



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

MAR 31 2010

Honorable Alexander B. Grannis, Commissioner
New York State Department of Environmental Conservation
625 Broadway, Executive Office 14th Floor
Albany, New York 12233-1010

Honorable Bob Martin, Commissioner
New Jersey Department of Environmental Protection
P.O. Box 402
401 East State Street, 7th Floor
Trenton, New Jersey 08625-0402

Dear Commissioner Grannis and Commissioner Martin:

I am writing regarding our ongoing efforts to effectively control the levels of pathogens in the waters of the New York-New Jersey Harbor Estuary system. We have been working, in consultation with the New York-New Jersey Harbor Estuary Program (HEP), towards attaining the Clean Water Act (CWA) mandate to achieve and maintain fishable/swimmable waters throughout the Harbor. As you are aware, our staffs have been working with their counterparts from the New Jersey Department of Environmental Protection (NJDEP) and the New York State Department of Environmental Conservation (NYSDEC) to reach agreement on the appropriate pathogen criteria necessary to achieve this goal, and to serve as the basis for the establishment of Total Maximum Daily Loads (TMDLs), as necessary.

While there is mutual agreement among the two States and the Environmental Protection Agency, Region 2 (EPA) on the Harbor-wide use of EPA's current national recommended criterion of 35 colonies of enterococci per 100 mL, as published in the November 2004 Federal BEACH Act Rule, the remaining issue is the appropriate averaging period. The issue is whether to apply this criterion as a 30-day maximum geometric mean or a bathing season geometric mean (May to September). EPA continues to support use of a 30-day geometric mean of 35 enterococci per 100 mL as the criterion for all waters of the Harbor, where attainable.

At the November 24, 2009, Harbor Oversight Committee meeting chaired by EPA, both NYSDEC and NJDEP representatives agreed that the BEACH Act-based 35 per 100 mL enterococci criterion should be expressed and implemented Harbor-wide as a seasonal geometric mean. If a seasonal geometric mean is used, only the Passaic River would exceed this criterion and require a pathogen TMDL.

At the December 2, 2009 HEP Policy Committee Meeting, EPA presented the States' intent to use the seasonal geometric mean throughout the Harbor. As a result, the Advisory Group's Representative asked for a meeting with EPA to discuss the pathogen endpoint issue. On January 7, 2010, my staff met with the non-governmental organizations (NGOs). At this meeting the NGOs made it clear that they oppose the States' proposed use of a seasonal geometric mean criterion.

The November 2004 Federal BEACH Act Rule provides states with the flexibility to use an averaging period ranging from a 30-day geometric mean to a seasonal geometric mean. That said, EPA is in the process of establishing a new BEACH Act-based pathogen criterion, which it will publish in October 2012. This criterion is expected to be based on a much more restrictive averaging period, possibly as low as one day, and will almost certainly be more stringent than either of the approaches discussed above.

Therefore, I suggest that you reconsider the use of the seasonal geometric mean and agree to implement the following proactive two phased approach to address pathogens in NY/NJ Harbor.

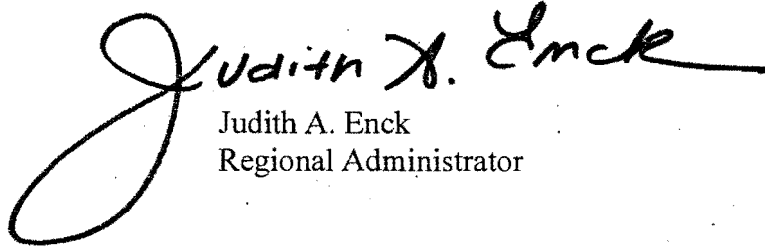
The first phase is to implement pathogen controls throughout the Harbor based on Phase 1 TMDLs established to meet a 30-day geometric mean of 35 enterococci per 100 mL. These TMDLs would be established by December 31, 2010. Permits would be issued and would include interim and final pathogen limits and compliance schedules to assess, design and construct combined sewer overflow and stormwater controls, necessary to achieve water quality standards.

EPA, NYSDEC and NJDEP would begin Phase 2 efforts when EPA's first draft of the revised Recreational Ambient Water Quality Criteria is released in October 2011. NYSDEC, NJDEP and EPA would review the new BEACH Act criteria and determine how to apply the criteria to the Harbor. As necessary, NYSDEC and NJDEP will adopt the new BEACH Act criteria, establish Phase 2 TMDLs and modify permits based on these Phase 2 TMDLs.

It is EPA's recommendation that we embrace the phased approach to implementing necessary pathogen controls in the Harbor, including a more aggressive Phase 1 effort. Enclosed is a Power Point presentation outlining the above that will be used by EPA at the April 12, 2010 HEP Policy Committee meeting to explain our position.

If you have any questions or wish to discuss this issue prior to the Policy Committee meeting, please feel free to call me at (212) 637-5000.

Sincerely,

A handwritten signature in black ink that reads "Judith A. Enck". The signature is written in a cursive style with a large, looping initial "J".

Judith A. Enck
Regional Administrator

Enclosure