



September 19, 2014

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

**Re: Concerns Regarding DEP's LTCP Process for All Waterbodies: Comments on Hutchinson River LTCP**

Dear Commissioner Lloyd,

Stormwater Infrastructure Matters Coalition (S.W.I.M.) submits this letter in response to the New York City Department of Environmental Protection's (DEP) invitation for public comments concerning the development of the Hutchinson River Long Term Control Plan (LTCP). At DEP's September 9, 2014 public meeting, DEP requested comments within a mere ten days, by September 19, 2014. Since DEP's deadline to submit the LTCP is September 30, 2014, we fail to see how DEP could take any meaningful account of these comments; nonetheless, we submit them for the record and urge DEP to take heed.

Moreover, we take this opportunity, to express our concerns not only about the Hutchinson River, but about the City's process of developing LTCPs for waterbodies citywide. We base our broader comments on our experience both at the Hutchinson River public meeting and at similar public meetings earlier this year for the Westchester Creek LTCP and Flushing Creek LTCP.

In sum, we believe the LTCP development process is deeply flawed, both in process and in substance.

We call on the City – as well as its regulators at the New York State Department of Environmental Conservation (DEC) and U.S. Environmental Protection Agency (EPA) – to make a major course correction. Two decades have passed since EPA adopted the CSO Control Policy, which anticipated complete LTCPs within three years. We cannot afford more years of delay in resolving the City's overall CSO abatement obligations – nor can we afford to make expensive decisions based on flawed assumptions and a lack of City-wide water quality strategy. In an era when community organizations, civic groups, and both government and private sector leaders are working (with many notable successes) to revitalize New Yorkers' connection to our long-neglected waterfront and waterways, our city's 8 million residents and our estuary deserve better when it comes to reducing sewer overflows and improving water quality.

The S.W.I.M. Coalition represents over 70 organizations dedicated to ensuring swimmable and fishable waters around New York City through natural, sustainable stormwater management practices in our neighborhoods. Our members are a diverse group of community-based, citywide, regional and national organizations, water recreation user groups, institutions of higher education, and businesses. S.W.I.M. was instrumental in crafting and passing the Local Law 5, which required development of the city's first Sustainable Stormwater Management Plan, and negotiating with the State and City to incorporate green infrastructure in the CSO Consent Order. We helped to pass the NYS Green Roof Tax Abatement legislation in Albany. Since our formation in 2007, we have testified at numerous public hearings on stormwater management related topics and have represented our members' interests with DEP, the Mayor's Office of Long Term Planning and Sustainability, City Council, the State Legislature, DEC,

EPA, and others. Several members of the Coalition currently serve on the DEP's Water Infrastructure Steering Committee (formerly known as the Green Infrastructure Steering Committee).

Our specific comments and concerns follow.<sup>1</sup>

## **Public Participation**

### 1. Engagement

Members of the S.W.I.M. have attended various LCTP public meetings, including the Hutchinson River meeting on September 9<sup>th</sup>. We would like to see more robust participation by the members of the communities at these meetings and refer you to the S.W.I.M. letter to former Commissioner Holloway on ways to improve public participation (please see attached). Presentations should also be tailored to the audience in a style to which recreational water users and concerned citizens can relate on a personal level.

S.W.I.M. is committed to continuing its work on engaging our members in this process. We hope the DEP will consider recommendations so that together we can create a meaningful public participation process.

### 2. Feedback process

At the Hutchinson River kick off meeting, participants were asked to place stickers on a map to show where and how they use the river. Presumably, this map is being used to inform the development of alternatives for the LTCP. While using maps is a great way to involve people, the maps would be more useful if members of the community are able to participate online and not only at the meetings. With the readily available digital technology, crowd-sourcing might be a worthwhile endeavor for collecting anecdotal data. In addition, the current mapping process is functionally disconnected with the realities of sewage-affected waterways; when the DEP asks the community where they swim, for a waterbody so polluted that no one swims in it, the agency shouldn't take that silence as meaning that lesser CSO protections are warranted. Let this comment letter serve as S.W.I.M. Coalition's statement that our members and the public want to swim, fish, kayak, sail, row, wade, and enjoy every inch of the NYC watershed – including the length of the Hutchinson River, Flushing Creek (and Bay), and Westchester Creek. That they currently cannot do so should inform the DEC's oversight of DEP's proposed LTCPs.

### 3. Public process timeline

The Hutchinson River LTCP has been more than two years in the making (since issuance of the current CSO Consent Order), yet the barest outline of a plan, exclusively in the form of a power point presentation, was shared with the public only ten days before a comment deadline. This timeline is not

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<sup>1</sup> We note that we have not yet had the opportunity to fully review the Westchester Creek LTCP that the City submitted to DEC on June 30, 2014. We expect that we will find some aspects of the City's methodology that are laudable and have improved since the Waterbody/Watershed Plans submitted in 2007 under the prior CSO consent order. However, based on our members' participation in the Westchester Creek, Flushing Creek, and Hutchinson River public meetings, we expect many or all of the concerns expressed in this letter will apply to the Westchester Creek LTCP as submitted to DEC. We expect to provide further comments on that LTCP to both DEP and DEC. We also note that we are closely tracking the litigation between DEC and DEP concerning the sufficiency of the Alley Creek LTCP, which is the only other LTCP to have been submitted, to date, under the current CSO Consent Order. We share DEC's concerns about the adequacy of that plan. Moreover, we urge the City and State to resolve those disputes without years of litigation, which will likely delay not only a cleanup of Alley Creek, but also adoption and implementation of LTCPs throughout the City.

acceptable. If the DEP is genuinely interested in public participation, the public must be given more time to comment and must be provided with a real draft plan as well as the power point summary.

Moreover, the question asked at the LTCP meeting was presented to the public as (paraphrased) “which of these costly options would you want to pay for with your water rates, given that none of them will make the water cleaner?” With more than a dozen options presented – none of which have been studied for environmental impact, coastal zone consistency, actual feasibility, or impact on community – ten days is too short a timeframe to develop a well-informed decision.

### **Green Infrastructure Components of the LTCP**

We strongly support the use of green infrastructure to reduce CSOs wherever feasible. However, we are very concerned that not enough preliminary work is being conducted prior to inclusion of GI in the LTCPs. For Westchester Creek, it seems as though the proposed approach is simply to implement DEP’s generic, citywide Green Infrastructure Plan to address the water quality issues in the Creek. Likewise for the Hutchison River, DEP gave no indication in the recent public meeting that any planning or analysis of GI opportunities in the watershed has been incorporated into the development and evaluation of alternatives for the LTCP.

We are concerned that without conducting some type of preliminary analysis in these specific areas for siting green infrastructure, not only will the GI Plan’s citywide targets (which are currently framed in terms only of acres of impervious area managed, not CSO reduction achieved) not be reached, but meaningful further reductions in CSO discharges to these waterbodies will not be achieved. (We note with concern that DEP has stated, in its most recent GI Annual Report (at pp. 17-18), that, by the end of 2014, it only expects to have completed, initiated construction of, or developed an “advanced design and progressing to final design” on green infrastructure projects totaling one-half of the CSO Consent Order targets established for the end of 2015. Based on those statistics, it would seem unlikely that DEP will meet this first major performance target under the Consent Order.)

It takes time to work through the process of identifying potential sites and then determining if they are viable. While we strongly support the inclusion of GI in the LTCPs to the maximum extent feasible and recognize that all specific GI sites cannot be determined in advance during development of the LTCP, there must be *some analysis* of on-the-ground conditions *before* the LTCP is submitted to the public for review, so the public can have an opportunity to weigh-in on the feasibility of the proposed approach. At this point in the maturation of DEP’s GI program, such screening-level analysis is surely feasible, yet at each of these LTCP public meetings the message has been the same: the DEP plans on using GI, but has no information as to how much, by when, where, or to what extent.

Furthermore, we have significant concerns about how GI installations will be maintained. Although DEP has talked about engaging communities in stewardship, we have not seen this implemented through any type of educational programming, at least in the Bronx. We have not been able to achieve the foundation of public engagement: educating the public on the CSOs. We are still waiting for educational signage that could direct people on what to look for and whom to call about problems on and in the water. We cannot expect to have citizen stewards without first having educated cadre of citizens.

For those few who are engaged and knowledgeable, there is an informative Bioswale Care Handbook available on the DEP website, but even the engaged citizens cannot learn to care for bioswales by reading a handbook: they need to be properly trained. Moreover, community engagement, by itself, cannot be the

solution to DEP's GI maintenance needs. The LTCPs need to explain how GI installations that are part of the "selected alternative" will be maintained; if all of the details of a long-term maintenance program cannot be developed by the time LTCPs are finalized, the compliance schedule for implementing the LTCPs must include deadlines for submission of detailed maintenance plans to DEC for public comment and DEC review and approval.

## **Selection of alternatives**

### **1. Lack of impact analysis**

According to DEP's statements at the Hutchinson River public meeting, the impacts of alternatives on water quality and on the river as a whole will not be analyzed until after an alternative has been selected. This is a backward process. How can the affected communities evaluate various alternatives without knowing what the potential impact of each alternative is? The current process is akin to a patient choosing a medical treatment based on cost alone without knowing the risks and effectiveness of various treatments.

Because of the lack of analysis on various alternatives, the only basis on which to form an opinion is DEP's asserted cost of each alternative and the associated percent reductions of CSO volumes or bacterial loads (*e.g.*, 100% CSO load reduction for \$818 million, 87% bacterial load reduction for \$278 million). Even this comparison has been biased by DEP's presentation of the alternatives as a false dichotomy of limited investment vs. huge investment that leads to little to no incremental gain. DEP's Hutchinson River presentation seemed intended to leave attendees with the impression that investing in CSO abatement in the City's portion of the watershed is futile because upstream loads from Westchester County are the sole cause of the River's problems. This position was maintained despite presentation of evidence to the contrary, and real concerns about the data upon which DEP was basing its models. DEP presented no analysis of improvements that would result from a combination of pollution reduction efforts by the City and by sources in Westchester County. Even if the City cannot solve the river's pollution problems by itself, this does not absolve the City of responsibility for getting its own house in order.

We are also well aware of the City's dispute with the State concerning the adequacy of the Alley Creek LTCP and are closely tracking that litigation. One of the central issues there is DEP's failure to evaluate alternatives that could achieve progress towards the Clean Water Act's fishable/swimmable goals, beyond secondary contact recreation standards but short of full compliance with primary contact standards. While our ultimate long-term goal remains achievement of fishable/swimmable waters throughout New York City, we recognize that cost is a relevant factor in development of the LTCPs. Therefore, we support DEC's position that it is essential to evaluate alternatives that could significantly increase the period of time within a given year (or after any given rainstorm) within which a waterbody (or portions thereof) attains the fishable/swimmable standard. Consideration of such alternatives is necessary to avoid false choices between minimal investment and (purportedly) unsustainable levels of investment.

### **2. No information on regulatory, administrative, and environmental feasibility of implementing alternatives**

DEP provided no information at the public meeting on feedback from other public agencies on the alternatives under consideration. For instance, one of the alternatives is to construct a tunnel in a wetland along the river. We were informed this option is "cheaper" than a tunnel under the Cross Bronx

Expressway. However, DEP refused to address questions about whether digging a tunnel in a wetland is even feasible from the permit issuance stand point. Has the NYS DEC determined this is indeed a viable option? If so, why was this not stated? Has the NYC Parks Department weighed in on this option? It is irresponsible for DEP to present digging up and destroying part of a wetland as a “cheaper” alternative, since that would cause the loss of vital ecosystem functions and values provided by such wetlands.

It is a fatal flaw in the City’s LTCP process to present “alternatives” to the public that showcase only the cost of construction, fail to include the feasibility of the alternative, fail to present the environmental and social impacts of those alternatives, all while clearly misleading the public by saying that none of the options will improve water quality, and that all costs will be borne by water ratepayers.

DEP also presented no specific timelines associated with the alternatives. The lack of timelines gives us no basis to compare alternatives with regards to how long each alternative will take to achieve results, nor does it allow any comment on whether proposed timeline for any given alternative is fast enough.

We are informed that all these questions – impacts on water quality and the river as a whole, wetland permit and regulatory feasibility, timelines, etc. – will be analyzed after a preferred alternative is selected. DEP seems confident that the City can change course if post-construction data shows the reductions are not meeting the goals as planned. However, most of the alternatives cost more than \$100 million with some as high as \$818 million. “Decide now, make it work later” is not the way to make a decision that commits hundreds of millions of public dollars. Nor is it consistent with the Clean Water Act requirements for developing an approvable LTCP.

### 3. No cost analysis that frames each waterbody in the citywide context

We understand each waterbody has its own LTCP development with its own timeline, as is appropriate to ensure that the plans achieve water quality goals in each individual waterbody. However, the public (and DEC) should be provided with sufficient information to understand each LTCP in the citywide context, in terms of resource allocation. How much does the City believe it can spend for all of the LTCPs across the city, and how are resources allocated to each? Is the City spending similar amounts in each waterbody? Or is one waterbody allocated more resources than others and, if so, why? This type of information would certainly inform the comments by the public by providing context for the scale of the costs. If the water rates are to increase to implement LTCPs, they increase citywide and not by watershed.

DEP did not present any such information at the Hutchinson River meeting. However, based on our initial, cursory review of the Westchester Creek LTCP that DEP submitted to DEC in June 2014, it appears that DEP attempted to present such information there, accounting for a wide range of anticipated CSO and non-CSO compliance costs.

Some of the cost figures presented there are, to be blunt, absurd.

For example, the Westchester Creek LTCP notes that a new Municipal Separate Storm Sewer System (MS4) permit is pending and that compliance with this permit will entail new costs for DEP. The LTCP assigns an estimated cost of \$2.5 billion to MS4 compliance, based on an average of a reported \$2.4 billion cost in Philadelphia and \$2.6 billion cost in Washington, DC for those cities’ “stormwater” compliance. In reality, these cost figures represent those cities’ CSO compliance costs, not MS4 costs. Such baseless cost estimates of DEP’s regulatory compliance obligations bias the LTCPs against any CSO control alternative that requires significant investment. (In regard to MS4 compliance costs, we also

note that not all such costs are borne by DEP and, therefore, not all would affect water rates. MS4 compliance responsibilities are spread across many city agencies; DEP will coordinate but will not bear all implementation costs.)

### **Flawed modeling**

We are not confident that the model and the data used for the development of the LTCP are adequate. DEP stated at the Hutchinson River meeting that modeling analyses were conducted using 2008 water quality data and 2010 rainfall data. We believe using only one year's worth of data in modeling severely compromises the analyses. Even though Save the Sound conducted a water quality study in the Hutchinson River in 2014 and offered this information to DEP, the data from that study was not used in the development of the Hutchinson River LTCP, nor did DEP commit to using information supplied by the public; claiming that (again, paraphrasing) if the models in use are wrong, they're wrong for all alternatives. That there is evidence being ignored that could show CSO reductions *will* have an impact on water quality is simply unacceptable.

### **Coordination with other critical programs**

We understand that it will take more than eliminating CSO discharges to allow the Hutchinson River – and other waterbodies – to meet the Clean Water Act's 40-year-old fishable/swimmable goals. DEP needs to ensure all water quality programs are implemented in a coordinated fashion to not only maximize public resources but to achieve the greatest outcome. For this reason, we want to see an institutional and effective coordination among units of the government responsible for CSO abatement, stormwater management via the MS4 permit, and green infrastructure.

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We appreciate DEP's efforts over the last several years to improve its openness about its CSO planning process and its willingness to receive constructive feedback from S.W.I.M. and other members of the public. In many respects, DEP has come a long way in that regard since the S.W.I.M. Coalition was formed in 2007.

However, our recent experience, summarized above, demonstrates that DEP still has a long way to go.

We would welcome the opportunity to meet with you to discuss these matters further, and we will continue our efforts to improve both the process and the results. Please contact me at 718-399-4323 or [jstein9@pratt.edu](mailto:jstein9@pratt.edu) with any questions.

Sincerely,



Jaime Stein, Chair

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

Sean Dixon, Riverkeeper

Robin Kriesberg, Bronx River Alliance

Lawrence Levine, Natural Resources Defense Council

Paul Mankiewicz, Gaia Institute

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