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**Via Email**

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Re: *Proposed Rule Making I.D. No. ENV-48-14-00005-P – Water Quality Standards for Class I and Class SD Waters in New York City and Suffolk County*

Dear Sir or Madam:

The City of New York (“City”) appreciates the opportunity to submit these comments regarding the above-referenced Proposed Rule Making (“Proposed Rule”). The City shares the New York State Department of Environmental Conservation’s (“DEC”) goals of improving water quality in and around New York City, and DEC has recognized that substantial water quality improvements have been achieved in recent decades.

**Background**

The City has a long history of action and research to improve water quality, beginning with the construction of some of the first wastewater treatment plants (“WWTPs”) in the nation. These efforts continue, often in partnership with DEC, including DEP’s ongoing programs to implement green infrastructure to reduce storm water flow, operate cutting edge nitrogen removal technology at multiple WWTPs and invest in wetland restoration efforts in Jamaica Bay and throughout the City. Further, under the oversight of DEC, DEP is actively engaged in planning, designing and building multiple projects to address combined sewer overflows (“CSOs”) throughout the City based on current standards. All told, DEP has invested over \$10 billion since 2002; as a result, water quality in the harbor is the best it has been in a hundred years. DEP remains committed to making additional substantial investments to further improve water quality.

The City believes the Proposed Rule reflects DEC’s ongoing recognition that tremendous strides have been made in improving water quality in the City, and generally supports upgrading water quality standards (“WQS”), including opening more water bodies to primary contact recreation where appropriate. The City continues to seek opportunities to expand its 14 miles of public bathing beaches, which currently serve approximately seven million swimmers every year. For the City’s waterbodies with a designated use for swimming, the New York City Department of Health and Mental Hygiene runs

a rigorous monitoring and warning program to protect public health. Based on the water quality improvements that have resulted from the City's substantial water quality investments, and consistent with the methodology for measuring compliance in DEC's Regulatory Impact Statement, the City supports upgrading WQS in the Hudson River (Manhattan) and Upper NY Bay to include primary contact fecal coliform water quality criteria during the May-October recreation season. Furthermore, the City would support efforts by DEC to incrementally improve water quality in other current I and SD waterbodies above the existing secondary contact standard where appropriate.<sup>1</sup>

While many areas in the City are appropriate for swimming, certain waterbodies in the City have a unique status as urban tributaries where swimming may be unsafe due to factors other than pathogens. As DEP has documented, and as DEC has classified these waterbodies, primary contact uses are inconsistent with their status as working waterbodies with active navigational uses or other constraints, such as bulk heading, low flows, or security restrictions. These urban tributaries pose very small risk of exposure to humans in areas where swimming is not a designated, appropriate or permitted use. DEP seeks to prioritize its investments in improving water quality in those waterbodies with active recreational uses or which have a reasonable potential for such uses in the foreseeable future and is concerned about the imposition of WQS designed for the sole purpose of protecting swimming in waterbodies where no such use is permitted or advisable.

The City's recently submitted CSO Long Term Control Plans have proposed strategies to cost-effectively improve water quality and reduce pathogens through a combination of proposed disinfection projects and other cost-effective projects. DEP's preliminary cost estimates indicate that the potential costs of complying with the Proposed Rule by disinfecting CSOs would be approximately \$3 billion in the tributaries and over \$9 billion if open waters are included. Some commenters have expressed a preference for CSO volume reduction instead of disinfection projects. The City estimates that the costs of 100% CSO capture would range from \$24 billion for the tributaries to \$84 billion for the tributaries and open waters. Thus, if the City were required to comply with the Proposed Rule through CSO volume reduction alone, these costs would have serious implications for DEP's ability to effectively manage a host of public priorities while continuing to ensure that its water rates are reasonable and affordable for all New Yorkers. Currently more than 27% of New York City households pay 2% or more of their income towards their wastewater bills. The billions in additional costs that the City would be required to spend as a result of this Proposed Rule, on top of current projections of other future wastewater spending, would further burden the over 21% of New York City's residents who live below the federal poverty line.

Moreover, the costs of compliance would go well beyond the significant increases in water rates. As stated above, the City is committed to making additional investments to improve water quality in waterbodies where recreational uses are consistent with the character of the waterbody. The City believes this goal can be achieved with reasonable expenditures and in a manner that minimizes impacts on host communities. However, if the City is required to construct massive CSO and stormwater storage and/or treatment facilities to comply with the

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<sup>1</sup> For example, in each of the four CSO Long Term Control Plans submitted by DEP in 2014, DEP proposed site-specific targets for fecal coliform that would be more stringent than the current Class I fecal coliform standard.

proposed standards through volume reductions in every waterbody regardless of that waterbody's characteristics, the burden on local communities could be considerable. Although the City would seek to mitigate impacts of such construction, disruption to the local communities would likely be unavoidable. In addition, to site such facilities, the City would likely be required to acquire large tracts of land with the concomitant loss of that land for preferred community uses.

It is in this context that the City submits the following comments on the Proposed Rule.

1. The City supports the preservation of the Class I and SD use classifications under the Proposed Rule; however, the City does not support the Proposed Rule's uniform application of the primary contact criteria to those waters regardless of each waterbody's unique characteristics.

The Proposed Rule does not change the designated use of waters designated Class I or SD. Rather, under the Proposed Rule, the best usages of Class I waters would remain secondary contact recreation and fishing, and the best usage of Class SD waters remains fishing. The City fully supports DEC's continuing to maintain the Class I and SD use classifications.

The Proposed Rule appropriately recognizes that Class I and SD waters should not be reclassified for primary contact use. The City recognizes that many commenters are requesting that DEC designate all Class I and SD waters as suitable for primary contact, which would effectively leave no distinction among the various use classifications under state law.<sup>2</sup> It is important to recognize, however, that many of the waters in and around the City, particularly the small urban tributaries, have characteristics that make primary contact recreation unsafe or infeasible. Some are bulkheaded, impeding public access; some support important industrial waterfront uses and shipping traffic; and some have extremely low flows. In others, public access is completely prohibited due to security restrictions imposed by state or federal authorities. These waterbodies are in contrast to the over 14 miles of the City's waterfront that are enjoyed by millions each year for swimming. Federal and state law and regulations support the adoption of different water body use classifications, and different water quality criteria to support those various water body uses. A "one size fits all" primary contact designation, as many commenters request, is neither sensible nor required, and ignores the other important existing water body uses and their impacts to recreation.

The City does not support the Proposed Rule's uniform application of primary contact criteria to all Class I and SD waters. Rather, the City suggests that instead of adopting such uniform primary contact criteria, regardless of whether primary contact water quality and/or primary contact uses are attainable, DEC should identify those I and SD waters that the public currently uses for primary contact, where primary contact water quality is attainable through reasonable controls, and apply primary contact criteria to those water bodies where appropriate. It is unrealistic and inappropriate to require primary contact coliform standards everywhere, regardless of the costs and regardless of the potential for human contact with the waters. Absent

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<sup>2</sup> Both the CWA and the State ECL recognize that different waterbodies are appropriately assigned different uses.

investments on an unprecedented and massive scale and construction of huge storage tanks and tunnels, or other treatment facilities in areas where swimming is not advisable or allowed, the requirement would result in inevitable, continual and pervasive non-compliance, and would threaten to divert scarce public resources from where they are most needed. The City strongly believes it is important to focus large scale pollution control efforts and investments in water bodies where the public benefit is greatest. Accordingly, the City suggests that DEC should identify those I and SD waters that the public currently uses for primary contact, where primary contact water quality is attainable through reasonable controls, and apply primary contact criteria to those water bodies where appropriate. The City would welcome the opportunity to provide necessary information and support for this endeavor.

Moreover, the City supports DEC's efforts to improve water quality in waterbodies that are not designated for primary contact recreation, and fully intends to identify and implement reasonable controls of discharges from CSOs regardless of whether such controls are required under current water quality standards. The City would further support DEC's efforts to incrementally improve water quality in current I and SD waters above the existing standard, even if the water quality meets current requirements, regardless of whether those waters are used or suitable for primary contact. In fact, three of the Long Term Control Plans already submitted include additional projects to reduce pathogen levels, and DEP expects to include similar projects in many of the remaining Plans; the City would support the application of more stringent pathogen criteria in those waterbodies once those projects are operational.

2. The City Seeks Clarification of DEC's Statement Indicating that RWQC Will Apply to Class I and SD Waters.

At the January 6, 2015 information session on the Proposed Rule, DEC indicated that it would likely apply the EPA recreational water quality criteria enterococcus standard ("RWQC") to Class I and SD waters. EPA is clear, however, that the RWQC applies only to waters that are designated for primary contact. "EPA's 2012 RWQC recommendations are national recommendations for all waterbody types designated for swimming, bathing, surfing, or similar water contact activities (referred to throughout this document as 'primary contact recreation use')." EPA *RWQC* at 3; "EPA's 2012 RWQC recommendations describe the desired ambient water quality conditions to support the designated use of primary contact recreation." *Id.* at 5. Since DEC's proposed rule does not change the current designated use of secondary contact and fishing for Class I and fishing for Class SD waters, DEC's statement that the RWQC standards would likely apply to such waters raises important concerns for the City, as the RWQC are substantially more difficult, and more expensive, to attain.

Accordingly, DEC should not, as a result of the Proposed Rule, seek to apply the RWQC to all Class I and SD waters, given EPA's clear direction that the RWQC are to apply to waters designated for primary contact recreation, and should clarify that the Proposed Rule does not have this effect. This is particularly important given the potential cost implications to the City, noted above, of a rule that would require significant increases in CSO capture volumes to achieve compliance.

3. The City seeks to better understand DEC's conclusion that current water quality criteria do not comply with the Clean Water Act ("CWA"), that the Proposed Rule is necessary to comply with the CWA, and that the Proposed Rule does not exceed any federal minimum standards.

DEC states in the Notice of Proposed Rule Making, dated December 3, 2014 ("Notice") and the accompanying Regulatory Impact Statement, that the current coliform criteria for Class I and SD waters do not comply with the CWA, and that the Proposed Rule represents the federal minimum standards. For example, in Section 8 of the Notice, DEC states, "If the water classifications remain unchanged, it is possible that the EPA could exercise its authority to promulgate regulations for New York State to bring the Class I and Class SD waters into compliance with the Clean Water Act." In Section 9 of the Notice, DEC states, "The proposed regulatory changes do not exceed any federal minimum standards." These statements indicate that DEC considers it a federal minimum requirement that all waters must have pathogen levels that meet swimmable criteria, regardless of whether swimming is a designated use or whether there are other factors that make swimming unfeasible or dangerous (*e.g.*, due to inaccessibility of water, low flows, security restrictions, shipping traffic or industrial use, or dangerous levels of toxic [non pathogen] pollutants). However, this position would be inconsistent with the basic framework of the CWA, which recognizes that different waterbodies are appropriately assigned different uses.

The City requests that DEC clarify the basis for its assertion that any water body with pathogen criteria that does not support swimming is not in "compliance" with the CWA, and that swimmable pathogen criteria must be applied to waters regardless of whether primary contact recreation is a designated use and/or a use that is precluded due to the factors noted above. The rulemaking document does not sufficiently explain DEC's position that the current State WQS do not comply with the CWA, or that the Proposed Rule does not exceed federal minimum standards.

The City notes that the CWA provides, with respect to establishing WQS, that "such standards shall be established taking into consideration [the waters'] use and value for public water supplies, propagation of fish and wildlife, recreational purpose, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." CWA § 303(c)(2)(A). EPA's regulations set forth the requirements for establishing water quality criteria, and define water quality "criteria" as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 CFR § 131.3(b) *emphasis added*. The regulations further provide, "States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use." 40 CFR § 131.11(b)(1) *emphasis added*. While DEC refers to the swimmable *goal* in CWA § 101(a)(2), the specific *requirements* are set forth in the above quoted sections of the CWA and EPA regulations.

Moreover, EPA's recent document on recreational water quality criteria reiterates, "When states adopt new or revised WQC [water quality criteria] into WQS, they must be scientifically

defensible and protective of the designated uses of the waterbodies.” EPA Office of Water, *Recreational Water Quality Criteria, 820-F-12-058*, p. 5 *emphasis added*. Significantly, DEC’s current WQS for Class I and SD, including applicable pathogen criteria, were approved by EPA.

In addition, EPA’s Guidance: *Coordinating CSO Long-Term Planning with Water Quality Standards Reviews*, July 31, 2001 (“EPA 2001 Guidance”), explicitly allows states to adopt less stringent pathogen standards for waters that are not designated for primary contact. “EPA’s policy is that any secondary contact criterion adopted by a state should be appropriate for the anticipated use and not exceed a geometric mean five times EPA’s recommended water quality criteria for primary contact recreation. Applying a less stringent criterion to a water body where only ‘secondary contact’ activities occur should result in no greater risk of gastrointestinal illness than do water bodies designated with primary contact recreation.” *Id.* at 18 *emphasis added*. As DEC explains throughout the Notice and Regulatory Impact Statement, most of the waters to which the proposed rule will apply are affected by CSOs, and the EPA 2001 Guidance is therefore particularly relevant to this Proposed Rule.

In light of these provisions, the City requests that DEC clarify why it believes the CWA requires that pathogen criteria that were developed to support swimming must be applied to all waters regardless of their designated use, including waters that are not designated for swimming, given that ratepayers will bear the substantial costs of compliance with those criteria. Moreover, the City requests further clarification of DEC’s statement that the regulation does not exceed any federal minimum standard, as the CWA and EPA regulations and guidance appear to require only that water quality criteria protect the designated use of the water, and pathogen standards developed to protect swimmers are only applicable to waters designated for primary contact.

4. The City seeks clarification regarding the effect the Proposed Rule would have on the applicability of federal use attainability regulations.

The City seeks clarification as to how the Proposed Rule will interact with federal regulations allowing removal of a designated use, or adoption of a use that does not include primary contact, when supported by a Use Attainability Analysis (“UAA”).

Under 40 CFR 131.10(g), a State may remove a designated use that is not an existing use based on one or more of six enumerated factors (“the UAA factors”). This provision may be used to support adoption of a pathogen criterion that is less stringent than necessary to support primary contact, based on a demonstration that features of a water body preclude the primary contact use. As explained in EPA’s 2001 CSO LTCP/WQS Review Guidance:

Physical Alterations in the urban environment often preclude full attainment of uses due to limited access, channelization, and hydraulic impairments that pose logistical as well as safety constraints for swimmers, waders, fisherman [sic] and boaters. Examples of such alterations include modification for shipping channels and certain types of flood control projects. Physical alterations may justify the need for a review and possible revision of

applicable water quality standards when developing LTCPs. *Id.* at 8.

Presently, DEC may assign a I or SD classification for a water body if it is demonstrated, through a valid UAA, that swimming is not feasible (Class I), or primary and secondary contact is not feasible (Class SD) due to any of the applicable UAA factors. Under the current State WQS for I and SD waters, either designation allows for coliform water quality criteria that do not support primary contact (Class I) or primary and secondary contact (Class SD). A UAA might also support site-specific standards applicable to certain waterbody segments that differ from existing pathogen standards. The Proposed Rule, however, states that the coliform standards that support swimming will be applied to I and SD waters, even though “other factors,” (*e.g.*, as set forth in EPA’s 2001 Guidance: limited access, channelization, and hydraulic impairments that pose logistical as well as safety constraints for swimmers) may limit primary contact.

Moreover, DEC states that the Proposed Rule creates no additional obligation beyond what is required under the 2012 CSO Consent Order. The Consent Order provides that under certain circumstances, DEP will submit a UAA demonstrating the highest attainable use of the water body: “The Use Attainability Analysis will assess the waterbody’s highest attainable use, which the State will consider in adjusting water quality standards, classifications, or criteria and developing waterbody-specific criteria.” The existing CSO Consent Order is based on current WQS, and explicitly provides that DEC may adjust the water quality criteria and/or adopt waterbody specific criteria for CSO.<sup>3</sup>

Federal law and regulation and EPA’s 2001 Guidance thus support the application of less stringent standards where there are logistical or safety constraints for swimmers. DEP therefore requests that DEC affirm that it does not intend, through the Proposed Rule (which appears to apply the swimmable primary contact coliform criteria *even where other factors limit that use*), to restrict the use of the UAA process to establish site-specific WQS that are less stringent than the proposed pathogen standard where appropriate.

5. The City’s comments related to DEC’s Cost Analysis.

DEC has concluded that the Proposed Rule imposes no additional costs on the City. As stated in the Regulatory Impact Statement, “Investments in water pollution abatement projects

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<sup>3</sup> In addition, the City is concerned that DEC’s proceeding with the Rule Making now is premature and in conflict with the process outlined in the Goal Statement, as this rulemaking precedes the City’s submission of UAAs for some waterbodies in the LTCPs. Moreover, for those waterbodies where the City has submitted UAAs for DEC review, the Proposed Rule does not appear to consider the analyses included in those UAAs. The UAAs submitted for Alley Creek, Hutchinson River, Westchester Creek, and Flushing Creek demonstrated that the coliform standards set forth in the proposed rule are not fully attainable in these waterbodies. Moreover, DEP anticipates that other UAAs required under the 2012 CSO Consent Order will demonstrate that additional waters that are affected by the Proposed Rule would not achieve the proposed coliform standard based on the federally endorsed UAA factors. The City thus seeks a clarification of DEC’s timing for reviewing these UAAs and, where it determines the UAA factors support a less stringent standard, whether DEC recognizes the need to preserve its ability to adopt such standards in light of the Proposed Rule, which imposes a uniform standard regardless of such pending, and soon to be submitted, UAAs.

are necessary to bring New York City waters into compliance with the swimmable goal. However, for several reasons, New York City is already obligated to make those investments, and therefore, the proposed amendments would not impose any costs on regulated persons or New York City above and beyond costs that are currently required.”<sup>4</sup> As discussed above, however, DEC has not adequately supported the assertion that the Proposed Rule does not impose any obligations beyond what is currently required. Accordingly, if the Proposed Rule does not represent the minimum requirement, the cost analysis included in the Regulatory Impact Statement is insufficient and DEC must include a more thorough analysis of incremental costs of compliance relative to compliance with the existing WQS for Class I and SD waters.

In addition, the City believes that the cost of compliance, as set forth in the Regulatory Impact Statement, is underestimated, in part because the analysis relied on outdated and/or inaccurate information.<sup>5</sup> Based on preliminary calculations, the City believes the costs of treating or eliminating CSO discharges that cause or contribute to exceedances of the proposed coliform criteria would likely be in the range of \$3 billion to more than \$9 billion. In addition, the City notes that while many of the waters that are subject to the Proposed Rule are impacted by CSOs, several of those waters are also impacted by pathogens from other sources, including but not limited to municipal separate storm sewers within and outside of New York City, illicit discharges, and direct overland drainage. There is no reference in the Regulatory Impact Statement to the compliance costs related to these other sources of pathogens. The City, therefore, seeks clarification as to whether DEC has assessed the additional obligations, above what is currently required, that the Proposed Rule places on those non-CSO pollutant sources, and requests that DEC update the cost analysis in the Regulatory Impact Statement with this information. The City estimates that the cost of eliminating discharges from other sources, including the City’s municipal storm sewers, that cause or contribute to exceedances of the proposed coliform criteria would likely require billions of dollars of additional spending.

Moreover, the cost analyses in the Regulatory Impact Statement only discuss costs associated with complying with coliform standards. If this rule changes the status of Class I and SD waters such that the EPA’s RWQC enterococcus standards will apply, DEC must consider the costs of meeting that requirement. As discussed above, EPA’s RWQC clearly would not apply to Class I and SD waters under the current State standards, as those waters are presently not designated for primary contact, and EPA’s RWQC are only required for primary contact waters. If DEC believes that the RWQC will now apply to Class I and SD waters, or that this rule makes such application mandatory in the future, DEC should include the cost of meeting those standards in the regulatory impact analysis.

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4 Regulatory Impact Statement at Section 4(b).

5 DEC also indicates that, because Alley Creek and the tributaries to Jamaica Bay are currently classified as “Class A” waters required to be suitable for primary contact recreation by the Interstate Environmental Commission (“IEC”), the Proposed Rule would impose no new requirements or costs for these waters. *See* Regulatory Impact Statement at Section 4(b). However, the only parameter for which IEC sets ambient WQS for these waterbodies is dissolved oxygen. IEC Water Quality Regulations Section 2.03(a). The IEC does impose fecal coliform limitations for effluent discharging to IEC waters, but does not regulate ambient water quality for fecal coliform. Thus, the City has found no basis to conclude that compliance with the IEC rules would require pathogen reductions from its CSOs.



Finally, the estimated cost of compliance set forth in the Regulatory Impact Statement is based on attainment of the proposed fecal coliform standard during the recreation season.<sup>6</sup> To be consistent with this underlying assumption in the Regulatory Impact Statement, the Proposed Rule should explicitly provide that attainment will only be required during the recreation season. Because the recreation season is also the time period when the public will use the waterbodies for swimming, this limitation is appropriate and consistent with the goals of the Proposed Rule. We also note that DEC's estimated cost is based on a specified sampling methodology for measuring compliance, and any modification to that practice would impact DEC's cost analysis.

### Conclusion

The City seeks to prioritize its investments in improving water quality in those waterbodies with active recreational uses or which have a reasonable potential for such uses in the foreseeable future, and believes the Proposed Rule should reflect this approach. The City appreciates DEC's consideration of these comments and looks forward to DEC's response.

Sincerely,



John Rousakis  
General Counsel

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6 See Regulatory Impact Statement at Section 4(c).