state's efforts to solve CSO pollution in New York City.

We welcome the opportunity to sit down with your office to discuss our concerns, at your convenience. Further, we look forward to continued engagement with your agency as the state's regulatory and enforcement oversight of the City's combined sewer system progresses, in the hopes that we can, together, bring the waters of New York City fully into compliance with the Clean Water Act.

Respectfully submitted,

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