



December 17, 2015

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

RE: Alley Creek and Little Neck Bay CSO Long Term Control Plan

Stormwater Infrastructure Matters Coalition (S.W.I.M.) submits this comment letter on the Combined Sewer Overflow (CSO) Long Term Control Plan for Alley Creek and Little Neck Bay.

These comments are in response to DEP's Final LTCP plan which was presented at "Public Meeting #3" on November 17, 2015 and Appendix H Supplemental documentation, dated May 2015. Since DEC is responsible for approval or disapproval of DEP's proposed plan, we reserve the right to submit additional comments to DEC, and it is our understanding that DEC will have formal public comment periods before making final decisions on whether to approve each of the City's LTCPs.

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.

On behalf of the SWIM Coalition Steering Committee, please accept these comments regarding the Alley Creek and Little Neck Bay CSO LTCP. In short, we urge DEP – with instruction from DEC – to improve upon the current proposed plan rather than finalizing the plan as it currently stands. Namely we urge the DEP to increase reductions in CSO discharges, to invest more in green infrastructure, and to integrate CSO planning with MS4 pollution reductions planning. We further note that many of the concerns we raise below also apply to other LTCPs that are currently pending.

Use Attainability Analysis (UAA)

The UAA presented in this plan, like the UAA's in all LTCPs submitted to date, is not sufficient to satisfy Clean Water Act requirements. The purpose of a UAA is to assess the factors affecting the attainment of fishable/swimmable goal. As such UAAs must evaluate all sources of pollution and not solely the CSOs. The UAA for the Alley Creek and Little Neck Bay LTCP, however, merely attempts to show that existing water quality standards cannot be attained by controlling CSO discharges alone (e.g., with 100% CSO control, but without reduction of other, non-CSO pollution sources).



DEP's load source analysis for Alley Creek asserts that stormwater contributes higher bacteria loadings than CSO, more than five times higher at the testing location within the creek. Stormwater discharge from MS4 areas is twice the amount of CSO discharge, and is a major source of discharge for Little Neck Bay. Little Neck Bay is further impacted by septic systems in Douglas Manor, which DEP analyzes as a contributing factor to poor water quality yet has no plans to correct it. This very clearly demonstrates that water quality in Alley Creek cannot be evaluated solely on CSO reduction.

Based on DEP's analysis, stormwater reduction through the MS4 plan in coordination with CSO reduction is essential to meet water quality standards. As highlighted in many of our prior comment letters on other LTCPs, the City cannot solve water quality problems in any waterbody unless the CSO LTCP and MS4 programs are integrated and coordinated.

Furthermore, DEP's assertion that dry weather bacteria likely comes from waterfowl on Oakland Lake, not illicit discharge, seems faulty. If DEP truly believes waterfowl waste is contributing a significant enough bacterial load to warrant a UAA, this source of pollution should be further analyzed and validated, rather than allowed to be a reason, without a rigorous scientific analysis, to fall short of water quality standards.

We incorporate, by reference, the legal analysis of the UAA standards set forth in our comment letters on the Flushing Creek, Westchester Creek, and Hutchinson River proposed LTCPs; for the same reasons stated in those letters, DEP's UAA for Alley Creek does not satisfy the UAA standards and we urge the DEC to reject the UAA for Alley Creek.

No actual reduction of CSO volume; risks of disinfection

DEP's proposed action for the Alley Creek LTCP does not *reduce* CSO- it merely *disinfects flow* during the recreation season (May- October). According to DEP's presentation at public meeting #3, the proposed LTCP would result in 16 overflows annually, totaling 132 million gallons per year.

The city should be further reducing CSO volumes (and frequency) as much as possible, not relying on disinfection with untested effects on human and wildlife health. Indeed, the LTCP identifies "challenges" associated with the disinfection option. Despite this, the LTCP postpones the decision of whether dechlorination will be required, even while seeking to lock-in disinfection as the preferred alternative. This proposed alternative should not be accepted until the results of the pilot study in Spring Creek can inform us if it is possible to control chlorination and dechlorination of turbid and inconsistent volumes of CSO discharge without adverse impacts on the ecosystem. The pilot study has not yet begun, and we will not see the results until the end of 2017.

We propose that integrative source reduction through green infrastructure and/or small scale grey infrastructure practices should be explored immediately to work towards CSO volume reduction, rather than relying on untested technology of disinfection or waiting two years to see if the one proposed alternative is even feasible.



Seasonal vs. year-round attainment

We continue to question the seasonal water quality attainment over the year round attainment. Thanks to the improvements made to date in many waterbodies, more people are using these resources for not only recreation but also for educational purposes. By only aiming for seasonal attainment in Alley Creek and Little Neck Bay, we are dismissing opportunities for boaters and other recreational users on the creek and bay, as well as educational uses by schools and one of the City's premier environmental education facilities.

Updating pathogen water quality criteria

It is our understanding that DEC intends to determine the adequacy of the LTCP based on the state's pending water quality standards updates, which rely on fecal coliform criteria for primary contact. However, as DEC has acknowledged (including at the water quality standards hearing earlier this year), the state is required to further revise its primary contact standards to reflect EPA's recreational water quality criteria, based on a more scientifically valid -- and more protective -- enterococcus standard. Under the Clean Water Act, for "coastal recreational waters," the state is required to make this change by late 2015; while it appears the state will miss that deadline, it is nonetheless clear that this change is coming soon, on a far faster time frame than the implementation of the city's LTCPs.

We believe all LTCPs currently under review and all future LTCPs should be evaluated based on compliance with the enterococcus criteria. At a minimum, the LTCPs must include a "reopener" that requires the city to update the plans -- with public participation and subject to DEC review and approval -- when the state water quality criteria are updated.¹

"Sensitive Areas" & "Primary Contact Recreation"

In section 2.2.a.4 - Identification of Sensitive Areas, DEP asserts that Little Neck Bay is a sensitive area due to primary contact recreation at DMA Beach, and Alley Creek for the presence of threatened or endangered species. Once again, DEP has limited the term "primary contact" to swimming or other activities where a person purposefully submerges in the water. However, recreation such as kayaking and canoeing, which take place throughout the city's waterways - including Alley Creek - involves a substantial likelihood of significant contact with the water. Accordingly, many other states and EPA have recognized paddling as a form of "primary contact." DEP and DEC should do the same, and should therefore ensure that the LTCP gives heightened attention to limiting CSO pollution in areas where such recreation is most likely to occur. That should extend beyond Little Neck Bay to include Alley Creek.

¹ In connection with this point, we note that, in DEC's Responsiveness Summary accompanying the 2012 CSO Order, DEC stated (Response 5.3) that, pursuant to the CSO Policy, all LTCPs must ensure that "[t]he planned control program is designed to allow cost effective expansion or cost effective retrofitting if additional controls are subsequently determined to be necessary to meet WQS or designated uses."



“Recovery Time” and “Wet Weather Advisories”

The LTCPs submitted to date all include analysis of “recovery time” (i.e., the length of time after a CSO event that a water body would remain too polluted for contact). They also propose issuing “wet weather advisories,” based on recovery times, to the extent that the proposed CSO improvements do not fully meet primary contact water quality standards. The analysis here is complex, and appears to reflect substantial back-and-forth between DEC and DEP about the appropriate methodologies to evaluate recovery time.

This issue should be more fully vetted with recreational users of the City’s waters, to ensure that this analysis -- and any resulting advisory system -- reflects the realities of how people actually use the waterways and utilizes the best communication strategies to inform people about advisories. (For example, we urge DEP to study real-time notification systems, such as Newtown Creek Alliance’s Weather in the Watershed CSO Alert System, and plan to expand your Wait! program citywide.)

Further, the LTCPs present the recovery time analysis based on state Dept. of Health fecal coliform standards, but the analysis should be based on enterococcus standards from EPA’s Recreational Water Quality Criteria (i.e., the “STV”), and advisories should be based on that standard.

In addition, advisories should begin as soon as possible, based on the current pollutant loadings; implementation of an advisory system should not wait until CSO controls included in the LTCP have been implemented.

Finally, we emphasize that this endorsement of improved public notification does not mean that we support the level of continuing CSO pollution that would continue under the DEP’s plan. Advisories are not a substitute for a plan that reduces pollution as needed to meet Clean Water Act goals. Rather, to the extent unsafe pathogen levels cannot be eliminated 100% of the time and any water quality improvements will take time to be fully implemented, we support the development and implementation of effective public advisory systems as soon as possible.

Dissolved oxygen

Alley Creek and Little Neck Bay are listed as impaired for dissolved oxygen on DEC’s 2014 303(d) list, due to pollution from “urban/storm[water]/CSO.” However, the LTCP asserts that these waters are in attainment with dissolved oxygen standards under the “baseline” pollutant loading conditions. If DEP believes the impairment designation in the 2014 303(d) list was incorrect, the LTCP should identify the information on which DEC relied for the impairment determination and explain why DEP’s analysis refutes DEC’s analysis. It is insufficient for the LTCP to put forward a claim of attainment without acknowledging the discrepancy with DEC’s determination in the 303(d) list (which was approved by EPA), and without providing a reasoned explanation of why DEP’s conclusions are more reliable than DEC’s.



Coordination with the MS4 program, reduction of other pollution sources, & TMDLS

Alley Creek and Little Neck Bay are on DEC's 2014 303(d) list of waters requiring a TMDL, due to impairments for pathogens and dissolved oxygen, which are attributed to "urban/storm[water]/CSOs." The draft LTCP demonstrates that these multiple sources (and perhaps others) do, in fact, contribute to water quality impairments.

When DEC approved the 2012 CSO Order, it provided public assurances that LTCPs would include a TMDL or comparable pollution budget, accounting for all pollutant reductions needed to attain water quality standards, where CSO reduction alone would not achieve the standards. In the "Responsiveness Summary" accompanying the Order, DEC stated (Response 5.3) that "As noted in the CSO Control Policy, among other applicable criteria...DEP should demonstrate that for each LTCP:...*Where WQS and designated uses are not met in part because of natural background conditions or pollution sources other than CSOs, a total maximum daily load, including a wasteload allocation and a load allocation, or other means should be used to apportion pollutant loads*" (emphasis added). DEP must follow-through on this requirement, and DEC must insist on it.

As noted above, final decisions on the necessary level of CSO control should not be made until there is a comprehensive plan -- with effective enforcement mechanisms -- that addresses all pollutant sources sufficiently to meet current and future water quality standards.

Green Infrastructure Targets

DEP's assessment of green infrastructure alternatives for Alley Creek is based on 10% of impervious surfaces managed by green infrastructure, but has failed to include an assessment of a 50% impervious area managed scenario, which DEP claims will reduce annual CSO discharge by 65%. This scenario should be retained as an alternative for implementation, and its cost evaluated in comparison to the nine other grey infrastructure alternatives.

Furthermore, DEP dismisses a hybrid green/grey alternative, stating "preliminary evaluation of GI alternatives indicated that the water quality benefits were not sufficiently cost-effective to warrant the development of any hybrid green/grey alternatives." It seems unreasonable to dismiss a source reduction alternative that can be implemented iteratively and more cost effectively than a grey infrastructure solution. Though we understand that green infrastructure cannot be the only solution to eliminating CSOs, it is a highly beneficial solution to reduce CSOs and complement grey infrastructure solutions. Overall, a source reduction solution like green infrastructure is much preferred over an end-of-pipe solution like disinfection, especially seasonal disinfection.

Section 8.8 of Appendix H Supplemental documentation, the Recommended LTCP Elements to Meet Water Quality Goals, states DEP intends to "continue to implement the Green Infrastructure program". Continuation of the program, DEP states in the Green Infrastructure section, is to "assume no public investment of green infrastructure", and rather assumes there will be approximately 45 acres of private, on-site GI implementation through new development or redevelopment by 2030. It seems then that DEP has not planned any green infrastructure for the Alley Creek Watershed, but assumes 3% of impervious surfaces will be managed with green infrastructure by 2030, through building code requirements on new developments. Green infrastructure could play a larger role in reducing pollution if it were expanded more broadly.



We strongly support maximizing the use of cost-effective green infrastructure to reduce CSOs. The feasibility of green infrastructure targets -- including higher or lower than the assumed “baseline” for the watershed -- should be examined in each LTCP, based on the most current information and experience DEP has gained through the initial years of its green infrastructure program, so that both DEC and the public can weigh in on the reasonableness of DEP’s proposed targets. We also offer the following questions and recommendations concerning green infrastructure elements of the plan:

- We are aware of the difficulty in meeting the citywide target of 1.5% in 2015 as well as challenges faced by DEP in some watersheds where the geological conditions limit widespread GI installation. Now that DEP has more experience with GI implementation, does DEP still believe this is a reasonable and achievable target? If so, is there a basis for the assumption?
- Specifically, in regard to evaluating GI opportunities on private property, DEP must assess both opportunities for retrofits of existing developed space (including through incentives and/or direct subsidy of capital costs, 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.
- DEC has previously stated that all of the LTCPs must evaluate the potential for improvements to the city’s stormwater rules to catalyze more green infrastructure installation. But the LTCPs developed to date have not done so. Specifically, in the Responsiveness Summary addressing comments on the 2012 CSO Order, DEC stated (Response 3.5) that “[a]s part of the evaluation of alternatives in LTCPs, DEP will also evaluate how well the stormwater controls are working in combined sewer areas as part of an overall review of the [DEP Stormwater] Rule.” DEP must follow-through on this; and DEC must insist on it, as per the public assurances given in response to concerns about the 2012 CSO Order.
- The LTCP is silent on plans for maintenance of green infrastructure. This omission must be corrected, as it contravenes both the CSO Policy and DEC’s explicit assurances made in 2012. Specifically, in the Responsiveness Summary addressing comments on the 2012 CSO Order, DEC stated (Response 2.5), in answer to the question “How does the Order ensure GI is maintained?”:
 - o “The Proposed Order requires that the City submit approvable Long-Term Control Plans. Per Paragraph II.C.6 of the EPA Combined Sewer Overflow (CSO) Control Policy (1994), an LTCP must include an Operational Plan which consists of a revised operations and maintenance program developed as part of the nine minimum controls to include agreed-upon long-term CSO controls. The revised operation and maintenance program should maximize removal of pollutants during and after each precipitation event. Green infrastructure that is considered to be CSO Controls will need to be included in the revised operations and maintenance program.” (emphasis added)



Thank you for the opportunity to submit these comments for the Alley Creek and Little Neck Bay CSO LTCP. We would welcome the opportunity to meet with you to discuss these matters further. The S. W. I. M. Coalition will continue to reach out to and educate the public on water quality issues in the City. We look forward to continuing our dialogue.

Sincerely,

A handwritten signature in black ink that reads "Julie A. Welch".

Julie A. Welch, Coalition Coordinator

On Behalf of the S.W.I.M. Coalition Steering Committee:

Sean Dixon, Riverkeeper

Larry Levine, Natural Resources Defense Council

Michelle Luebke, Bronx River Alliance

Paul Mankiewicz, The Gaia Institute

Tatiana Morin, NYC Urban Soils Institute

Jaime Stein, Pratt Institute

Shino Tanikawa, New York City Soil & Water Conservation District

cc:

Judith Enck, Regional Administrator, US EPA Region 2

Joan Leary Matthews, Director, Clean Water, US EPA Region 2

Jim Tierney, Assistant Commissioner for Water Resources, NYS DEC

Joseph DiMura, Director, Bureau of Water Compliance, NYS DEC

Gary Kline, Section Chief, Bureau of Water Compliance, NYS DEC

Angela Licata, Deputy Commissioner, NYC DEP