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By Email to www.regulations.gov
US Environmental Protection Agency

Re: Public Comment on EPA's National Enforcement Initiatives
for Fiscal Years 2014-2016
Docket ID No. EPA-HQ-OECA-2012-0956

The City of New York (City or NYC) submits these comments in response to EPA's request for public comment on National Enforcement Initiatives for Fiscal Years 2014-2016 that was published in the Federal Register on January 28, 2013. EPA proposes to extend its current enforcement initiatives, first developed in 2011, through fiscal years 2014-2016 with little change. EPA explains that it selects priority areas to focus federal resources "on the most important environmental problems where noncompliance is a significant contributing factor and where federal enforcement attention can make a difference."

New York City urges EPA to use its national and regional enforcement power to assist municipalities in addressing the environmental and public health issues they have the least capacity to address on their own: air pollution and greenhouse gas emissions. As progressive as the City has been and continues to be in these areas, we do not have the legal authority ourselves to regulate the major sources of these pollutants, such as power plants in the mid-west. Accordingly, we look to EPA to take the primary role in addressing these sources. Conversely, with respect to municipal wastewater and stormwater infrastructure, municipal governments are in the best position to take the lead in addressing environmental concerns, and we urge EPA to partner with municipalities in their efforts to enhance their infrastructure where possible, rather than to focus primarily on enforcement.

The City has a direct interest in EPA's allocation of its scarce enforcement resources. New York City has taken a proactive role in furthering national initiatives while prioritizing solutions to local urban challenges. In 2007, the City launched PlaNYC, a multi-disciplinary plan which

seeks to prioritize investments that will maximize public health benefits and environmental protection.¹ We have enacted the most comprehensive set of building efficiency laws in the nation that will reduce carbon emissions by 5%, reduce citywide energy costs by \$700 million annually, and create almost 18,000 construction-related jobs. We have enacted local heating oil rules that will prevent hundreds of deaths annually and reduce greenhouse gases. We have also planted almost 500,000 trees, created or preserved more than 64,000 units of housing, and built entirely new neighborhoods with access to transit.

Former EPA Administrator Jackson recently recognized PlaNYC and its accomplishments in an address given to the Environmental Law Institute. She thanked the City for its work on a local law that bans No. 6 fuel oil and incentivizes the use of ultra-low sulfur content fuels to reduce emissions of particulate matter, and recognized that the City's greenhouse gas emissions are down 16% since 2005.

With respect to the efforts of the New York City Department of Environmental Protection (DEP)² to enhance the City's water infrastructure, Former Administrative Jackson recognized that the waters of New York Harbor are the cleanest they have been in over a century due to over \$9 billion invested in water quality since 2002 and the implementation of innovative watershed-based programs to capture and manage stormwater.

We believe that the current priorities with respect to Municipal Infrastructure, the first of EPA's six initiatives, are not the product of holistic cost/benefit analysis and do not reflect current needs and opportunities. Rather, the current enforcement priorities continue the disproportionate concentration of EPA's resources on municipal point source dischargers that by and large have been removing over 85% of pollutants from wastewater for decades, but ignore non-point dischargers and other sectors. In today's economy, when cities and states must balance budgets every year, we can no longer afford such an irrational policy. Accordingly, the majority of the City's comments focus on Municipal Infrastructure. We also provide comments on two other initiatives, New Source Review and Air Toxics.

¹ City of New York, PlaNYC: A Greener, Greater New York (2007), available at http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/full_report_2007.pdf.

² DEP is the New York City agency with primary responsibility for overseeing the operation, maintenance and management of the water supply that provides high quality drinking water to nearly half the population of the State of New York – over nine million people. DEP provides 1.1 billion gallons of water to 8.4 million New York City residents, 1 million upstate New York residents, and millions of visitors every day. DEP also collects wastewater and stormwater, and treats an average of 1.3 billion gallons a day at our 14 Wastewater Treatment Plants (WWTPs) located within the City. DEP operates seven additional WWTPs outside the City of New York in the City's upstate New York watershed.

EPA Should Use its Enforcement Power to Protect Municipalities from Toxic Air Pollutants and Excessive Greenhouse Gas Emissions

Air pollution from ozone and fine particulate matter (PM 2.5) contributes to approximately six percent of annual deaths in New York City. Each year, PM 2.5 pollution causes more than 3,000 deaths, 2,000 hospital admissions for lung and heart conditions, and approximately 6,000 emergency department visits for asthma in children and adults each year. Ozone causes an estimated 400 deaths, more than 800 hospital admissions and more than 4,000 emergency department visits among children and adults. In addition to the serious threat such impacts pose to the health and welfare of City residents, they also put additional strains on the City's public hospitals and on the Medicaid system, which is the primary payer for approximately 45% of the citywide costs of emergency room visits related to asthma.

New York City is taking important steps to reduce local sources of air pollution. These efforts include local laws to eliminate the use of highly polluting heavy heating oil and incentive programs to accelerate the transition to the cleanest fuels; promoting the use of low-emission alternative vehicle technologies in public fleets and private automobiles; and reducing automobile congestion. Together these efforts are expected to save hundreds of lives and prevent hundreds of hospitalizations each year. However, New York City is unable to achieve attainment for federal standards on ozone and fine particulate matter on its own. Recent studies indicate that approximately 45% of New York City's PM 2.5 concentrations are the result of upwind transport from sources outside the City, including pollution from Midwestern power plants and factories. These sources are beyond the authority of the City to regulate or control.

The EPA's Cross State Air Pollution Rule ("Cross State Rule"), which was finalized in July of 2011, but later struck down by the D.C. Circuit Court of Appeals in August of 2012, would have significantly improved local air quality in New York City and led to fewer emergency room visits, hospitalizations and premature deaths, particularly among vulnerable populations. The Cross State Rule would have also brought virtually all downwind non-attainment areas into attainment by reducing air pollution from upwind states. The rule required twenty-seven states to significantly improve air quality by reducing power plant emissions that contribute to ozone and fine particle pollution in other, downwind states.

The City is encouraged that the EPA has chosen to continue to prioritize controlling emissions from coal fired power plants and other industrial sources as part of its National Enforcement Initiatives for Fiscal Years 2014-2016. As part of this initiative, the City urges the EPA to develop a legally defensible strategy for regulating and enforcing reductions in cross state air pollutants. Thousands of lives stand to be saved in New York City and nationwide. Without a strong approach to reducing cross state air pollution, New York and many other downwind areas will be unable to attain federal standards for ozone and fine particulate matter pollution, despite their best efforts to reduce local sources of pollution that are within their control.

New York City is also supportive of EPA efforts to enforce performance standards for greenhouse gas emissions for power plants. In June of 2012, the City joined the States of New York, Connecticut, New Mexico, Oregon, Rhode Island, and Vermont, the Commonwealth of Massachusetts, and the District of Columbia in offering supportive comments regarding the proposed *Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources*:

Electric Utility Generating Units. This was an important initial step toward a national reduction in greenhouse gas (GHG) emissions from power plants. However, we urge EPA to strengthen these standards and also address emissions from existing sources as soon as practicable.

Climate change and increasing risks of extreme weather pose immense risks to the public health, infrastructure, and economic vitality of New York City and the nation. While no single extreme weather event can be linked directly to climate change, the recent devastation caused by Hurricane Sandy in the New York Region underscored the City's, and the nation's, vulnerabilities. In New York City alone, over 800,000 customers lost power, five hospitals were fully evacuated, the subway system was completely shut down for over 3 days, 75% of gas stations were unable to operate due to lack of gas supply for over a week, and 43 people died, mostly from drowning. As a result, the City experienced over \$19 billion in public and private losses. By 2030, the impacts from climate change are expected to intensify. Average temperatures in New York City are expected to increase by as many as three degrees Fahrenheit, sea levels could rise by nearly a foot, and weather patterns are expected to become both more extreme and less predictable. The effects of these changes on the City will be significant. Hotter temperatures will exacerbate public health risks, particularly for vulnerable populations like the elderly, and will further strain our infrastructure, including energy distribution systems. Rising sea levels will expose the homes, businesses, streets, wastewater treatment plants, and power plants that line our 520 miles of coastline to increased hazards. More extreme weather will also leave the City susceptible to more frequent violent storms like Hurricane Sandy, prolonged periods of drought, and severe flooding.

To address these challenges, New York City is working both to reduce its own contributions to global warming and to prepare for its inevitable effects. This work is occurring as part of PlaNYC. The City committed to reduce citywide greenhouse gas emissions 30% by 2030, and emissions from City government operations 30% by 2017. As noted above, to date, citywide emissions are down over 16% since 2005. These reductions are largely due to cleaner electricity generation, as power plants have switched from burning highly polluting coal and heavy oil to cleaner natural gas and as older units have retired and been replaced by new, more efficient ones. The City has also made major strides in promoting energy efficiency, particularly among large buildings which are now required to publicly report on their energy use each year and undertake cost effective efficiency measures. While the City has added approximately a quarter-million people and grown its economy significantly since 2005, total energy use has been essentially flat, which indicates that the City is getting more efficient.

We recognize, however, that no city can confront the complex challenges of climate change alone and we applaud EPA for promulgating regulations that demonstrate a Federal commitment to reducing greenhouse gas emissions in power plants and other large stationary sources. Standards that have been created for new facilities create an essential, national framework for spurring energy sector investment in clean technology. Furthermore, they would provide an important, uniform baseline for future regulation and action. The City, therefore, encourages the EPA to undertake aggressive enforcement of these standards as part of its National Enforcement Initiative.

However, these standards are insufficient to achieve the sharp reductions in global greenhouse gas emissions required to avoid the most severe impacts of global climate change. Therefore the

City urges the EPA to adopt more aggressive standards like those proposed by New York State and to develop and disseminate new standards for existing sources as soon as practicable. Not until both new and existing electrical generation facilities are subject to stronger emissions controls will we see nationally the pronounced decline in GHG emissions. New York City has confronted the risks of climate change aggressively in recent years, and we look forward to supporting EPA as they develop a similarly ambitious national approach to these same challenges.

EPA's Enforcement Paradigm for Municipal Infrastructure Should Encourage Partnerships with Municipalities

EPA's obligation and authority to enforce landmark environmental legislation, including the Safe Drinking Water Act, the Clean Water Act (CWA) and the Clean Air Act, is unquestionably a central and important component of EPA's mission to protect public health and the environment, goals DEP shares. These groundbreaking national laws have led to tangible improvements in water and air quality across the United States. Since these laws were codified in the 1970s, however, many of the readily identifiable sources of pollution have been addressed, federal funding has dropped substantially, and new concerns such as global warming illustrate the need for a cross-media holistic approach that encourages low carbon footprints.

EPA's enforcement initiatives focus on only six subject matter areas out of a potential list of at least hundreds of areas of interest. As noted above, the remainder of our comments focus on EPA's first-listed initiative: "Municipal Infrastructure – addressing sewage discharges from combined sewer systems, sanitary sewer systems, and municipal separate storm sewer systems." We urge EPA to shift its focus with respect to Municipal Infrastructure from a punitive enforcement approach to supporting partnerships with municipalities like New York which are committed to strategic infrastructure enhancement programs.

Many of the treatment plants built in the 1970s and 1980s are reaching the end of their useful life, and many utilities are rationalizing such investments along with general "state of good repair" programs in holistic asset management programs. Such programs, as well as new investments in sewers and water lines, are facilitated by an investment approach rather than an enforcement approach, which can also have the perverse effect of diverting resources to less productive ventures.

DEP has one of the largest capital budgets in the region, with \$14 billion of work currently under construction and in design. DEP has taken a leadership role in investing in Green Infrastructure (GI) and is implementing a \$2.4 billion GI plan over 20 years, including more than \$187 million of GI investments that will be in the ground by 2015 and more than \$735 million committed in the 10-year Capital Plan. GI projects will soften our hardscapes and absorb rain before it reaches our sewers, preventing surcharges and overflows.

And the commitment to improving water quality extends beyond these significant investments in reducing combined sewer overflows. Since 2002, DEP has spent more than \$21 billion to build drinking and water quality systems, 69% of which was necessitated by federal mandates. State and federal assistance in the form of grants has accounted for less than 2% of the funds necessary to build these projects. In these times of economic hardship, the imbalance between federal

support and federal mandates burdens local governments, especially when federal rules often fail to account for local conditions and needs. Our experience has been that EPA's estimates of the compliance costs for many of these projects have proven to be woefully undervalued.

The cost of these efforts is substantial for New Yorkers who, since federal support for water infrastructure virtually ended more than 12 years ago, have seen water rates increase by 150% since 2002 and more than 105% since 2006 alone (DEP is funded almost exclusively through rates paid by our customers). Many of these water rate increases have been necessary to comply with rigid, one-size-fits-all mandates imposed by federal regulators without consideration for the more comprehensive environmental efforts and priorities of New York City and other large cities across the country. Rather than supporting these efforts, the federal government has eviscerated funding that supports municipalities' infrastructure improvements at the same time as it has sought to punish these same municipalities through imposition of penalties and enforceable milestones that limit their flexibility to best manage their systems.

Given federal budget constraints, it is unlikely that municipalities will benefit from significant federal infrastructure support. Thus, the burden of funding these federal mandates will continue to be borne by our ratepayers. Recognizing the success of municipalities' investments, the current lack of federal funding, the need for investment in state of good repair and the diminishing returns of additional water quality mandates, the federal government should embrace a new enforcement paradigm that recognizes municipalities as willing partners in protecting the environment and improving public health. As such, EPA should use its limited enforcement resources to focus on truly bad actors and encourage municipalities, through incentives, rather than punishment, to continue to invest in their infrastructure.

We note EPA's important efforts to recognize the multiple unfunded mandates facing municipalities and the scarce resources municipalities face to address such mandates. EPA's recent endorsement of Integrated Planning is a positive step. The ability to consider several water-related obligations together, and to assess financial capability in light of total water-related obligations, can be of significant benefit and may offer substantial relief to communities on the more substantive aspects of the requirements (focusing limited resources where the community will get the most environmental benefit). However, the Integrated Planning Policy fails to take a truly integrated approach, as it is limited solely to a municipality's CWA obligations. Viewing regulatory obligations, and undertaking enforcement actions focused on individual system elements, only reinforces a silo-based approach.

EPA's enforcement paradigm should also encourage partnership approaches. EPA and DEP have worked together for many years on an integrated source water protection program in the NYC watershed which has allowed the City to protect more than 110,000 acres of pristine undeveloped land, to help upstate residents preserve working farms, and to avoid the environmental degradation, expense and social costs of a water filtration plant.

EPA should embrace such efforts and, to the extent that federal enforcement is warranted, should allow for flexibility and a watershed-based approach. DEP learned, though its efforts to eliminate non-point pollution from farming in its water supply watershed that pursuing partnership can better serve environmental goals than the blunt instrument of enforcement. In the

early 1990s, DEP proposed extensive regulations to heavily regulate farming in the watershed. Farmers reacted strongly, fearing that an overly burdensome regulatory scheme would put them out of business. In response to these concerns, DEP chose to adopt a cooperative, voluntary program that provides farmers with a system of incentives to implement and maintain pollution control practices on their farms. Long before the term “ecosystem services” began to be used widely, DEP was investing in systems to prevent pollution at the source. By any measure, the program (known as the Watershed Agricultural Program) has been a great success. More than 90% of large watershed farms have enrolled in this voluntary program. Monitoring has demonstrated improvements in water quality, with reductions in nutrient levels in key reservoirs.

Finally, the program has helped preserve – and in some cases enhance – the economic viability of farming as an integral component of the local economy. This win-win approach demonstrates how a new enforcement paradigm – emphasizing an initial approach of supporting and incentivizing environmentally beneficial actions by willing partners can yield highly successful results, without the top down regulatory approach that is often EPA’s first “go to” response to regulatory compliance challenges.

Enforcement, when necessary, should allow for innovation and not lock a municipality into a long term course of action without the possibility of reassessing whether the selected course of action is the most effective and efficient. New York City’s GI agreement with New York State is based on planning and prioritization initiated by the City and structured in accordance with adaptive management principles. It includes 5-year build-out goals, annual reporting of activities, in-depth reviews of progress every five years, and, perhaps most important, a process for instituting mid-course corrections without penalties.

EPA’s enforcement paradigm has remained largely unchanged since the passage of the landmark environmental laws and is still rooted in the punitive, litigious, and costly approach of the 1970s and 1980s, despite the leadership shown over the last decade by many municipalities improving water quality and air quality. Having achieved many of the key goals of the CWA – e.g., the achievement of secondary treatment at publicly owned wastewater treatment plants (POTWs) and the 85% removal standard, resulting in significant water quality improvements in receiving waters around the country – we are concerned that EPA appears to be focused on enforcement against point sources alone with little, if any, consideration of the cost/benefit of achieving additional, marginal water quality enhancements.

Another troubling trend evidenced by recent federal enforcement actions is the back door attempt to regulate by guidance documents and the threat of federal enforcement. For example, significant policy changes such as those implicated by a 2010 EPA memo concerning establishment of TMDL Waste Load Allocations for NPDES Permits should be adopted only through notice and comment rulemaking, which would address costs that would be incurred or water quality benefits to be achieved by such a shift from BMP to numeric effluent limitations. In addition, municipalities often lack the resources or must divert resources from their main missions to defend against federal government actions that mandate initiatives that would not provide an environmental benefit commensurate with the funds the municipality would have to expend to comply with them. We urge EPA to take these important points into consideration when formulating its enforcement initiatives for the next three years.

EPA's Targeting of Municipalities for Punitive Enforcement is Misguided

In 2011, when the current initiative was initially adopted, EPA entitled it “Keeping Raw Sewage and Contaminated Stormwater out of Our Nations Waters.” To the extent that the goal of that initiative is to further the CSO Policy and encourage effective implementation of Nine Minimum Controls to improve and protect the quality of receiving water bodies, DEP believes this is a sound and laudable initiative but one that is proceeding well under state direction, at least in New York State. As discussed above, DEP has implemented innovative stormwater controls and has invested in technological advancements in furtherance of those goals.

DEP is concerned, however, about EPA's shift from characterizing this initiative as “Keeping Raw Sewage and Contaminated Stormwater out of Our Nations Waters” to “Municipal Infrastructure.” The significance of this change in nomenclature is unclear but appears to indicate a shift away from a strict focus on water quality. It would be helpful for EPA to explain whether this represents a shift in its enforcement focus.

DEP is particularly troubled by a review of the recent enforcement cases undertaken by EPA, which have resulted in a series of consent decrees that do not focus solely on discharges that affect water quality but rather seek to regulate “any discharge of wastewater from [a] collection to public or private property that does not reach waters of the United States, including wastewater backups onto public streets, into buildings, or onto private property.”³ These consent decrees often include stringent reporting requirements for discharges into buildings and costly programs designed to address operational practices that have little to do with environmental impacts.

In the request for comments on the proposed initiatives, EPA states that the national proposals are selected based on “(1) environmental impact; (2) significant noncompliance; and (3) appropriate federal role.” Based on these criteria, DEP does not believe that discharges which do not reach waters of the United States meet these criteria. The federal government should not be inserting itself into a municipality's infrastructure management strategies which do not result in discharges of pollutants to the waters of the United States.

The focus on municipalities as EPA's top enforcement initiative is also misplaced. Federal enforcement initiatives should be focused on the unwilling – those who, by their actions, or inactions, are causing significant water quality impairments. Over the past three years, EPA's focus on municipal infrastructure as its number one enforcement initiative has seriously strayed from this fundamental principal. Strikingly, when EPA reports its “successful” enforcement initiatives, it touts the amount of civil penalties collected rather than gains in public health or water quality. For examples, EPA boasts that the more than \$152 million in civil penalties

³ See e.g. Conservation Law Foundation, Inc. and the Consent Decree in *United State of America v. Boston Water and Sewer Commission, et. al.*, Civil Action No. 10-10250-RGS, Section IV.(6)(y), (2012).

assessed in fiscal year 2011 was the highest in the last five years. This emphasis on monetary penalties collected seems out of place with the agency's underlying goals.⁴

Measuring success by penalties leveled rather than by accomplishments achieved starkly contrasts with DEP's efforts to work with regulators to stay ahead of national issues and strategically target infrastructure investments. DEP has invested billions of dollars in mandated projects to reduce combined sewer overflows while also pursuing large capital projects that are not required by law. For example, DEP has targeted resources in areas of the city that lack storm sewers, such as part of Queens. Since 2010, DEP has invested more than \$100 million to construct or reconstruct 17 miles of sewers in Queens, and the City plans to build an addition 36 miles of sewers in that borough in fiscal years 2013 and 2014. DEP has also taken proactive measures to reduce the occurrence of sewer backups caused by City-owned infrastructure. These investments were not only proactive measures to provide the best quality of service to ratepayers, but also put DEP ahead of a national enforcement initiative focused on reducing sewer overflows as well as sewer backups. In a continued effort to be the most transparent large utility in the nation, DEP published the 2012 State of the Sewers report explaining programmatic efforts to optimize the sewer system, reduce backups, and identify new areas for improvement, all of which were supported by positive trends in empirical data.

Due to the struggling economy, municipalities are widely facing budget cuts and rate increases. An enforcement approach emphasizing incentives and partnership, much as DEP executed in its Watershed Agricultural Program, is the right approach. EPA and other environmental enforcement agencies, without compromise to their mission of protecting human health and the environment, should first work more closely and cooperatively with municipalities toward ensuring compliance with regulations, and only pursue , civil monetary penalties and/or criminal enforcement as a last resort where faced with unwilling partners. There are multitudes of approaches to accomplish this goal.⁵

EPA Should Focus on Non-Point Sources of Water Pollution as a National Enforcement Priority

EPA's current CWA enforcement approach, focused on municipal discharges under wet weather conditions, fails to take into account the significant non-point source pollution from the agricultural, residential and industrial sectors. WWTPs are heavily regulated under the CWA, and with the assistance of a federal grant program that effectively wound down in the late 1990s, many municipalities expanded and improved treatment works so that today nearly all meet or exceed the performance standard of reducing 85 percent of conventional pollutants during dry weather flows. DEP has invested over \$1 billion in nitrogen upgrades to its WWTPs and expects to invest an additional \$125 million in the near future. And these facilities are extremely costly

⁴ Paul, Patrick J., *Toward More Rational Environmental Enforcement*, 26-SPG Nat. Resources & Env't 55, American Bar Association, 2012.

⁵ *Id.*

to operate – we anticipate O&M costs for the nitrogen upgrades to exceed \$30 million annually once these facilities are completed.

But these investments can only take us so far if other pollution sources are ignored. For example, in Chesapeake Bay, only 12% of the nitrogen loadings are from WWTPs, while 56% are from agriculture, 22% from forestry, and 6% from suburban runoff. In New York’s Long Island Sound, point source discharges account for less than half the nitrogen loadings. EPA should focus its resources in proportion to contributions. Linking water quality (303(d) data) and compliance information will better show where non-point sources are responsible for contamination. While one enforcement initiative has been Concentrated Animal Feeding Operations (addressing animal waste discharges from large animal feeding facilities), there have not been efforts to target agricultural sources of water pollution on a broad scale. EPA must shift its focus, again, to a holistic, watershed-based approach in which all sources are equitably included and the most effective solutions to impacts are implemented.

Conclusion

As NYC continues to plan future programs and investments, the City hopes its regulators will work with us as we direct our resources to holistic improvements of quality of life and environmental standards, rather than dictate traditionally inflexible mandates that do not reward innovation.

Sincerely,

/s/

Hilary Meltzer, Deputy Chief,
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cc: Carter Strickland, Commissioner, NYC Department of Environmental Protection
Sergej Mahnovski, Director, Mayor’s Office of Long-Term Planning and Sustainability