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By email: SHPDcomments@epa.gov

Thomas J. Gardner
Office of Science and Technology (Mail Code 4305T)
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Stakeholder Input; Revisions to Water Quality Standards Regulations
75 Fed. Reg. 44930 (July 30, 2010)
EPA Dkt. No. EPA-HQ-OW-2010-0606

To Whom It May Concern:

The New York City Department of Environmental Protection (DEP) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) proposed changes to the Water Quality Standard regulation (WQS) administered by EPA to implement the federal Clean Water Act. The City is currently in the midst of an unprecedented period of investment to improve water quality in New York Harbor; \$6 billion of projects have been completed or are under way since 2002 alone, including wet weather expansion at our wastewater treatment plants, aggressive nutrient removal, billions of gallons of combined sewer overflow (CSO) capture, marshland restoration in Jamaica Bay, and hundreds of other projects.

The purpose of these projects—which have been nearly 100% funded by New York City residents—is to meet federal and state water quality standards, and to implement PlaNYC, Mayor Bloomberg's blueprint for a sustainable New York City. These massive investments are starting to pay off. This year, for the first time ever, all of DEP's 14 wastewater treatment plants are meeting monthly Clean Water Act standards for pollutant removal, and we will soon begin to operate four new CSO detention facilities that will have the capacity to capture 2.6 billion gallons of CSO per year. As a result of this work, New York Harbor is healthier than it has been at any time in the last 100 years—a fact we have recently celebrated during the 100th anniversary of our Harbor Survey. (A copy of the 2009 Harbor Survey Report is attached; we will release a centennial review of the program shortly). One benefit of this success is that more of New York Harbor is available for recreation and all of the other use goals set out in the Clean Water Act than ever before.

The City's commitment to improving water quality is deep, and as the agency responsible for providing clean drinking water and wastewater services to over 9 million New Yorkers (8.4 million in the City and a million more in Putnam,

Rockland, Ulster, and Westchester Counties) DEP is keenly interested in EPA's proposed changes to the Water Quality Standards (WQS) regulations and acutely aware of the significant operational and fiscal impacts that could result from their adoption. Our recent successes are significant milestones in the effort to continuously improve water quality, but they have come at a very substantial cost to New Yorkers. Since 2002 alone, water rates have increased by 124%, in large part to fund federally and state mandated projects. In the last four fiscal years, rates have had to increase by double digits every year—including during the last two years of national financial crisis when many New Yorkers have struggled to make ends meet. And while the Clean Water Act establishes as national policy that Federal financial assistance be provided to build public wastewater treatment infrastructure,¹ of the \$6.3 billion New York City has spent on water quality projects since 2002, only \$41 million (0.64%) has been paid for with federal grants.² This trend must be reversed if WQS regulations are to be changed in any way that would impose an additional financial burdens on service providers and local residents; and regardless of fiscal impact, any proposed changes should be supported by rigorous scientific analysis, as well as analysis of the costs and benefits of potential changes based on the specific and unique circumstances of the localities like New York City. A one-size-fits-all approach cannot work.

The comments that follow are organized into general observations that we hope can inform EPA's approach to this effort going forward, followed by specific comments on the areas that EPA has targeted for potential changes through a 2011 rulemaking. In short, we stand ready to work closely with EPA throughout this process, and we hope that direct and repeated engagement with major service providers like New York City—that will likely be most directly impacted by many proposed changes—will be part of EPA's ongoing process.

Before turning to our comments, I note that this rulemaking effort is nearly contemporaneous with EPA's overall strategic planning effort upon which the City recently submitted comments (attached), as well the comprehensive clean water strategy that EPA is developing through the "Coming Together for Clean Water" effort ("Clean Water Strategy" or "CWS") in which the City is participating, and through which EPA very recently published a "Public Discussion Draft" on which comments are also being solicited. The Clean Water Strategy contains many elements that the City strongly supports, including green infrastructure (CWS at 8 and other places); developing locally-based partnerships (CWS at 4), exploring "bold, new, creative, more effective ways to implement [Clean Water Act] and other programs . . . [including] voluntary approaches and market-based incentives" (same); and EPA's commitment to make a "substantial shift in [] programmatic approaches to identify and implement multi-benefit solutions that will help communities plan and be more responsive to changing factors such as population growth and increased urbanization." (CWS at 8). We will submit more focused comments on the draft CWS itself shortly, but note these substantial parallel efforts here because it is important that EPA's effort to assess and propose changes to the WQS regulations be harmonized and consistent with the strategic goals for water quality generally.

¹ See 33 U.S.C. § 1251(a)(4).

² During the 1970s through the early 1990s, New York City received significant Federal and New York State matching funds for the construction and upgrade of wastewater treatment plants. Since the mid-1990s, grant funding dropped significantly until the 2009 American Recovery and Reinvestment Act. In lieu of grants over the past two decades, Federal funding has consisted of the State Revolving Fund program in the form of subsidized, low interest loans. Of the \$6 billion in spending on water quality projects, \$4 billion was financed with SRF loans.

DEP would like to meet with EPA as soon as possible to discuss all three of these efforts, to provide a more comprehensive perspective about the opportunities for water quality efforts that are targeted, realistic, and fiscally and environmentally sustainable, and to explore opportunities for a partnership to realize our mutual goal of more accessible and usable waters for all citizens.

General Comments

1. A primary rationale for the proposed changes and their timing is that they have not been updated since 1983. The existing water quality regulations already drive mandated projects that have provided and continue to provide tangible water quality benefits resulting in the revitalization of many aquatic ecosystems. New York Harbor, for example, is cleaner than it has been in 100 years. This has come at a steep cost, with mandates that are at or over the limits of affordability – at least for publicly owned treatment works and urban ratepayers, who have undertaken most of the mandates imposed by the Clean Water Act (CWA). Rather than change the existing 1983 regulations, EPA should seek more meaningful and equitable improvements through comprehensive legislative authority to address currently unregulated or under-regulated sectors.
2. The setting and attainment of water quality standards should be guided by site-specific conditions, and water quality designations should remain the purview of states. EPA’s proposal to establish a presumption that all waterways can attain a fishable/swimmable standard would effectively set a one-size-fits-all, national water quality standard that is not consistent with the well-settled operation of the CWA, and is at odds with the watershed approach and sustainability goals that appear to be the foundation of its draft CWS—and that the City strongly supports. The states, local governments and their constituents are in a much better position to understand and address site-specific circumstances, as the CWS recognizes in its endorsement of a “collaborative approach to community based programs.” (CWS at 8). Uniform standards restrict their flexibility to create innovative, holistic, sustainable, and cost-effective solutions to local problems.
3. The City supports the CWA’s goal of swimmable/fishable waters where attainable, but in its particulars, the CWA explains at a much greater level of detail the many considerations that are to factor into the setting and implementation of WQS regulations by the states (with EPA approval). The CWA is designed to restore and maintain the “chemical, physical and biological integrity of [the] Nation’s waters.” 33 U.S.C. § 1251(a). This broad standard encompasses many sub-goals, including the elimination of all pollutant discharges by 1985, water quality that “wherever attainable...provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water” by 1983, a probation of toxic pollutants, federal financial assistance for public owned treatment works, and a major research and demonstration effort to develop pollution control technology. Past experience or Federal budget considerations have caused the EPA to abandon the “no discharge” goal and, for many years, federal grants and research. EPA’s singular focus on the “fishable/swimmable” aspiration, and the proposal to make it a presumption, oversimplifies the goals of the Act, and the many considerations that go into its implementation.

4. With few exceptions, New York City's tributaries and open waters are already designated for recreational uses. Our ongoing CSO reduction efforts and upcoming Long Term Control Plans will have to demonstrate attainment with those uses (or their unattainability). "Swimmable" or primary contact recreational standards are not appropriate for all waterbodies, especially where there are competing uses and adequate outlets for those activities, such as those provided in New York City's 14 miles of public beaches, scores of public swimming pools, and other waters designated for swimming. Active ports and maritime industries are uses that must be protected and promoted as vital economic engines, as recognized in the CWA's foundation in protection of navigable waters and in Congress's support of harbor development and other economic programs. To mandate pristine conditions for sensitive aquatic resources or swimming in areas where there are shipping channels that are routinely navigated or affected by intense port activity and shipping commerce would not be a reasonable use of public resources. New York City is currently undertaking a comprehensive waterfront planning effort to balance all waterfront and water uses and we would be please to debrief the EPA on that effort.
5. DEP fully supports the EPA's adoption of environmental justice goals. Indeed, many environmental justice communities support a working waterfront and maritime industrial jobs. Those uses should not be precluded or impeded by a uniform policy mandating a specific use designation of every waterway.
6. EPA's decisions about standard setting and implementation strategies must be based on sound science. In the next five years, EPA will complete the first set of five National Aquatic Resource Surveys assessing the ecological health of waterbodies. Those surveys should assist in determining the need for regulatory reform, and an effort to change the WQS regulations should follow those surveys. A broad review of water quality standards should follow the Agency's review of science and research in anticipation of revised recreational water quality criteria in October 2012, rather than preceding that effort by more than a year, as currently proposed. Depending on the criteria adopted by the Agency, mandating fishable/swimmable as the designated use for all waterways will require many billions of dollars in additional investment in New York City, and throughout the country. The expected water quality benefits and their costs must be fully understood and explained to the public as part of any changes to the WQS regulations. We suggest that this be a broader engagement effort than the minimal cost/benefit analysis required under Executive Orders. Rather, the analysis should include epidemiological studies to assess whether there will be substantial public health benefit from additional reductions in pathogen concentrations that will require very substantial funding, and many years of capital investments to achieve. Consistent with CWA policy, EPA should also assess the prospects, if any, for federal funding to support the capital investments that the proposed WQS changes will require.
7. EPA's emphasis on TMDLs can be a reasonable approach to ensure that investments are focused on the greatest loadings. For example, CSO and nitrogen abatement have required vast expenditures, yet municipalities face additional requirements to address loadings under the Municipal Separately Sewered Stormwater System (MS4) program, without regard to whether those additional measures will result in more meaningful water quality improvements than ongoing CSO control measures. A comprehensive assessment – which can and should take place whether or not a TMDL is developed by resource-constrained

states – would examine relative pollutant loadings from a variety of sources, and adopt the most cost-effective means of reducing pollution, rather than promoting separate wet weather programs (CSO and MS4) without regard to relative water quality improvements.

Designated Uses

8. EPA’s proposal addresses the standards to be applied when states seek to remove a designated use to one that is not “swimmable/fishable.” EPA should clarify that the proposal does not apply to situations where a state seeks to continue a dedicated use that is not swimmable/fishable. Similarly, the EPA should clarify that a state does not have to provide a Use Attainability Analysis (UAA) to continue existing water quality standards.³
9. In the event that EPA moves forward with the proposed WQS regulation, it must simplify the standards and procedures for Use Attainability Analyses, and should allow municipalities and other stakeholders to file UAA petitions if states do not have sufficient resources to do so.
10. In many cases, municipalities like New York City are unfairly burdened with remediating historical conditions unrelated to ongoing discharges. The process for review of existing water quality standards should allow for consideration of specific site conditions and uses. In particular, it is common for physical constraints and conditions such as historical bulkheading and dredging to have changed depth, flushing, or even sediment oxygen demand. In such cases, limiting ongoing discharges will not resolve impairment. Any changes to the WQS regulation should amend the UAA process to explicitly recognize bulkheading, dredging, and other alternations as either “human caused conditions,” “hydrologic modifications,” or “physical conditions” that may make water quality standards unattainable. In addition, sediment contamination with legacy pollution from our nation’s industrial past may be a larger problem for aquatic organisms than more benign ongoing discharges. The Superfund program developed as a site-specific approach to address contaminated sites. Dredging remedies are complicated and expensive and require close coordination with Army Corp of Engineers. While contaminated sediments are typically caused by historical discharges, more stringent pollution controls in urban areas borne by municipal or other current dischargers in an often futile attempt to counteract background conditions. Any changes to the WQS regulation should explicitly recognize contaminated sediments or groundwater flows as background “human caused conditions” that can prevent attainment.
11. EPA should further use its discretion to promote a sophisticated approach to water regulations that would (1) reflect the full range of societal uses of urban waterways (e.g., shipping, industrial uses) rather than just recreational uses, (2) account for the availability of other recreational outlets within a reasonable distance (e.g., pools, public bathing beaches, fishing piers), (3) reflect non-water quality limitations on uses (e.g. safety considerations such as shipping lanes and tides), (4) reflect the need for supporting land-side infrastructure (e.g., public transportation and access to support bathing areas) and (5) consider the impact to

³ If States were compelled to affirmatively demonstrate the appropriateness of existing standards that have already gone through extensive regulatory review, EPA’s proposal would upend the long-standing, intended operation of the CWA, and would substantially burden already strained state and local resources. States should not be required to perform a Use Attainability Analysis for the maintenance (or removal) of any Section 101(a)(2) use.

air quality and carbon emissions posed by increased energy demands for additional water treatment infrastructure. Such a water use regime would more closely resemble land use zoning, where areas of a city are designated for industrial, residential, and recreational use in order to accommodate the full range of societal needs.

Variations

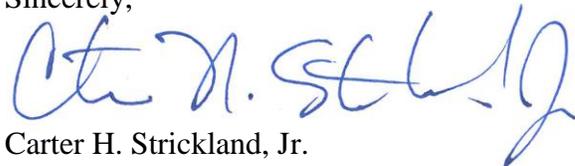
12. EPA's proposed changes suggest that variations have been used improperly and that a primary goal of this proposed change is to prevent future misuse. Variations are important tools that provide temporary relief from standards during construction and similar actions. They are a necessary and more flexible mechanism than the current UAA and have also been used where states do not have the resources to undertake or review a UAA. If EPA intends to tighten the regulation of variations, compelling evidence must be presented for doing so, and in connection with any change the UAA process must be simplified as discussed in paragraphs 9 and 10 above.

Triennial Reviews

13. Meaningful water quality improvements often take many years to achieve; mandatory triennial reviews would typically repeat conclusions reached just a few years beforehand. The pace of changes to water quality criteria is also much longer than three years, which is appropriate given the need to base any changes on sound scientific research on any public health and environmental effects, and the need to match investment cycles. Greater flexibility for program review would allow states to focus their reviews on rapidly-changing waterbodies and to spend their resources supporting local pollution control efforts.

DEP clearly has concerns about EPA's proposed changes to the WQS regulation. As I noted at the outset, we appreciate that EPA has engaged stakeholders early in this process, and we look forward to working with you not only in this rulemaking, but to take the steps necessary to improve water quality in New York Harbor and around the country. We would like to meet with appropriate staff as soon as possible to discuss the WQS effort as well as EPA's draft strategic plan and proposed draft CWS. If you would like to discuss these or any other issues, please reach out directly to me at (718) 595-4418 or by email at cstrickland@dep.nyc.gov.

Sincerely,



Carter H. Strickland, Jr.
Deputy Commissioner for Sustainability

Attachments:

Comments on Draft EPA Strategic Plan for FY 2011-2015 (07.30.2010)
New York Harbor Water Quality Report 2009

- c: The Hon. Bob Perciasepe, EPA Deputy Administrator
- The Hon. Judith Enck, Administrator, EPA Region 2 Administrator
- The Hon. Pete Grannis, Commissioner, New York State Department of Environmental Conservation