March 16, 2015

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SENT VIA ELECTRONIC MAIL

Re: Comments on NYSDEC's Proposed Amendments to 6 NYCRR Parts 701 and 703 for Class I and Class SD Waters

Dear Mr. Simson;

On behalf of Riverkeeper and Natural Resources Defense Council, ("commenters"), please accept the following comments on the New York State Department of Environmental Conservation's ("DEC") proposed amendments to two sections within the state water quality regulations for Class I and Class SD waters in New York City ("NYC").

I. ISSUE OVERVIEW

On December 3, 2014, the New York State DEC opened for public comment a proposal to amend New York's water quality standards (within Parts 701 and 703 of Title 6 of the Official Compilation of Codes, Rules, and Regulations) for Class I and Class SD waters to meet the "swimmable" goal of the Clean Water Act ("CWA" or the "Act"). The DEC proposes adding the phrase "*in addition, the water quality shall be suitable for primary contact recreation, although other factors may limit the use for these purposes*" in the definition of Class I waters, and the same phrase, with added suitability for secondary contact recreation, for Class SD waters.[1]

Additionally, the DEC proposes amending the total coliforms and fecal coliforms standards. For total coliforms, Class I and Class SD waters would now be deemed impaired if the monthly median value and more than 20 percent of the samples, from a minimum of five examinations, exceeds 2,400 and 5,000, respectively.[2] For fecal coliforms, "The monthly geometric mean, from a minimum of five examinations, shall not exceed 200" for Class I and Class SD waters under the proposed rule.[3]

[1] *See* NYS Register, December 3, 2014, at 17.
[2] *Id.*
[3] *Id.*

As stated by the DEC, "[t]he waters of New York State (both freshwater and saline) are grouped into classes with uses designated for each class, along with standards to protect their uses."[4] The purpose here is, according to the DEC, to "require that the quality of Class I and Class SD waters be suitable for "primary contact recreation" – not to change the designated uses of those waters.[5] Indeed, as the DEC explains, water quality standards include two components "designated uses and water quality criteria – that operate in tandem."[6]

In the waters of New York State, the state prohibits water pollution from impairing "the best usages of the receiving water as specified by the water classifications" contained in the state regulations.[7] Because these proposed regulation amendments for Class I and Class SD waters do not amend the best usages designated for those waters, they would remain "secondary contact recreation and fishing" and "fishing," respectively. As such, the regulation amendments solely improve upon the water quality criteria, not the designated uses of the waterways.

While Riverkeeper and NRDC support the imposition of more protective water quality criteria for the waterways at issue, the State's failures with respect to primary contact recreation as a use for these waters is unacceptable. DEC's proposal unacceptably leaves these waters short of full legal protections that are due to waters designated for primary contact under the CWA.[8]

Further, the specific recreational water quality criteria the state has proposed for these waters are based on outdated science and do not protect public health. DEC must establish criteria for these waters that are based on the best science (which requires numeric limits on enterococcus bacteria) and are at least as protective as EPA's Recreational Water Quality Criteria. DEC has recognized that it owes such legal protection to waters that are currently designated for primary contact use. To comply with the law and protect public health, DEC must apply the same criteria to these waters.

II. DEC FAILED TO INCLUDE PRIMARY CONTACT RECREATION USE IN ITS ANALYSIS

a. The DEC Failed to Designate Primary Contact Recreation as a Use

The assignment of criteria in the form of standards of purity for Class I and Class SD waters at issue (while separately and independently enforceable as criteria) fails to assess or designate uses (existing or otherwise) and thus fails to fully discharge the DEC's non-

[4] *Id.*
[5] *Id.*
[6] *Id.*, at 18.
[7] 6 NYCRR § 701.1.
[8] "Primary contact recreation" has been defined by the U.S. EPA as including, but not limited to, activities like swimming, rafting, wind surfing, canoeing, kayaking, tubing, scuba diving, snorkeling, and water skiing (*see* www.epa.gov/region6/water/ecopro/watershd/standard/rec-uaa_worksheet.pdf). Other states have adopted EPA's perspective that "primary contact recreation" means activities "(1) where there is a high likelihood of incidental ingestion of water, . . . [e]xamples include, but are not limited to, kayaking, tubing, skin diving." See www.waterquality.utah.gov/WQS/20071017_Follow-up_Email_WQS_Mtg.pdf. Moreover, as many members of the public testified at the public hearing for these regulation amendments, educational activities like water quality sampling or ecological investigations at the water's edge often expose teachers and students to waterborne pathogens and illnesses to the same extent as swimming, boating, and other primary contact recreation.

discretionary duty to issue water quality standards addressing all necessary components thereof.[9] As New York's Court of Appeals has plainly explained,

> [W]ater quality standards are provisions of State and Federal law, which define the quality goals of a water body or some portion of it, by designating the use or uses to be made of the water, by setting criteria necessary to protect the uses, and by incorporating an antidegradation policy.[10]

Based on the discussion below, it is clear that the DEC is required by federal law to designate the subject Class I and Class SD waters for primary contact recreation or conduct a structured scientific analysis to justify its refusal to do so.[11] Moreover, as noted by the New York State Court of Appeals, the DEC must designate the best usages of the state's waters and the criteria necessary to protect those uses in order to meet the Clean Water Act's federally-mandated requirements for water quality standards.

New York State law which implements Section 303 of the CWA speaks to the same issue. Section 17-0301 of the Environmental Conservation Law ("ECL") provides that the Department (1) shall group the designated waters of the state into classes in accordance with considerations of best usage in the interest of the public and further (2) shall adopt and assign standards of quality and purity for each such classification necessary for the public use or benefit contemplated by such classification." The proposed amendments fail to designate primary contact recreation as a best usage of the waters at issue and consequently fail to fully discharge the Department's non-discretionary duties under state law.

The proposed amendment to the Class SD regulation, for example, plainly includes a best usage (fishing) and standard of quality (suitable for fish survival) to support that use, but just as plainly does not include a primary contact recreation as a best use. Inclusion of a standard of quality for primary contact recreation (the DEC's proposed addition of "suitable for primary and secondary contact recreation") is not a substitute for a best use. Put visually, as proposed, the water quality standards for Class I and Class SD are:

Class	Use Designated as Fishing?	Do the Criteria Support Fish?	Use Designated as Primary Contact Recreation?	Do the Criteria Support Primary Contact Recreation?
I	Yes	Yes	**No**	Yes
SD	Yes	Yes[12]	**No**	Yes

[9] As is set forth more fully below, existing uses which are actually attained in the water body on or after November 28, 1975 must be maintained and cannot be (even partially) eliminated, whether or not such uses are included in the water quality standards as designated uses (40 C.F.R. §§ 131.12(a)(1), 131.3(e) and 131.10(h)(1)).

[10] *Niagara Mohawk Power Corp. v. State Dep't of Envtl. Conservation*, 82 N.Y.2d 191, 194 (1993); *see also Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 120-21 (2d Cir. 2006); *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1127 (D.C. Cir. 1997) Northwest Envtl. Advocates v. United States EPA, 268 F. Supp. 2d 1255, 1265 (D. Or. 2003).

[11] EPA's regulations specify that state adoption of WQS must be signified with certification by the state's Attorney General that that the water quality standards "were duly adopted pursuant to State law." (40 C.F.R. § 131.6(e)).

[12] For Class SD waters, the water quality criteria for fish is distinguished from the criteria for Classes I through SB – in Class SD waters the water is only suitable for fish survival, not propagation.

Clearly, for fishing, the uses are designated and the water quality criteria are set to support those uses.

For primary contact recreation, however, no best use is set. The proposed amendment to 6 NYCRR § 701.14 provides that

> The best usage of Class SD waters is fishing. These waters shall be suitable for fish, shellfish, and wildlife survival. *In addition, the water quality shall be suitable*[13] *for primary and secondary contact recreation, although other factors may limit the use for these purposes.* This classification may be given to those waters that, because of natural or man-made conditions, cannot meet the requirements for [primary and secondary contact recreation and] fish propagation.

By employing terms of obvious import and meaning under both federal and state law, the amendments for the Class I and Class SD waters at issue plainly prescribes a standard of quality suitable to support a use (see ECL § 17-0301; 6 NYCRR 700.1(61); 40 C.F.R. § 131.3(b)), but fail to include primary contact recreation as a best usage.[14] This conclusion is fully supported not only by the plain language of ECL § 17-0301 and the language of the proposed regulation itself (above), but by the Department's existing water quality standards. To be sure, the text of the existing Class SD regulations expressly recognizes that the classification applies to "those waters that, because of natural or man-made conditions, cannot meet the requirements for primary and secondary contact recreation and fish propagation."[15] As is explained herein, both the Clean Water Act and the Environmental Conservation Law require otherwise.

b. DEC Must Designate Primary Contact Recreation as a Use Because There is, in Fact, Existing Use of Class I and Class SD Waters for Primary Contact Recreation

According to the DEC, the proposed amendments to Parts 701 and 703 would help the State to achieve the CWA mandate "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and, wherever attainable, "provide[] for recreation in and on the water" (commonly referred to as the swimmable goal).[16] In working toward this goal, however, the DEC failed to adequately address the fact that these waters are already being used for primary contact recreation (i.e., it is an existing use), and therefore, under the CWA, primary contact recreation must be designated as a use.

As noted, the Department is required to assess waters (such as the Class SD and Class I waters at issue) which do not include fishable/swimmable uses every three years to determine if any new information has become available which indicates that fishable/swimmable uses are attainable, and if so, the Department is required to revise is water quality standards to designate such uses.[17] Thus, EPA's regulations provide that "[w]here existing water quality standards

[13] As noted, 40 CFR 131.3[b] provides that "Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. . ." (*emphasis added*).
[14] *See* ECL §17-0301; 6 NYCRR 700.1(5).
[15] 6 NYCRR 701.14.
[16] NYS Register, December 3, 2014, at 18.
[17] 40 CFR § 131.20(a).

specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained."[18]

Existing uses which were attained as of November 28, 1975 cannot be eliminated.[19] In order to effectuate – at least – a preservation of what uses are extant in a waterway, EPA's regulations provide that "[w]here existing water quality standards specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained."[20] This sets a floor for future water quality standards to improve upon.

The CWA's antidegradation policy is what specifically locks in this floor – it requires that existing in-stream uses must be maintained and protected.[21] Existing uses which are actually attained in the water body on or after November 28, 1975 must be maintained and cannot be (even partially) eliminated, whether or not such uses are included in the water quality standards as designated uses.[22] These existing use protections apply to all waters.[23] Taken together, in the EPA's words, the antidegradation policy "protects the highest use attained in the water body on or after November 28, 1975."[24]

To the extent a higher existing use than those presently designated in the water quality standards is attained in a water body, the existing use is the "minimum" best usage of the water body, and is "designated" as such as by operation of law for CWA permitting and water quality standards (both uses and criteria) purposes.[25]

The waters at issue are home to extensive use for both swimming and other primary contact recreation activities.

First, a Riverkeeper analysis of information available online shows that in the past 10 years, an average of 4,528 people per year have participated in an average of 10 organized public swim events in Class I waters around New York City. The year with the most events (16) was 2014; the year with the most swimmers (5,861) was 2010. These swims took place in the Hudson, East and Harlem Rivers, Upper Bay, Buttermilk Channel, and in the Narrows.

Several events crossed into the Class SB waters of Lower New York Bay. Several additional events occurred solely in Class SB waters, or in the waters of New Jersey on the western side of the Hudson River and are not tallied here. The official events are organized by

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[18] 40 CFR § 131.10(i); *see also* 40 CFR §§ 131.3(e), 131.3(f), 40 CFR § 131.10(i).
[19] 40 CFR §§ 131.12(a)(1), 131.3(e), 131.10(h)(1).
[20] 40 CFR § 131.10(i); *see also* 40 CFR §§ 131.3(e), 131.3(f), 40 CFR § 131.10(i).
[21] 40 C.F.R. § 131.12(a)(1); NYSDEC Technical Operation Guidance Series ("TOGS") 1.3.9, at 2.
[22] *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 705 (1994) *citing* 40 CFR § 131.12(a)(1); see also 40 C.F.R. §§ 131.12(a)(1), 131.3(e) and 131.10(h)(1).
[23] Ohio Valley Envtl. Coalition v. Horinko, 279 F. Supp. 2d 732, 740 (S.D. W. Va. 2003), *citing* 40 C.F.R. § 131.12(a)(1).
[24] *Id. at* 751; *see also* NYSDEC TOGS (Antidegradation) 1.3.9 at 2.
[25] *See PUD No. 1*, 511 U.S. at 718, *citing* 40 C.F.R. § 131.12(a)(1); NYSDEC TOGS 1.3.9, at 2 (directing the application of water quality-based effluent limitations to provide for the protection and maintenance of attained higher existing uses above those included in standards currently assigned to waters).

for-profit and not-for-profit groups, and include the New York City Triathlon, NYC Swim, Urban Swim, Coney Island Brighton Beach Open Swimmers and Sharkfest events.[26]

Public swim events have been occurring in New York City waters for decades. NYC Swim, organizer of the Manhattan Marathon, writes that the first known group swim around Manhattan (Hudson, East and Harlem Rivers) was held in 1928, reoccurred "for several years, generally attracting about two dozen swimmers each year." Solo swimmers continued the tradition through 1975, and annual group swimming around Manhattan resumed in 1982. NYC Swim now calls it "the longest running annually held swim race in the world."[27]

While there may have been other one-time events that are not reflected in these totals, and there may be additional swimmers who took part in events that are not reflected here because the information is not readily available. Notably, the totals reported herein by Riverkeeper also do not reflect the thousands of recreational swimmers who enjoy the public trust resource of the Hudson River independently of organized swim events. Accordingly, the above-reported occurrences of recreational swimming conservatively represent a minimum verified number.

New York City and the State of New York have surely been made aware of these existing uses. As NYC Swim reports on its website, in over two decades, over 20,000 participants in more than 135 events around the City have had the long-term support of several federal, state, and city agencies, including the New York Police Department, the United States Coast Guard, the Hudson River Park Trust, the City of New York Office of Parks and Recreation, the National Park Service, the New York City Economic Development Corporation, the Fire Department of New York City, and the New York City Department of Transportation. Clearly, these uses are known by federal, state, and local agencies.

Second, the waters at issue are used extensively for other primary contact activities, including human-power boating (e.g., paddling, such as kayaking, canoeing, and dragon boating) and educational activities.[28] As many members of the public highlighted at the public hearings for these regulations, other recreational uses, occur in waterways throughout the City, from the Bronx River and Gowanus Canal to Flushing Bay, the Hudson River, and the Staten Island Kills. These uses cover the gamut of itemized water activities highlighted in the recent 2012 EPA Recreational Water Quality Criteria:

> "Primary contact recreation typically includes activities where immersion and ingestion are likely and there is a high degree of bodily contact with the water, such as swimming, bathing, surfing, water skiing, tubing, skin diving, water play by children, or similar water-contact activities."[29]

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[26] Note, these are just a sampling of the organized and long-running official events from around the Class I and Class SD waters – a host of unofficial swimming events (e.g., jumping in the River during summer) occur throughout the City.

[27] NYC Swim, Manhattan Marathon history, http://www.nycswim.org/Event/Event.aspx?event_id=2502&from=history.

[28] *See*, e.g., www.rockingtheboat.org, http://bronxriver.org/?pg=content&p=aboutus&m1=1, http://www.bceq.org/wp-content/uploads/2010/04/BCEQ__Requesting_Sensitive_Area_02172010.pdf, and www.nycwatertrail.org.

[29] 2012 RWWC, 2.0 Applicability and Scope, at 6, *infra*, n. 59.

Indeed, in most of the waters at issue, New York City specifically encourages and promotes these activities.[30] Moreover, again as noted during public hearings on these rules, water access for education – by teachers and their students – occurs year-round and also subjects children and their caregivers to risks with "a high degree of bodily contact with the water," similar to the EPA-cited "water play."

Finally, although the actual uses described above are sufficient to render primary contact an existing use for Clean Water Act purposes, we also note that decades of water quality data suggest that conditions sufficient to support primary contact recreation uses exist, at some times and places, in the Class I and SD waters. The City of New York has been sampling bacteria in New York Harbor since 1909 and has documented a long-term trend toward better water quality. At times and in places throughout the Class I and Class SD waters, water quality has met both state and federal standards and criteria for primary contact recreation. It is precisely this improving trend in water quality that has brought more people into these waterways for primary contact recreation. The Clean Water Act requires DEC to now protect these existing uses, by adopting water quality standards (both uses and criteria) that will drive solutions to the remaining water quality problems.

c. The DEC Failed to Assess Attainability of Primary Contact Recreation as a Use

As noted above, the DEC's stated goal for these amendments is to make Class I and Class SD waters meet the CWA's swimmable goal. DEC drafted these rules to include water quality criteria (for total and fecal coliforms) which meet the state's existing primary contact standards for non-coastal recreational waters (yet do not meet either the existing standards for coastal recreational standards or the new federal minimum standards, as discussed below). However, the agency did not assess the attainability of primary contact recreation as a best usage.[31] Even if primary contact recreation were not considered an existing use of these waters, DEC would still be required, under the Clean Water Act, to assign these waters a designated use of primary contact recreation unless a "Use Attainability Analysis" (or UAA) determines that such use is not attainable.

Water quality standards ("WQS") are the State's goals for individual water bodies and provide the legal basis for control decisions under [Clean Water] the Act."[32] The CWA requires states to establish water quality standards for every body of water within a state.[33] A water quality standard defines the water quality goals of a water body (or a portion thereof), "by designating the use or uses to be made of the water, by setting criteria necessary to protect the uses, and by preventing degradation of water quality through antidegradation provisions."[34] The minimum elements that must be included in a State's water quality standards include use designations for all waterbodies, water quality criteria sufficient to protect those use designations, and an antidegradation policy.[35]

[30] http://www.nycgovparks.org/facilities/kayak
[31] See NYS Register, December 3, 2014, at 17.
[32] 40 CFR § 130.0.
[33] 33 U.S.C. § 1313.
[34] EPA Water Quality Standards Handbook at 7.1.
[35] 40 CFR § 131.6(b).

Use designations consistent with CWA §§ 101(a)(2) and 303(c)(2) are among the minimum elements which must be included in state water quality standards sent to EPA for review.[36] Fishable/swimmable uses are "are deemed attainable if they can be achieved by the imposition of effluent limits . . . and cost-effective and reasonable best management practices for nonpoint source control."[37] Criteria, on the other hand, are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use, and, as noted by the DEC in the notice for this rulemaking, should work in tandem with the designated use.[38]

The Act also requires states to review their water quality standards at least once every three years (a "triennial review") and submit the results of that review to EPA for approval.[39] When performing its triennial review, the State must evaluate what uses are being attained.[40] If a water body is designated for a use that requires less stringent criteria than a use that is being attained, the State must revise the use on that water body to reflect the use that is being attained.[41] As EPA's regulations explain:

> Any water body segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act shall be re-examined every three years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly.[42]

The water quality standards for the Class I and Class SD waters at issue were last revised in 2008.[43] Since that time, a plethora of new information has come to light (some or all of which is presumably in the possession of the Department) with respect to the quality of the subject waters, the means by which water quality may be further improved in such waters, and the actual existing use, as discussed above, of the subject waters for primary contact recreation

Once the Department completes its revision to the water quality standards, EPA is then responsible for reviewing any new or revised standards adopted by the states to determine if the standards are consistent with the CWA and EPA regulations promulgated under the Act.[44] If EPA disapproves the standards, the state has ninety days to correct the deficiencies else EPA must promulgate its own standards for the state.[45]

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[36] *See Idaho Mining* Ass'n v. Browner, 90 F. Supp. 2d 1078, 1082 (D. Idaho 2000), quoting 40 C.F.R. § 131.6.
[37] *Id.* at 1101, *citing* 40 C.F.R. § 131.10(d). Where a state fails to designate a water body for fishable/swimmable uses, "the state must conduct a use attainability analysis ("UAA") in accordance with the provisions of the CWA." *See* 40 C.F.R. § 131.10(j)(1).
[38] NYS Register, December 3, 2014, at 18.
[39] 33 U.S.C. § 1313(c)(1).
[40] Riverkeeper further understands that the Department's expressed position (at least in the admittedly pre-decisional context of non-prejudicial stakeholder discussions) has been that its action to promulgate bacteria criteria for New York City waters is being taken separately and independently of the Department's pending triennial review of New York State's water quality standards.
[41] EPA Water Quality Standards Handbook at 2.8.
[42] 40 CFR § 131.20(a), *see also* EPA Water Quality Standards Handbook at 6.1.4.
[43] *See* 6 NYCRR §§ 701.13, 701.14.
[44] 33 U.S.C. § 1313(c)(2)(A), (c)(3).
[45] 33 U.S.C. § 1313(c)(3), (4).

EPA's regulations at 40 CFR part 131 interpret and implement CWA § 303 by requiring that water quality standards provide for fishable/swimmable uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability, *i.e.*, that a default designation of CWA section 101(a) goal uses should apply.[46]

Accordingly, EPA's regulatory rebuttable presumption of fishable/swimmable uses is "consistent with Congress' express directive that water quality standards be such as to 'protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA],'"[47] and the presumption furthers one of the over-arching purposes of the CWA – "to achieve fishable/swimmable uses wherever attainable."[48, 49]

d. Consequences of the DEC's Failure to Designate

Where the Department has acted to designated primary contact recreation as use, such as for the Class SB Hudson River waters, (*see* 6 NYCRR § 701.11 ["The best usages of the Class SB waters are primary and secondary contact recreation and fishing."]), the Department has done so in plain language which, consistent with ECL § 17-0301, is in accordance with the best usages of the waters and unambiguously designates primary contact recreation as a best usage. For the same Class SB waters, the Department has separately assigned criteria to protect the best usage of primary contact recreation.[50]

Assigning uses is a necessary prerequisite (absent the presence of an existing use) to the implementation and enforcement of the Department's generally-applicable water quality standards which are themselves premised upon the designation or existence of a use.

For example, the general regulatory conditions which apply to all water classifications specify that:

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[46] *See Mo. Coalition for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903, 907 (W.D. Mo. 2012). The mechanism in EPA's regulations used to rebut the presumption of fishable/swimmable uses is a "use attainability analysis". A UAA is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g) (*see* Water Quality Standards for Kansas (Final Rule), 68 Fed. Reg. 40428, 40430 (July 7, 2003)). Where a state fails to designate fishable and swimmable uses without having conducted a UAA to demonstrate that such uses were unattainable, EPA is required to promulgate water quality standards which include designated uses for the waters at issue (*see id*.; *see also* 40 CFR §§ 131.10(j) and (k)). As the Court in *Idaho Mining Assn.* explained, EPA's regulations at 40 C.F.R. Part 131 interpret and implement Sections 101(a)(2) and 303(c)(2)(A) of uses have been shown to be unattainable, effectively creating a rebuttable presumption and default designation of fishable/swimmable in the absence of a UAA (*see Idaho Mining Assn.*, 90 F. Supp. 2d at 1088).

[47] *Idaho Mining Ass'n.*, 90 F. Supp. 2d at 1097, *citing* 33 U.S.C. § 1313(c)(2)(A).

[48] To that, and as the federal District Court in *Idaho Mining Assn.* has explained, the CWA "clearly indicated an intent that states move toward more protective water quality standards to preserve the nation's waters for human uses as well as for aquatic life" and that EPA's regulatory fishable/swimmable rebuttable presumption embodied in 40 C.F.R. § 131.10[j] and [k] implemented the clear intent and key purpose of the CWA. (*Idaho Mining Assn. Id*. at 1097). EPA's Part 131 Regulations are consequently an "interpretive rule designed to further the policies of the CWA by providing for fishable/swimmable use designations unless a UAA affirmatively demonstrates that such uses cannot be attained." (Id. at 1099).

[49] 33 U.S.C. § 1251(a)(2) (*emphasis added*); *see also Kansas Natural Res. Council, Inc. v. Whitman*, 255 F. Supp. 2d 1208, 1209 (D. Kan. 2003).

[50] *See* 6 NYCRR 703.4 (surface water quality standards for coliforms).

> The discharge of sewage, industrial waste or other wastes shall not cause impairment of the best usages of the receiving water as specified by the water classifications at the location of discharge and at other locations that may be affected by such discharge.[51]

This clear requirement plainly prohibits discharges which impair the uses as specified in the water classifications of the WQS.

Where such best usages have been designated, the Department directly enforces the designated best usages separately and independently of water quality criteria.[52] But, if a best usage (such as primary contact recreation) is not "specified" by the water quality standards (*see* 6 NYCRR § 701.1), the Department would lack the regulatory predicate to directly enforce the designated best usage.[53] Furthermore, not having a "use" designated for a waterway potentially means that:

- Clean Water Act provisions requiring total maximum daily loads may not apply;
- Waterways might not be listed on CWA § 303(b) or § 305(d) lists for waterways with impaired uses;[54]
- Requirements for BEACH Act waterways (such as public notifications for swimmer safety and the requirement that the state adopt water quality criteria at least as protective as EPA's Recreational Water Quality Criteria) may not be triggered;
- Upstream jurisdictions (e.g., New Jersey, or Westchester County) may not have to limit their pollution to protect downstream uses[55]; and
- Clean water revolving fund grants could be jeopardized as there would be fewer impaired uses on a waterway and thus a lower potential scoring for grant applicant ranking.[56]

In sum, the assessment as to the attainability of primary contact uses and the designation of primary contact uses based upon the outcome of such an assessment remains an un-addressed CWA and ECL mandate for the waters at issue, and the Department (in addition to assigning criteria which would be protective of the use) must assess primary contact recreation uses in Class I and Class SD waters.

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[51] 6 NYCRR § 701.1.

[52] *See, e.g., In re: Indian Point Units 2 and 3*, Ruling on Proposed Issues for Adjudication and Petitions for Party Status (December 13, 2010), 2010 N.Y. ENV LEXIS 86).

[53] As noted however the Department's proposed criteria to support the use of primary contact recreation would remain fully enforceable. The Clean Water Act and the Environmental Conservation Law, however, plainly require more of the State of New York than the mere designation of criteria, as is explained at length herein. Designated uses are but one of the many requisite bases for regulation required by the CWA (*see, e.g.,* 40 C.F.R. 130.7(b)(3), providing that, for the purposes of listing waters as "impaired" thereunder, applicable water quality standard applicable water quality standards include "numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements."

[54] *See* 40 C.F.R. § 130.7(b)(3).

[55] *See* EPA Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews (2001) at 34.

[56] *See* EPA SRF Funding Framework -- Policy and Guidance (1996), directing states to state reviews existing water quality information from CWA Section 305(b) report), nonpoint source management plan (CWA § 319), and estuary management plan (CWA § 320) and other sources to determine its overall water quality priorities. *Id.* at 4. Section 305B reports, in turn, "indicate the assessed fraction of a State's waters that are fully supporting, partially supporting, or not supporting designated beneficial uses." (64 FR 68722, 68726; see also 40 CFR 130.8[b]).

III. THE BEACH ACT AND EPA'S 2012 RECREATIONAL WATER QUALITY CRITERIA

In 2000, Congress passed the Beaches Environmental Assessment and Coastal Health Act ("BEACH Act") to "improve the quality of coastal recreation waters."[57] In 2012, pursuant to BEACH Act requirements,[58] the EPA finalized its first update – since 1986 – of recreational water quality criteria ("2012 RWQC").[59] This update was developed by EPA…

> "pursuant to §304(a)(1) and §304(a)(9) of the CWA and it includes EPA's recommended final recreational water quality criteria … for the protection of primary contact recreation in both coastal and non-coastal waters, based upon consideration of all available information relating to the effects of fecal contamination on human health … ."[60]

Generally, these criteria must be adopted by all states within three years of any EPA revisions; here, given that these were published in November 2012, states have until November 2015 to update their WQS.[61]

In addition to requiring the development of this updated criteria, the BEACH Act created a grant program for coastal states "to develop and implement programs for monitoring and notification for coastal recreation waters adjacent to beaches or similar points of access that are used by the public."[62] These grants are only available for states to spend at access points alongside waters "designated under § 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities."[63]

Under the Clean Water Act, States must, at least every three years, revise their WQS, including water quality criteria (numeric or narrative).[64] As discussed above, "[s]uch revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters *based upon such uses*."[65] The EPA has 60 days, by law, to determine if those WQS (including criteria) meet the requirements of the CWA.[66] In reviewing state criteria, the agency can require states to justify any standards not in conformity with the federally developed EPA criteria.[67]

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[57] *See*, P.L. 106-284 (2000), Preamble.
[58] P.L. 106-284 § 3(b).
[59] 79 F.R. 71191 (November 29, 2012).
[60] EPA Final Recreational Water Quality Criteria ("2012 RWQC"), at Foreword (*emphasis added*). Available at http://water.epa.gov/scitech/swguidance/standards/criteria/health/recreation/.
[61] 33 U.S.C. § 1313(i)(2(A).
[62] P.L. 106-284 § 4.
[63] Id., at § 5, amending the CWA to include 33 U.S.C. § 1362 (21)(A)(ii).
[64] 33 U.S.C. § 1313(c).
[65] Id., at § 1313(c)(2)(A). Also as discussed above, there is no CWA allowance for criteria based upon uses which are not designated for a particular body of water. According to one court, "water quality criteria, on the other hand, are measures of the conditions of a water body and … the key aspect of water quality criteria is that they are dependent upon designated uses associated with them; as EPA regulations explain: 'States must adopt those water quality criteria that protect the designated use.'" *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 215 (D.D.C. 2011) (citing 40 C.F.R. § 131.11(a)).
[66] *Id*.
[67] See, *Mississippi Com. on Natural Resources v. Costle*, 625 F2d 1269 (5th Cir., 1980).

Among the many elements of the 2012 RWQC, these EPA "criteria recommendations are both for a [geometric mean ("GM")] and [statistical threshold value ("STV")] (rather than just a GM or just an STV) because used together they would indicate whether the water quality is protective of the designated use of primary contact recreation."[68] The EPA warns that "[u]sing the GM alone would not reflect spikes in water quality because the GM alone is not sensitive to them."[69]

Here, in addition to (and perhaps as a consequence of) the State's failure to designate primary contact recreation as a use, the DEC is proposing to revise water quality criteria in a manner inconsistent with the EPA's 2012 RWQC. First, the DEC's proposed Class I and Class SD criteria are based on levels of fecal and total coliform, instead of the now-standard *Enterococcus* and *E. coli* criteria promulgated in the 2012 RWQC (EPA's prior, 1986 Recreational Water Quality Criteria also relied on *Enterococcus* and *E. coli*, rather than fecal or total coliform; by federal rule, those 1986 federal criteria currently apply to all coastal waters in New York that have been designated for primary contact recreation). Second, the DEC's fecal coliform standards use a geometric mean where the EPA's criteria require use of both the GM and STV, "because used together they would indicate whether the water quality is protective of the designated use of primary contact recreation."[70] Put more simply, the EPA's new criteria reflect the understanding that people don't swim on an average day – and therefore the criteria necessary to protect primary contact recreation as a designated use must also contain an STV.

Under the CWA, states can depart from the EPA's promulgated criteria, but they must have a good reason to do so. In the notice announcing the 2012 RWQC, the EPA noted that:

> States and authorized Tribes may adopt other scientifically defensible water quality criteria that differ from these recommendations. When adopting new or revised water quality standards, the States and authorized Tribes must adopt criteria that are scientifically defensible and protective of the designated uses of the bodies of water. In establishing criteria, States may base it on (1) EPA's recommended criteria, (2) EPA's recommended criteria modified to reflect site-specific conditions, or (3) other scientifically defensible methods.[71]

Here, the DEC provided no scientific support for backsliding away from the updated 2012 RWQC, no site-specific reasons why a GM would suffice, or, for another example, why using *Enterococcus* would not suffice.

Overall, there was no stated basis for a departure from these 2012 RWQC, and, as such, under the CWA the EPA cannot approve these criteria. By failing to comply with the BEACH Act, the State is doubling down on risk, turning its back on swimmer safety and coastal water quality improvements because, by failing to designate primary contact as a use, it is closing its own door for BEACH Act grant applicability.

[68] 2012 RWQC, at § 3.6.2.
[69] *Id.*
[70] 2012 RWQC, at § 3.6.2.
[71] 77 F.R. 71191.

IV. THE PROPOSED REGULATIONS CREATE AN AMBIGUOUS APPLICABILITY LOOPHOLE

The proposed regulations include significant ambiguities – in each classification – which should be clarified in the DEC's final regulations.[72]

First, in the proposed amendments to the Class I and Class SD regulations, DEC proposes adding the following language:

> *…the water quality shall be suitable for primary [and, for Class SD waters, secondary] contact recreation, although other factors may limit the use for these purposes.*[73]

Here, the ambiguity lies in the loophole created by the underlined clause – that "other factors" may limit uses in these waterways.

To Riverkeeper's understanding, the DEC has always lawfully interpreted such "other factors" which may "limit" recreational uses to activities such as barge traffic precluding safe swimming or naturally-occurring conditions such as shallow depth or rapids which would likewise preclude safe swimming. Unfortunately, the language could conceivably be argued to include something like a combined sewer overflow event that, because of pollution discharged, limits a waterway's utility for swimming. Commentors ask the DEC to clarify this ambiguity in the final regulations to ensure that non-pollutant and non-pollution factors are the only potentially limiting "other factors" that come to bear in classification and use decisions.[74]

Second, the regulatory language for Class SD waters contains another, existing ambiguity. The DEC regulation states that Class SD waters include those which, "because of natural or man-made conditions, cannot meet the requirements for primary and secondary contact recreation and fish propagation."[75] The ambiguity here lies in the use of the phrase "natural or man-made conditions" – which could be conceivably argued to include the water pollution outcomes of a combined sewer overflow (a man-made condition) or a large, severe rainfall (a natural condition. Here, again, DEC should clarify the regulation to show, in plain language, that these "natural or man-made conditions" which would preclude the assignment of a use do not include water pollutant or pollution factors.[76]

V. CONCLUSIONS

As noted above, Riverkeeper and NRDC support the DEC's proposed goal of having Class I and Class SD waters meet the CWA's swimmable goal in New York City.[77] In the

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[72] Riverkeeper recognizes that the ambiguities discussed herein appear in other sections of Part 701 and intends to address such matters going forward in triennial review.
[73] NYS Register, December 3, 2014, at 17 (emphasis added).
[74] For example, the DEC could state "*In addition, the water quality shall be suitable for primary recreation, although other non-pollutant or non-pollution factors may limit the use for these purposes.*"
[75] 6 NYCRR § 701.14.
[76] See 40 CFR § 131.10(g), allowing States to remove a designated uses which are not an existing uses, or establish sub-categories of a use where the State can demonstrate that attaining the designated use is not feasible because of, inter alia dams, diversions or other types of hydrologic modifications or lack of depth, etc.
[77] We also incorporate, by reference, the comments submitted by the SWIM Coalition.

regulations proposed, however, the DEC does not go far enough toward that goal – falling short substantively and legally.

First, the DEC must set uses that include existing primary contact recreation uses, which for these waters are extensive.

Second, even if the current activities in these waters were not deemed "existing uses", the DEC must assess the attainability of primary contact recreation and designate such use unless it is unattainable.

Third, the DEC must set new primary contact recreation criteria for these waters based on and consistent with EPA's 2012 RWQC and the BEACH Act, ensuring that such criteria include a STV standard as well as a geometric mean.

Fourth, the DEC must clarify ambiguities in both the proposed and the existing Class I and Class SD regulations as discussed above.

Without these revisions, DEC's proposed regulations fail to meet the minimum requirements of federal and state law. Our organizations would welcome the opportunity to work further with the DEC toward effectuating these changes.

Sincerely,

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