



December 17, 2015

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

RE: Alley Creek/Little Neck Bay CSO Long-Term Control Plan—Save the Sound Comments

Dear Commissioner Lloyd:

Save the Sound, a 501(c)(3) non-profit corporation dedicated to protecting and restoring Long Island Sound, submits these comments on the Combined Sewer Overflow (CSO) Long-Term Control Plan (LTCP) for Alley Creek and Little Neck Bay—as resubmitted on June 30, 2014, and amended by the Appendix E: Supplemental Documentation (dated May 2015)—which the New York City Department of Environmental Protection (DEP) has submitted for review to the New York State Department of Environmental Conservation (NYSDEC).

This letter, in response to DEP’s request for comments at “Public Meeting # 3” on November 17, 2015, urges DEP and DEC to ensure that the standards and methodologies applied in the Alley Creek/Little Neck Bay LTCP comply with Federal law and policy for long-term CSO control so that this LTCP becomes the lynchpin for other LTCPs in order to achieve the “swimmable/fishable” goal of the Federal Clean Water Act (CWA) in CSO-impaired waterbodies.

Save the Sound was formed in 1972 as the Long Island Sound Taskforce to preserve and protect the Sound. In 2004, Save the Sound merged with Connecticut Fund for the Environment (CFE), and is now a program within CFE. CFE has registered to do business in New York State (NYS) as Save the Sound. Save the Sound’s primary purpose is to conserve and enhance the biological integrity of Connecticut’s and New York’s air, land, and water resources, including Long Island Sound. Save the Sound uses legal and scientific expertise, advocacy, and education in furtherance of its purpose to achieve results that benefit the environment for current and future generations.

Save the Sound represents approximately 3,500 member households, many of whom use and enjoy Long Island Sound and its tributary rivers and streams. Many of Save the Sound’s members live on or near Long Island Sound, and enjoy, or recreate in these waters, including but not limited to commercial or recreational fishing and boating, swimming, and other recreational and commercial activity. Save the Sound’s members share a common concern about the quality of Long Island Sound and surroundings. The quality of Long Island Sound and surrounding areas directly affects the health, recreational, aesthetic, commercial, and environmental interests of Save the Sound’s members.

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Save the Sound respectfully submits that several aspects of the draft LTCP merit revision, including 1) the lack of any actual reductions to the estimated 132 million gallons a year from DEP’s CSOs, 2) minimum Green Infrastructure improvements, and 3) the lack of integration of MS4 pollution reductions. As explained below, the draft LTCP has major analytical flaws that detract from the central goal and purpose of the LTCP: in the long-term Alley Creek and Little Neck Bay can and will be fishable/swimmable waterbodies.

## **Executive Summary and Section 1 – Introduction**

### **1.1 Goal Statement**

The goal of the draft CSO LTCP must be clearly stated: to develop CSO controls that will ultimately result in compliance with the requirements of the CWA.<sup>1</sup> Based on the recent update by NYSDEC to the NYS Class I water standard, which went into effect on November 4, 2015, both Alley Creek (Class I) and Little Neck Bay (Class SB) must now attain water quality suitable for primary contact recreation and protection of aquatic life.

Currently Alley Creek and Little Neck Bay are heavily polluted with fecal matter from New York City’s sanitary effluent and other contamination, and suffer from low oxygen levels, which inhibit fishable/swimmable use. Therefore, the LTCP has to identify and implement long-term plans that will sufficiently clean up Alley Creek and Little Neck Bay to allow full fishable/swimmable use or, if that is not attainable, to allow fishable/swimmable use on a seasonal basis and/or in certain areas of Alley Creek and Little Neck Bay.<sup>2</sup>

It is now apparent that, with the proposed disinfection at the existing Alley Creek CSO Retention Facility in the draft LTCP, swimmable use on a seasonal basis in certain areas of the creek could be attained. However this plan runs the risk of sacrificing aquatic uses to meet the swimmable waters goal. This is not an acceptable trade-off given the ecological significance of this area. Save the Sound urges DEP and NYSDEC to complete the studies of the environmental impacts of residual chlorine discharge and dechlorination chemical discharge in these waterbodies.

#### **1.2.a Federal Regulatory Requirements**

This subsection of the draft LTCP must be updated to reflect, as it should, the current NYS designations under Section 303(d) of the CWA under which states must identify waterbodies that do not meet water quality standards (WQS) and are not supporting their designated uses. As noted in the draft LTCP, Alley Creek and Little Neck Bay were placed on the Final NYS 2014 Section 303(d) List of Impaired Waters Requiring a TMDL/Other Strategy (also known as the list of impaired waterbodies or “list”). The list identifies the pollutant or stressor causing impairment, and establishes a schedule for developing a control plan to address the impairment.<sup>3</sup>

However, the 2014 **Final** impairment listings are not accurately reflected or adequately analyzed in the draft LTCP. In the 2014 Final New York State Section 303(d) list, NYSDEC

<sup>1</sup> See CWA § 402(q)(2), 33 U.S.C. § 1342(q) and EPA’s CSO Control Policy, Federal Register, Vol. 59, No. 75, 18691.

<sup>2</sup> See EPA CSO Control Policy; CWA § 301(a)(2), 33 U.S.C. § 1251(a)(2).

<sup>3</sup> Placement on the list can lead to the development of a Total Maximum Daily Load (TMDL) for each waterbody and associated pollutant/stressor on the list.

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added **Alley Creek and Little Neck Bay tributaries** as impaired for **pathogens** and for **oxygen demand** associated with CSO discharges, storm discharges, and urban runoff. The draft LTCP ignores the dissolved oxygen (DO) impairment in the LTCP analyses and in the Use Attainability Analysis (UAA). The draft simply states: “Alley Creek and Little Neck Bay are expected to attain the DO criterion at least 95 percent of the time, the desired target of the NYSDEC. As that goal is attained, both areas are deemed to be in compliance with the DO criterion and there is no need for a UAA as it relates to DO.”<sup>4</sup>

Little Neck Bay had been designated as impaired for **pathogens** associated with CSO discharges, storm discharges, and urban runoff since 1998. NYSDEC included **Little Neck Bay** in the 2014 **Final** New York State Impaired/DeListed Waters Not Included on the 2014 Section 303(d) list for **oxygen demand** impaired waterbodies associated with CSO discharges, storm discharges, and urban runoff. Little Neck Bay had been designated as such since 2000.<sup>5</sup>

The LTCP is not the instance for DEP to implicitly refute NYSDEC’s CWA Section 303 (d) analysis. Moreover, it is a failure in the draft LTCP to ignore NYSDEC’s determination in the 303(d) list, which has been approved by the EPA. Accordingly, waterbody impairments and listings must be updated and taken into consideration in the LTCP.

**Section 2 - Watershed/Waterbody Characteristics**

**2.2.a.4 Identification of Sensitive Areas**

The draft LTCP “Identification of Sensitive Areas” is flawed because it fails to acknowledge that Alley Creek is a “Sensitive Area” under EPA’s CSO Control Policy. The draft LTCP only identifies “one sensitive area within Alley Creek and Little Bay Neck, namely the Douglaston Manor Association (DMA) Beach in Little Neck.” See Draft LTCP at 8-2, SD-53. This beach is certainly a sensitive site under the Federal EPA CSO Control Policy due to an existing use of primary contact recreation, but Alley Creek must also be regarded a sensitive site because it serves as habitat for threatened and endangered species and is used for kayaking and canoeing, which also implicate primary contact recreation.

Alley Creek—a NYS Significant Fish and Wildlife Habitat (termed Alley Pond Park) under NYS’s Coastal Program—“is one of the few remaining natural resources within northern Queens County. The availability of relatively large areas of various habitat types, especially tidal wetland communities, is unusual in the East River and western Long Island Sound area. In addition to providing habitats for fish and wildlife species within the area, the wetlands in Alley Pond Park contribute to the biological productivity of Little Neck Bay and adjacent marine waters.” Furthermore, the wetlands in the area are included in the National Wetlands Inventory and in NYSDEC’s Wetland Inventory. (see 2-43 to 2-48).

Specifically, as noted in the narrative for this NYS Significant Fish and Wildlife Habitat:

“A full complement of wetland wildlife species occurs in and around the marshes at Alley Pond Park. Probable or confirmed breeding bird species in the area include green-backed heron, black duck, mallard, Canada goose, clapper rail, common moorhen, killdeer, fish crow, marsh wren, red-winged blackbird, sharp-tailed

<sup>4</sup> See ES-26, see also SD 104.

<sup>5</sup> [http://www.dec.ny.gov/docs/water\\_pdf/303dlistfinal2014.pdf](http://www.dec.ny.gov/docs/water_pdf/303dlistfinal2014.pdf);  
[http://www.dec.ny.gov/docs/water\\_pdf/303dnotlisted2014.pdf](http://www.dec.ny.gov/docs/water_pdf/303dnotlisted2014.pdf)

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sparrow, and seaside sparrow. **These and many other species of herons, waterfowl, shorebirds, raptors, and passerines use the area as a stopover during spring and fall migrations (March - May and September - November, generally).** Concentrations of wintering waterfowl on Little Neck Bay, especially American black duck, mallard, and Canada goose, often feed in Alley Pond Park, depending on the extent of ice cover each year. **Northern harrier (T) also use the area as overwintering habitat.** Other wildlife species occurring in the area include raccoon, muskrat, opossum, diamondback terrapin (SC; occasional use), snapping turtle, garter snake, northern water snake, Fowler's toad, and two-lined salamander. Alley Pond Park contains abundant shellfish and Crustacea, such as fiddler crab, horseshoe crab, ribbed mussel, hard clam and snails. Finfish species found in the tidal shallows and Alley Creek include bluefish, striped bass, scup, Atlantic silversides, menhaden, and winter flounder. The diversity and abundance of fish and wildlife species occurring in Alley Pond Park are unusual in northern Queens County.” (emphasis added)

Incorrectly, DEP dismissed Alley Creek as a sensitive area with the following analysis:

“The Northern harrier (T) is a raptor whose diet consists *strictly* of land mammals (mice, voles and insects). Its presence is due to the relatively large protected wetlands in Alley Pond Park rather than the waters or aquatic life of Alley Creek. The presence of the Northern harrier therefore does not define Alley Creek as a sensitive area for threatened species, according to the EPA CSO Control Policy.” (See 2-50, emphasis added).

This statement is not just misleading but also inaccurate. It is well documented that the Northern harrier preys also on birds including occasional predation on ducks.<sup>6</sup>

Further, as the NYS Significant Fish and Wildlife Habitat narrative indicates, the Northern harrier is not the only raptor or endangered/threatened species to use this significant habitat. Moreover, the area is also used for kayaking and canoeing, as noted above, which the EPA and many other states have recognized as “primary contact” recreation. The LTCP must do the same, and therefore ensure that this sensitive area is properly addressed and CSO pollution reduced or eliminated as much as physically possible and economically achievable.

### 2.2.a.6 Compilation and Analysis of Existing Water Quality Data

To supplement the water quality sampling information that was available from DEP and the New York City Department of Health and Mental Hygiene (DOHMH), DEP undertook a sampling program during the development of the draft LTCP. Samples were collected in Alley Creek and Little Neck Bay in both dry and wet weather in November and December 2012. The emphasis of the sampling program was on bacteria indicators although data were developed for other water quality indicators such as DO. The sampling data and charts were presented at “Public Meeting # 3” (slide 16-19).

The two-month sampling interval in late fall/early winter that DEP presented to the public at “Public Meeting #3” should not be considered a baseline for conditions in the waterbodies. Precipitation intensity and volume in the region, triggering CSOs, are both highest

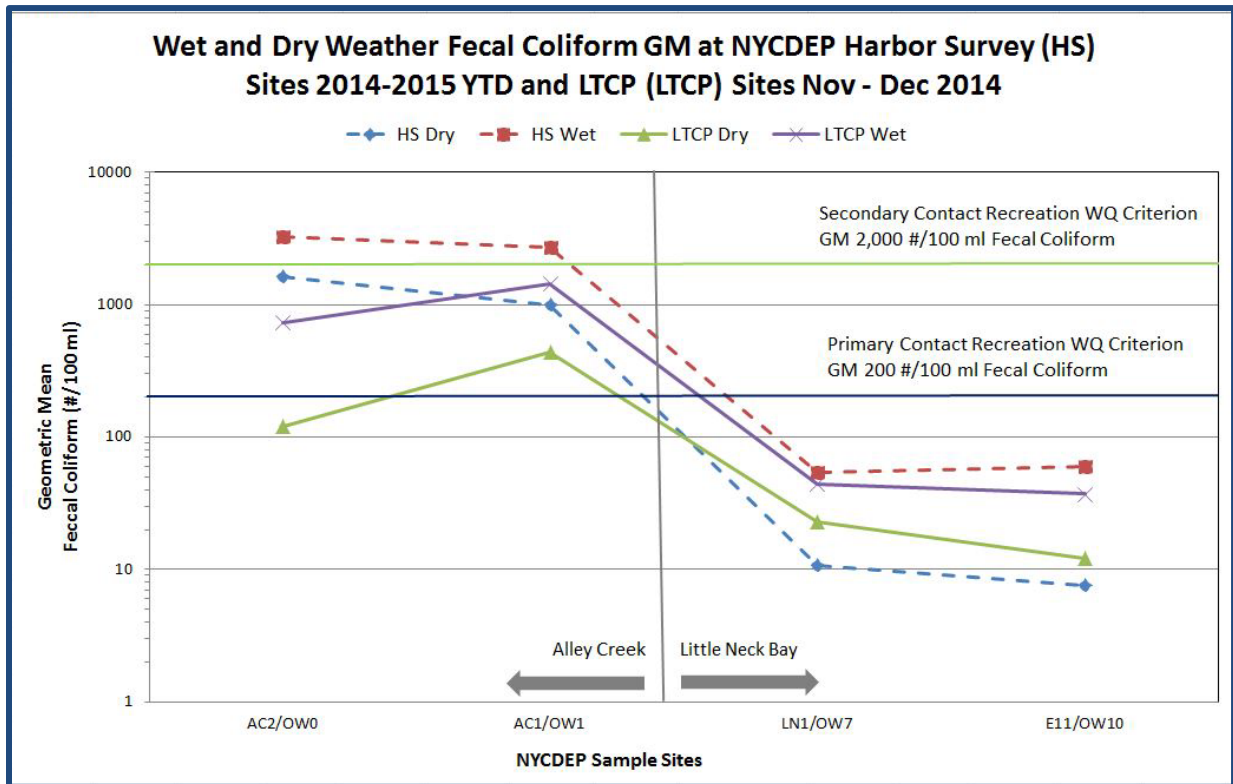
<sup>6</sup> [https://www.allaboutbirds.org/guide/Northern\\_Harrier/lifehistory](https://www.allaboutbirds.org/guide/Northern_Harrier/lifehistory) ; [http://nctc.fws.gov/resources/knowledge-resources/pubs5/web\\_link/text/jb\\_form.htm](http://nctc.fws.gov/resources/knowledge-resources/pubs5/web_link/text/jb_form.htm)

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in the spring and summer months which also correspond to parts of the year the majority of citizens recreate on Long Island Sound.

Relying on DEP’s Harbor Survey, Save the Sound analyzed the data and has prepared a figure showing wet and dry weather Fecal Coliform geometric means at DEP Harbor Survey Sites 2014-2015ytd and has compared those to DEP LTCP water sampling conducted in November and December 2012 (Figure 1). The figure includes the Harbor Survey sites that are relevant for evaluating the water conditions of Alley Creek and Little Neck Bay.<sup>7</sup> The results of this analysis demonstrate that recent water quality measured in Alley Creek is more contaminated with fecal pollution than reported in “Public Meeting #3”.

The increased levels of Fecal Coliform in dry weather conditions observed at Alley Creek Harbor Survey Sites between 2014-2015 year to date could be indicative of ongoing illicit discharges occurring throughout the system. The increased levels of Fecal Coliform in wet weather conditions, especially in Alley Creek, indicate that it is likely that CSO TI-007, TI-008 and/or TI-653 have significant flows in wet weather contrary to the zero-to-low flows reported in the LTCP (see Figure ES-2). Save the Sound strongly recommends continuing and expanding on the illicit discharge detection and elimination program in this area and a review of the flow rates of the CSOs in Alley Creek in wet weather and dry.



<sup>7</sup> DEP Harbor Survey data collected in Alley Creek and Little Neck Bay were aggregated and summarized for four sites in the two waterbodies (Figure 1). Harbor Survey sites AC1 and AC2 are located in Alley Creek in close proximity to DEP LTCP water sample sites OW1 and OW0, respectively (“Public Meeting 3”, slide 16). Harbor Survey sites LN1 and E11 are located in Little Neck Bay in close proximity to OW7 and OW10, respectively (Public Meeting 3”, slide 16).

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## Figure 1 – Comparison of NYC DEP Harbor Survey Data and DEC LTCP Data

### Section 8 - Evaluation of Alternatives

#### 8.6 Use Attainability Analysis (UAA) (and Appendix E)

A UAA is “a *structured scientific assessment* of the physical, chemical, biological and economic factors affecting the attainment of the use.”<sup>8</sup> (emphasis added). EPA has made clear that “the UAA must provide *sufficient information* for the state, public and EPA to determine that the use is not attainable.”<sup>9</sup> (emphasis added). The UAA in the draft LTCP fails to provide sufficient information to determine that primary contact recreation and higher DO levels are not attainable in Alley Creek and Little Neck Bay.

The draft UAA simply points out that “[t]here are multiple factors that might be affecting the achievement of higher pathogen attainments in Alley Creek such as discharges from direct drainage, combined sewer overflow (CSO) and stormwater outfalls, although there are also some local background dry weather sources of pollution in the upper Alley Creek watershed including those created by waterfowl populations and natural wildlife.” (see SD-104). Further, the draft LTCP, states that DEP “does not believe the dry weather bacteria concentrations emanating from Oakland Lake or the LIE [Long Island Expressway] Pond are illicit discharges, but are likely the result of waterfowl or other animals living in these natural settings. It is thus anticipated that these natural sources will remain unchanged in the future and are thus made part of the baseline conditions.” (see page 8-51). DEP concludes that, “although DEP has proposed a plan to control bacteria discharged from the Alley Creek CSO Retention Facility during the recreational season, there will continue to be other sources of bacteria that will preclude attainment of the future enterococci criteria within portions of Little Neck Bay.” (see 8-52).

These assertions do not amount to a complete UAA. UAAs are meant to assess what is attainable, not simply to document the current water quality condition and use.<sup>10</sup> The UAA fails to satisfy this requirement, which is also incorporated in the 2012 Consent Order between NYSDEC and DEP, and merely attempts to identify existing conditions that impede attaining the fishable/swimmable standard in Alley Creek and Little Neck Bay.

In summary, this UAA is unacceptable as it does not provide *sufficient information* to determine that higher uses are not attainable for Alley Creek. The UAA simply points the finger to other causes without a serious effort to conduct the “structured scientific assessment” required by the CWA and the 2012 Consent Order. DEP has not demonstrated that addressing the causes of bacterial contamination and low DO, which it must do under the CWA mandates, is not possible or would result in higher uses.

#### Comments by the Stormwater Infrastructure Matters Coalition (S.W.I.M.)

Save the Sound supports—and incorporates by reference—the comment letter by the Stormwater Infrastructure Matters Coalition (S.W.I.M.) on the draft LTCP for Alley Creek and Little Neck Bay. Save the Sound also endorses—and incorporates by reference—S.W.I.M.’s

<sup>8</sup> 40 C.F.R. §131.3

<sup>9</sup> See Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews (2001), p 6, available at [http://www3.epa.gov/npdes/pubs/wqs\\_guide\\_final.pdf](http://www3.epa.gov/npdes/pubs/wqs_guide_final.pdf)

<sup>10</sup> See EPA Memorandum, Improving the Effectiveness of the Use Attainability Analysis (UAA) Process (2006), p.1, available at <http://www.epa.gov/wqs-tech/use-attainability-analysis-uaa>.

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comment letters, dated October 30th, 2015, on the draft LTCPs for the Hutchinson River, Flushing Creek, and Westchester Creek.

In particular, Save the Sound is concerned with the adverse impacts of the disinfection alternative, and concurs with S.W.I.M.'s statement that these impacts have not been properly considered and that "[d]espite this, the LTCP postpones the decision of whether dechlorination will be required, even while seeking to lock-in disinfection as the preferred alternative." As S.W.I.M. puts it: "The health and environmental impacts of the preferred alternative cannot be properly evaluated when it remains unknown whether the disinfected discharges will be releasing huge doses of chlorine into the river, and when the LTCP presents no evaluation of the effects of non-dechlorinated discharges on human health and wildlife." See S.W.I.M.'s comment letter of October 30th, 2015, on the draft LTCP for the Hutchinson River.

We thank you for the opportunity to submit comments to this draft LTCP and reserve the right to submit additional comments to the NYSDEC during public comment periods before making final decisions on whether to approve each of NYC's LTCPs.

If you have any questions or comments, please do not hesitate to contact me.



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