



November 17, 2014

Honorable Emily Lloyd
Commissioner
NYC DEP
59-17 Junction Blvd
Flushing, NY 11373

via email: ELloyd@dep.nyc.gov and ltcp@dep.nyc.gov

Re: Comments on Flushing Creek Long Term Control Plan Public Meeting Presentation #2

Dear Commissioner Lloyd,

The Stormwater Infrastructure Matters (SWIM) Coalition submits this letter in response to the New York City Department of Environmental Protection's (DEP) invitation for public comments concerning the development of the Flushing Creek Long Term Control Plan (LTCP). We repeat some of the comments submitted to LTCPs for other waterbodies (e.g., Hutchinson River) because we see problems that are beyond any specific waterbody but are common threads in the general LTCP process. We also incorporate by reference those portions of our Hutchinson River comment letter (date 9/9/14) that were not limited to that water body but, rather, spoke to the city's LTCP process as a whole.¹

Based on our experience with the Flushing Creek LTCP public meetings, we maintain our opinion that the current LTCP development process is deeply flawed, both in process and in substance.

The SWIM Coalition represents over 70 organizations dedicated to ensuring swimmable and fishable waters around New York City through natural, sustainable stormwater management practices. Our members are a diverse group of community-based, citywide, regional and national organizations, water recreation user groups, institutions of higher education, and businesses. SWIM was instrumental in crafting and passing the Local Law 5, which required development of the city's first Sustainable Stormwater Management Plan, and negotiating with the State and City to incorporate green infrastructure in the CSO Consent Order. We helped to pass the NYS Green Roof Tax Abatement legislation in Albany. Since our formation in 2007, we have testified at numerous public hearings on stormwater management related topics and have represented our members' interests with DEP, the Mayor's Office of Long Term Planning and Sustainability, City Council, the State Legislature, the state Department of Environmental Conservation (DEC), U.S. Environmental Protection Agency (EPA), and others. Several members of the Coalition currently serve on the DEP's Water Infrastructure Steering Committee (formerly known as the Green Infrastructure Steering Committee).

¹ See <http://swimmablenyc.info/wp-content/uploads/2014/10/LTCP-comment-09-19-14-FINAL1.pdf>

In regard to the invitation for comments on the development of the Flushing Creek LTCP, we cannot emphasize strongly enough that it is impossible at this time for us or any member of the public to evaluate DEP's proposal or its underlying analysis, as the public is merely provided a PowerPoint presentation, instead of the actual draft plan. A PowerPoint presentation, almost by definition, lacks the substance or details vital to public review of the City's decision-making. Particularly for those who are unable to attend the meeting, simply accessing a Power Point presentation is woefully inadequate as compared to a robust, well-written, thoroughly cited, and comprehensive document on which to solicit meaningful feedback. Specifically for Flushing Creek, the PowerPoint presentation was missing essential information on the following:

- How the Waterbody/Watershed Facility Plan (WWFP) interfaces with the LTCP,
- CSO volume reductions and water quality improvements,
- How we determine whether a Use Attainment Analysis is warranted,
- How green infrastructure fits in, and
- Comprehensive analysis of alternatives proposed.

Before submitting any draft LTCPs to the State, the City should publish – for public comment – the actual plans, not just PowerPoint summaries of DEP's progress on development of the plans.

We again refer DEP to SWIM's recommendations for a meaningful public participation process that would meet the requirements of the CSO Policy. (Our July 2010 letter to DEP presenting our recommendations is posted here: http://swimmablenyc.info/wp-content/uploads/2010/07/SWIM_pubpart.pdf.)

Notwithstanding the limited available information, we offer the following questions and concerns about what DEP has presented to date. These must be addressed both in the public participation phase of LTCP development and in the technical review by DEC. We also sincerely hope that DEP will propose a LTCP that accounts for all of these concerns. We cannot help but note, however, that the final Hutchinson River LTCP submitted in September 2014 failed even to acknowledge the comment letter we submitted, at DEP's invitation, following the last public meeting on that plan.

First, DEP has not clearly explained the interaction between projects to which DEP has already committed and the obligations that DEP has in regard to the LTCP. From the Flushing Creek LTCP PowerPoint, it is not clear where the WWFP left off and the LTCP picks up. The distinction is important in understanding what the public should expect, how far along we are in the process, and determining where public comments are meaningful. Moreover, the public can be easily confused as to the *legal* requirements of each Plan, absent clear explanations of the City's roles and responsibilities (which have thus far been missing from LTCP presentations).

Among the key distinctions between LTCPs and WWFPs are 1) inclusion of GI as per the 2012 CSO Consent Order; and 2) the requirement to meet the water-quality based requirements of the Clean Water Act (CWA) and the 2012 CSO Consent Order.

Given the current legal disputes between the city and the state about the scope of these responsibilities, it is critical that DEP present unbiased explanations of the differing viewpoints and not merely DEP's view. (In this regard, we strongly recommend that DEC contribute to this portion of the PowerPoint presentations.)

Second, we have questions about DEP's implementation of the Nine Minimum Controls (NMC) required under the EPA CSO Policy. Are we correct in assuming that these are not all included in the presentation because some of them are included in the Flushing Creek WWFP? It would be useful for the public to know what is being implemented or planned for each of the NMCs. In particular we would like to know how the DEP is addressing floatables and public notification of CSO events since floatables control was eliminated as an alternative (even though it is required by EPA) and there is no mention of public notification of CSO discharge events in the presentation (likewise required by EPA).

Third, we strongly support the use of green infrastructure to reduce CSOs wherever feasible and are very concerned that not enough preliminary work is being conducted prior to inclusion of GI in the LTCPs, including the Flushing Creek LTCP. It is not clear whether the "potential area-wide GI contract" is part of the WWFP or the LTCP. This lack of details also makes it difficult to understand whether the "potential area-wide GI contract" is factored into the volume reduction shown on slide 20, whether it will be included in the LTCP, or to what extent it would be potentially included. Furthermore, will this be additional reduction beyond the stated WWFP targets? How and when does the DEP decide whether to implement an area-wide GI contract? What kinds of GI practices will be included in the contract? How will the feasibility of an area-wide contract be determined, and by when? Why is this listed under "current improvement projects (slide 17)" but not explained further on the "status of current improvements" (slide 19)? Based on what specific analysis is "Additional GI" eliminated as an alternative (slide 24)? As presented, the DEP gave the public absolutely no information as to their green infrastructure plans for this watershed; leaving us with the assumption that the City has no plan to implement GI for Flushing Creek beyond the few projects that are already underway, and that DEP has performed no detailed quantitative analysis (field-based or modeling-based) of the extent of opportunities for additional GI or the CSO reductions that such GI could achieve. We incorporate by reference the comments on green infrastructure that we included in our letter on the Hutchinson River LTCP; they apply equally to Flushing Creek.

We further emphasize that it is critical to assess not only GI opportunities on public land, but also on private property. In regard to private property, DEP must assess both opportunities for retrofits of existing developed space (through incentives and/or direct subsidy of capital costs, including under existing City programs and potential new programs and policies, such as those in place in other cities); and opportunities to improve stormwater regulations applicable to redevelopment projects. In regard to regulatory standards for redevelopment projects, we incorporate by reference point 1.b. of NRDC's Nov. 3, 2013 comments on the city's draft SPDES permits, which proposed strengthening DEP's existing rules with a revised standard that would result in the construction of more green infrastructure, without cost to the city.² SWIM

² See

<http://switchboard.nrdc.org/blogs/llevine/NRDC%20comments%20on%20NYC%20SPDES%20permits%20%2810-3-13%29.pdf>.

made similar recommendations in 2011, when DEP last proposed updates to its stormwater rules.³ At the time, DEP rejected that approach. DEP must reevaluate that decision now, as part of the LTCP development process, in order to evaluate the additional green infrastructure penetration rates, and resulting CSO reductions and water quality improvements that could be achieved by such a rule.

Fourth, much more information is needed on CSO volume reductions and water quality improvements that would result from each of the technically feasible options. DEP's public meeting presentation reported that current improvement projects, to which DEP already committed in the 2012 Consent Order, would reduce CSOs from 2,531 MGY to 1,200 MGY. These numbers do not match those reported when the Consent Order was signed; at that time, DEP reported a higher baseline of 2,395 MGY, and a higher post-project discharge of 1,394 MGY. What accounts for the new estimates? Has there been a change in calculation methodology? Or a change in the plans? Further, DEP did not present the breakdown of the projected volume reductions attributed to grey vs. green infrastructure.

Nor did DEP explain how the projected volume reductions translate to water quality improvements. What reductions in bacterial loads are expected? Is the dissolved oxygen level expected to increase? If so, by how much? Additionally we do not understand the justification for "recreational season" as the duration in which the City needs to improve water quality. Is this based on feedback from the recreational water users – that there are no uses off-season that require protection? Moreover, shouldn't any such temporal restrictions on meeting water quality standards be determined through the use attainment analysis process?

Fifth, at the second public meeting, the DEP engineer said that the main reason most grey infrastructure options were discounted was "flooding" – without elaboration. This rationale, without more to back it up, seems dubious. Since grey infrastructure is designed to increase the amount of stormwater that can be captured below-ground and conveyed to treatment facilities, how could it *increase* surface flooding?

Sixth, we understand that it will take more than eliminating CSO discharges to allow the Flushing Creek and Flushing Bay – and other waterbodies – to meet the Clean Water Act's 40-year-old fishable/swimmable goals. DEP needs to ensure all water quality programs are implemented in a coordinated fashion to not only maximize public resources but to achieve the greatest outcome. For this reason, DEP, in partnership with other state and federal agencies, needs to ensure effective coordination among units of the government responsible for CSO abatement, stormwater management via the city's MS4 permit, the city's broader green infrastructure initiatives, Superfund cleanups, and other related programs and initiatives.

Finally, we are left without any credible evidence as to why the DEP is recommending disinfection as the preferred alternatives. For instance, "additional GI" was eliminated based on "insufficient opportunity available," yet, there are no data to substantiate this claim. It is also unclear how this assessment relates to the "potential area-wide GI contract" presented under the "current improvement projects." Floatables control is also eliminated for the same reason without supporting evidence or explanation of how it can be simply eliminated from further

³ See http://swimmablenyc.info/wp-content/uploads/2011/11/SWIM_rule_comments_final.pdf.

consideration given that it is one of the NMCs. In fact, none of the alternatives are analyzed in terms of advantages, disadvantages and costs, with the exception of proposed disinfection alternatives. How is the public to evaluate the relative differences between grey infrastructure options without a comparative analysis between them?

By solely presenting the issue as a choice between disinfection options, the DEP is egregiously skewing the outcome of the LTCP process before providing any meaningful opportunity for public input. The entire purpose of the public participation requirement in the EPA CSO Policy (codified in section 402(q) of the Clean Water Act) is that the members of the public can engage in the LTCP decision-making process. In DEP's own Long Term Control Plan Public Participation Plan, the agency states:

“The overall goal of the LTCP public participation program is to raise awareness about, foster understanding of and encourage *input on the development* of waterbody-specific and citywide LTCPs. [emphasis added]”

The plan further lists objectives that include:

“Encourage public input on the preferred options for addressing CSOs and establish a process to maintain two-way communication with interested stakeholders.”

We share with the DEP again some of SWIM's recommendations on improving public participation, as submitted to former Commissioner Holloway on July 7, 2010, and emphatically call on DEP to overhaul its public participation process to incorporate our public participation recommendations:

- Establish a feedback-loop communication model (information traveling to and from the public; a clear route through which the public and the agency can share information and experiences).
- Dedicate appropriate personnel to maintain regular communication with stakeholders, and provide timely responses to requests for information.
- Establish a Citizens Advisory Committee, or equivalent stakeholder body(ies), and schedule to meet on a regular basis *throughout* the development of the LTCP.
- Provide an ongoing forum for local stakeholders and agency personnel to share plan updates and gather feedback. Presentations by all parties should clearly explain technical jargon and quantitative data.
- Institute a complete feedback loop for public participation by soliciting input from CAC members regarding the local impacts and feasibility of plan elements, defining the water quality and use goals for specific waterbodies, and clearly indicating how this feedback is incorporated into the resulting plans.
- Establish a Citywide LTCP CAC and hold technical work group sessions (as was done for the Open Water Citizens Advisory Committee [from 2005-07, as part of the WWFP process) to educate key stakeholders and interested members of the public on technical aspects of CSO abatement, such as modeling, public notification, source control, and water quality standards.

- DEP should seek public input specifically related to GI projects pursued by NYC residents on their own.

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We appreciate DEP's efforts over the last several years to improve its openness about its CSO planning process and its willingness to receive constructive feedback from SWIM and other members of the public. In many respects, DEP has come a long way in that regard since the S.W.I.M. Coalition was formed in 2007. However, our recent experience, summarized above, demonstrates that DEP still has a long way to go.

We would welcome the opportunity to meet with you to discuss these matters further, and we will continue our efforts to improve both the process and the results. Please contact me at 718-399-4323 or jstein9@pratt.edu with any questions.

Sincerely,



Jaime Stein, Chair

On behalf of the SWIM Coalition Steering Committee:

Sean Dixon, Riverkeeper

Robin Kriesberg, Bronx River Alliance

Lawrence Levine, Natural Resources Defense Council

Paul Mankiewicz, Gaia Institute

Tatiana Morin, New York City Soil & Water Conservation District

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cc: Council Member Donovan Richards, Chair, New York City Council, Committee on Environmental Protection

Judith Enck, Regional Administrator, US EPA Region 2

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