

**TESTIMONY OF
LAWRENCE LEVINE
SENIOR ATTORNEY
NATURAL RESOURCES DEFENSE COUNCIL**

**BEFORE THE
NEW YORK CITY COUNCIL
COMMITTEE ON ENVIRONMENTAL PROTECTION**

**FISCAL YEAR 2018 PRELIMINARY BUDGET, MAYOR'S FY '17 PRELIMINARY MANAGEMENT
REPORT AND AGENCY OVERSIGHT HEARING**

MARCH 23, 2017

**Re: City Council Oversight of the Department of Environmental Protection's Water
Quality Improvement Programs**

Good morning Mr. Chairman and members of the Committee. I am Lawrence Levine, Senior Attorney in the Water Program at Natural Resources Defense Council. I appreciate the opportunity to testify today.

I also serve on the Steering Committee of the Storm Water Infrastructure Matters (S.W.I.M.) Coalition. S.W.I.M. represents over 70 organizations dedicated to ensuring swimmable and fishable waters around New York City through natural, sustainable stormwater management practices in our neighborhoods. The Coalition's members are a diverse group of community-based, citywide, regional and national organizations, water recreation user groups, institutions of higher education, and businesses. While I do not testify today on behalf of the Coalition, the views expressed here are fully aligned with the Coalition's efforts.

The biggest ongoing sources of water pollution to New York City waters are raw sewage discharges (i.e., combined sewer overflows or CSOs) from the combined sanitary/storm sewers that serve about half of the City's land area, and polluted stormwater runoff from the City's municipal separate storm sewer system (MS4), which serves about a third of the City's land area, and. Both CSO and MS4 discharges are triggered by excessive stormwater runoff entering the sewer system. CSO and MS4 pollution fouls our waters, often rendering them unsafe for recreation and degrading habitat for fish and wildlife. DEP studies indicate that we cannot clean up our waters without addressing both of these stormwater pollution problems.

My testimony today is focused on DEP's efforts to reduce CSOs, including the installation of "green infrastructure" that captures stormwater on land before it causes pollution problems in our waterways. I will also address issues with DEP's water/sewer rate structure, which provides the revenues necessary for DEP's water pollution control efforts.

A successful green infrastructure program can not only to improve water quality, but also to leverage DEP's investments to make quality-of-life improvements in underserved neighborhoods, create green-collar jobs, and support the City's climate resiliency.

NRDC commends DEP for the substantial progress it has made since the 1990s in reducing CSOs, but we emphasize that the problem is far from solved. The City still has over 20 billion gallons of overflow per year, so much more remains to be done.

We ask that the Committee exercise its oversight responsibility to ensure DEP's efforts are directed towards effective, sustainable solutions that protect our waters for both human recreation and ecosystem protection. We also ask the Committee and the City Council to use their authorities to support and enable DEP's success.

In short, we are very concerned that:

1. DEP is seeking state approval, through back-room negotiations, of CSO cleanup plans that will not meet federal health standards and will leave hundreds of millions or billions of gallons of CSO in each waterbody annually, dozens of times per year, for many decades to come
2. DEP has not met its green infrastructure goals to date, and lacks a plan to meet its progressively larger goals in the future;
3. DEP's rate structure does not provide a fair and equitable means of generating sufficient, sustainable funding to support long-term efforts to reduce pollution from CSOs and polluted runoff.

I also would like to address DEP's capital budget for green infrastructure reflected in the Jan. 2017 Capital Commitment Plan. A recent Independent Budget Office report shows that DEP's capital program includes \$787 million in spending on green infrastructure from FY17-FY20. A bar graph in the report also indicates that, from the inception of DEP's green infrastructure program through FY16, total capital spending was around \$350 million. The Jan. 2017 capital commitment plan also includes a number of green infrastructure line items from FY21 -FY27, which, by my count, add up to \$230.5 million.

We highly commend DEP for committing such a substantial budget to green infrastructure. Indeed, DEP's green infrastructure plan called for spending \$1.5 billion through 2030 to meet DEP's goals for the amount of runoff to be captured by new green infrastructure.

However, the timing of the spending in the capital budget raises some questions, when compared to the interim and final green infrastructure targets under DEP's CSO Consent Order. Those targets require an increasing rate of installing green infrastructure in 5-year increments, with milestones in 2015, 2020, 2025, and 2030. By 2020, for example, DEP's milestone is about 40% of the total amount of green infrastructure to be built by the year 2030. Yet, the capital budget shows 73% of DEP's anticipated \$1.5 billion green infrastructure program being expended by 2020. Since DEP is already far behind on meeting even its 2015 target (it achieved only 40% of what was required by 2015), it seems unlikely that the explanation for these budget numbers is

that DEP is planning to meet its upcoming targets far ahead of schedule and would be able to meet its long-term targets even with a sharp decline in spending after 2020.

Instead, a possible explanation is suggested by the concerns we raise in the rest of this testimony – i.e., that DEP may be pulling back from its long-term performance targets for green infrastructure, even while continuing to spend money on green infrastructure projects. Simply spending money is not an acceptable metric for success. This Committee should exercise its oversight responsibilities to ensure that DEP meets its green infrastructure targets and maximizes water quality and community benefits from green infrastructure, not merely that DEP spends the promised amount of money on these projects.

In the remainder of this testimony, I provide background on several key concerns with DEP’s overall CSO program and its green infrastructure program, and identify questions that this Committee should be asking of DEP to ensure that the agency’s efforts will achieve our shared goals – embodied in the federal Clean Water Act -- of “fishable, swimmable waters” throughout New York City.

1. CSO Consent Order / Long Term Control Plans

- *CSO Order negotiations with NYSDEC: More than a year ago, DEP said that it was re-negotiating the 2012 CSO Consent Order, which defines the extent of DEP’s CSO control obligations. But DEP has said nothing publicly about this for over a year. With earlier CSO Consent Orders (in 2005 and 2012), DEP negotiated with the State in secret and presented the results to the public, whose waterways are fouled with raw sewage when it rains – and to local elected officials who represent them -- only after DEP signed the agreement.¹ This invites the following questions:*
 - **Is DEP still in negotiations with NYSDEC for a new CSO Consent Order?**
 - **Is it true that a new Consent Order would determine what happens with CSOs for the next 25 years?**
 - **Will City Council members and our constituents have a voice in shaping the requirements of a new Consent Order, before it is signed by DEP?**
- *Waterbody-specific CSO Long Term Control Plans: DEP’s proposed CSO plans that will not meet federal health standards (which EPA says the state is required to adopt). The plans will leave hundreds of millions or billions of gallons of CSO in each waterbody annually, dozens of times per year, for 25+ years.² This invites the following questions:*
 - **Why does DEP believe it is acceptable to proposed CSO plans that would continue massive overflows indefinitely?**
 - **How will DEP ensure that CSO controls, together with stormwater pollution controls in the separately sewered (“MS4”) areas, will clean up our water bodies in a reasonable period of time?**

- **How does DEP's respond to concerns about its proposal to disinfect CSO discharges with chlorine in some areas (Alley Creek, Flushing Creek, Hutchinson River), rather than actually reducing the volume of overflow?**

2. Green Infrastructure Program

- *DEP's level of commitment to meeting GI goals: DEP reported to NYSDEC that it is far behind on meeting its green infrastructure targets for 2015 in CSO areas. It also reported that its "Contingency Plan" to make up the difference no later than 2020 (i.e., five years late), is to continue with more of the same approach DEP has used to date, which has not succeeded in meeting targets (i.e., focusing almost exclusively on GI in the public right of way). DEP has presented no plan for meeting its much higher 2020 GI targets. DEP also suggested in the Contingency Plan that current green infrastructure targets should be reconsidered, and potentially reduced.³ As noted earlier in this testimony, DEP's capital budget through 2027 also raises concerns about DEP's intentions. This invites the following questions:*
 - **Is DEP backing off from its current green infrastructure targets under the 2012 CSO Order?**
 - **Does DEP intend to invoke a clause in the CSO Order that could allow it to redirect investments from green infrastructure to gray infrastructure?⁴**
 - **Are the GI funds in DEP's capital plan sufficient to meet the current CSO Order's green infrastructure targets for the years 2020 and 2025, and to ensure adequate progress towards the ultimate 2030 target?**
 - **What will DEP do differently to make sure it gets back on track with its green infrastructure targets, and meets even higher targets set for the years ahead?**
 - **If DEP does not believe it can meet its targets, how much GI does DEP think can be installed instead? What analysis has DEP done to come up with any potential new targets?**
 - **What help can City Council provide to ensure DEP meets its targets?**
- Specific aspects of DEP's GI program that need significant improvement:
 - *More effective stormwater rules for development projects: As part of DEP's Green Infrastructure Plan, DEP adopted a rule for development in the combined sewer portions of the city that requires "detention" of runoff (i.e., capture and slow release into the sewers). In the 5 years since DEP adopted the rule, DEP reports that it has resulted in little or no actual green infrastructure, but rather things like underground holding tanks for runoff.⁵ When DEP adopted the rule, it promised to revisit them to consider changing to a more effective "retention" standard (i.e., capture without release), which would result in more use of green infrastructure practices.⁶ In the MS4 portions of the*

City, DEP proposes (under pending legislation, Int. 1346) to develop a new “retention” standard, but only for the MS4 areas of the city. This invites the following questions:

- **Doesn’t this experience with the detention rule indicate that the rules for the CSO area need to be improved?**
- **Is DEP working on updating the stormwater standards in the CSO areas, to include a retention requirement? If not, why not? If yes, when does DEP expect to propose and adopt such rules?**
- *Retrofit of public facilities: Although DEP has built some GI retrofits on public properties outside the right-of-way, it does not appear to have a full-scale program to maximize these opportunities. DEP’s GI capital program, to date, has focused on projects in the right-of-way. This invites the following questions:*
 - **Does DEP have plans to ramp up its efforts to install GI retrofits in public facilities?**
 - **What challenges does DEP face in coordinating with other agencies?**
 - **How can City Council support DEP’s efforts to green public facilities?**
- *Private property retrofits: DEP’s efforts to promote green infrastructure private retrofits on private property have focused on the Green Infrastructure Grant Program. Since the inception of the GI program around 5 years ago, the grant program has funded some very good, high-visibility projects. But the total number of projects funded and built has been very small, and the program is not currently designed to be “scalable” to achieve significant amounts of cost-effective GI citywide. DEP’s Green Infrastructure annual reports and the Mayor’s OneNYC plan reported that DEP is developing an improved approach. In the fall of 2016, DEP released a Request for Information, seeking recommendations for launching a new program to build green infrastructure managing runoff on 1,000 acres of private property.⁷ By the end of November, DEP had received responses representing over 100 organizations. This invites the following questions:*
 - **What is the status of DEP’s efforts to develop a private property GI retrofit program?**
 - **How much money is included in DEP’s budget for this program?**
 - **How does DEP envision its current efforts leading to a large-scale program, which can achieve significant amounts of GI citywide?**
 - **In light of DEP’s suggestions that the GI targets under the consent order should be reduced, is DEP still aiming for 1,000 acres with this private retrofit program?**

3. Funding/Financing of CSO Controls & Green Infrastructure

- *GI funded by developers: DEP's 2010 Green Infrastructure Plan, like other leading cities' GI plans, relied on private investment in new development projects to generate substantial amounts of green infrastructure, without capital expense to DEP. This was to be achieved through a DEP regulation (referenced in section 2 above) mandating on-site stormwater management in new development projects. But DEP seems to have abandoned this approach, according to progress reports submitted to NYSDEC. For example, DEP's June 2016 "GI Contingency Plan" claims credit towards GI milestones only for publicly-funded projects, and describes an approach to meeting the next set of milestones that also relies only on publicly-funded projects. DEP also reported to NYSDEC that it has not been able to track all of the privately-funded development projects covered by its stormwater rule in combined sewer areas, and therefore is unable to assess the water quality benefits of the stormwater practices included in those private projects.⁸ This invites the following questions:*
 - **When DEP reports progress towards citywide green infrastructure targets, why is DEP only claiming credit for publicly-funded green infrastructure, and not for stormwater capture in privately-funded development projects?**
 - **Why does DEP's plan for "catching up" to its missed targets also rely exclusively on publicly-funded projects?**
 - **Doesn't this approach fundamentally undermine the Green Infrastructure Plan?**
 - **Doesn't this approach shift more of the cost burden to DEP, which will need to build more publicly-funded green infrastructure to substitute for privately-funded projects, in order to meet its GI targets?**
 - **Going forward, what is DEP doing to make sure it can track stormwater practices in development projects and count them towards its GI targets?**
 - **What is DEP doing to improve its stormwater rule, to ensure developers maximize use of green infrastructure in new development projects?** (See also related questions in Part 2 above.)
- *Funding cost-effective GI retrofits on private property: Other cities have found that widespread adoption of green infrastructure retrofits at existing private development is a critical element of cost-effective GI implementation. New York City is far behind other cities on this approach. (See Part 2 above for more background on DEP's current approach to private property retrofits.) This invites the following questions:*
 - **Does DEP still believe that investing its funds in private property GI retrofits is a cost-effective way to help meet its overall GI goals?**
 - **What is DEP doing to improve its program, in order to achieve widespread adoption of GI retrofits?** (See Part 2 for more detailed questions on this topic.)

- **What can City Council do to help DEP create a successful, large-scale program for GI retrofits on private property?**
- *Water rates and equitable funding sources: DEP will soon propose its FY18 rates. Under DEP's current rate structure, revenue for stormwater management (in both the combined sewer and separate sewer systems) is generated through wastewater charges. However, wastewater rates based on the amount of drinking water used by a customer, which is completely unrelated to how much stormwater a property puts into the sewer system. DEP completed a rate study in 2009 investigating a revised rate structure that separates out stormwater charges (based on a property's impervious area) from wastewater charges.⁹ This would create incentives for property owners to reduce runoff with GI and would potentially reducing total bills for residential customers and multi-family buildings (including affordable housing).¹⁰ In the FY16 ratesetting, at least one Water Board member encouraged DEP to pursue a stormwater fee, which is commonly used in many other cities.¹¹ While DEP has proposed some important programs to reduce water and sewer bills for affordable housing properties, DEP has not proposed any core changes to the rate structure or released any follow-up analysis since the 2009 rate study. This invites the following questions:*
 - **Does DEP believe that its CSO and MS4s investments are being funded in a fair and equitable way under the current rate structure?**
 - **What follow-up has DEP done since the 2009 rate study that investigated a stormwater fee and tiered rates? What additional follow-up is planned?**
 - **Wouldn't a separate stormwater fee based on impervious area be a more fair way to generate revenue? For example, wouldn't it reduce burdens on multi-family residents, who live in buildings that use a lot of water but have little impervious area? And couldn't it be structured to shift costs from residential to non-residential properties?**
 - **Has DEP looked at the nearly 2,000 other municipalities nationwide that have a stormwater fee along these lines? Is there any reason NYC couldn't do the same?**

¹ DEC puts out a proposed consent order for public comment before it is signed. However, this public comment period happens only after years of secret negotiations, following the City's signature on the deal and the City Comptroller's approval. Given the enormous disincentive to reopening negotiations at that point, public comments virtually never – if ever – result in changes to a proposed order.

² A brief overview of S.W.I.M.'s critiques of these plans can be found here: <http://swimmablenyc.info/?p=2706>. A 2-page fact sheet on the process of developing cleanup plans can be found here: http://swimmablenyc.info/wp-content/uploads/2008/03/LTCP-general_1.3.16_updated.pdf. A full citizens' guide to CSOs and the planning process can be found here: <http://swimmablenyc.info/wp-content/uploads/2016/03/workbook-3.8.16-2-4.pdf>.

Detailed comments on DEP’s proposed CSO plans, submitted by S.W.I.M. and some of our member organizations, can be found here: http://swimmablenyc.info/?page_id=8.

³ See pp. 1, 4, and 5 of the *Green Infrastructure Contingency Plan* here: http://www.nyc.gov/html/dep/html/stormwater/nyc_green_infrastructure_plan.shtml.

⁴ In the 2012 CSO Consent Order, Part IV.B. para. 3 (on pages 11-12) provides that, if DEP continues to miss its GI targets, future contingency plans may substitute gray infrastructure for green infrastructure. The Order is available here: http://www.dec.ny.gov/docs/water_pdf/csomod2012.pdf.

⁵ See DEP’s GI Annual Reports here: http://www.nyc.gov/html/dep/html/stormwater/nyc_green_infrastructure_plan.shtml.

⁶ See this letter from then-DEP Commissioner Strickland: <http://swimmablenyc.info/wp-content/uploads/2012/01/CHS-ltr-to-L.-Levine-re-Stormwater-Rule-12-21-2011.pdf>.

⁷ DEP, Request for Information (RFI), Management of a Green Infrastructure Private Property Incentive Program, Sept. 19, 2016, <https://a856-cityrecord.nyc.gov/RequestDetail/20160912013>.

⁸ See DEP’s GI Contingency Plan; the 2015 Green Infrastructure Annual Report (footnote 5); and the 2016 GI Performance Metrics Report (footnote 10), all available here: http://www.nyc.gov/html/dep/html/stormwater/nyc_green_infrastructure_plan.shtml.

⁹ See link to the full study in this DEP press release: http://www.nyc.gov/html/dep/html/press_releases/09-14pr.shtml

¹⁰ Properties with large impervious surfaces have a greater impact on the City’s stormwater management expense than those with less impervious space, or those that manage runoff from their impervious space on-site. For instance, a large non-residential property may use very little potable water but have a large amount of impervious surface, and therefore contribute a significant amount of stormwater runoff.

Conversely, multifamily residential properties use more water than such a non-residential property, but contribute much less runoff to the city sewer system because of its smaller impervious footprint. This inequitable pricing scheme puts an unfair burden on many ratepayers – including affordable housing residents – and fails to create incentives for sustainable stormwater management.

By restructuring rates to create a separate stormwater fee – based on a property’s impervious area, not potable water usage – the City can create a more equitable rate structure, incentivize green infrastructure on private property, and generate a dedicated revenue source for storm water management. Approximately 2,000 municipalities around the country, both large and small, now have a separate stormwater fee.¹⁰ (See <https://www.wku.edu/engineering/civil/fpm/swsurvey/>.) There are many models that the City could draw from in order to implement a rate restructuring effort; for example, Philadelphia made a revenue-neutral transition to a stormwater fee from a previous rate structure that was very similar to New York’s current rate structure. See <http://citylimits.org/2016/07/12/stormwater-is-new-challenge-to-citys-clean-water-plans/>.)

¹¹ The 2009 rate study also investigated “tiered rates” for water and sewer service, which would charge a lower per-gallon rate to those who use less water per housing unit. Tiered rates could also reduce bills for affordable multi-family buildings (especially if coupled water conservation assistance from DEP). At least year’s rate hearing, a Water Board member also encouraged DEP to pursue tiered rates.