Environmental Protection

Caswell F. Holloway
Commissioner
cholloway@dep.nyc.gov

59-17 Junction Boulevard
Flushing, NY 11373
T: (718) 595-6565
F: (718) 595-3525

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By Electronic and U.S. Mail

Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Re: EPA Retrospective Review Plan (Dkt. No. EPA-HQ-OA-2011-0156)

Dear Ms. Jackson:

Thank you for the opportunity to present these suggestions of the New York City Department of Environmental Protection (DEP) for the U.S. Environmental Protection Agency's (EPA's or Agency's) periodic, retrospective review of existing regulations under Executive Order 13563 (Feb. 18, 2011). DEP commends the Agency's active solicitation of public comments to better inform its preliminary submission to the Office of Information and Regulatory Affairs (OIRA) of a plan for reviewing existing regulations to ensure the most effective and least burdensome plan for achieving regulatory objectives.

We believe the Administration's review is timely and critical. New York and other cities need a true partner in the federal government, and particularly the EPA, to revitalize our urban areas and our economy. The EPA should promote urban areas as one of most efficient ways to combat sprawl, air pollution, habitat degradation, and carbon emissions. Unfortunately, uncoordinated mandates have driven up the cost of living in cities. In New York City alone, approximately $14 billion since 2002 has been spent on water and wastewater infrastructure to satisfy Federal or State mandates. (Another $5 billion was spent on state-of-good-repair work and the funding needed for essential projects like City Water Tunnel No. 3). The $19 billion spent on water and wastewater infrastructure between 2002 and 2010 is more capital investment than went to any other social need, including education and public safety. Even if you add funding under the stimulus bill, federal grants account for just 1.3% of that capital; during the same time period, water rates for New Yorkers have increased by 117%, from an average annual bill of $375 for a family of four to $816 today.

In many cases, DEP would have chosen to build these projects without a mandate, but in a way and on a schedule that is affordable for New Yorkers.

Consent orders imposed by the EPA, the Department of Justice at EPA's request, or states implementing EPA-delegated programs, often seek compliance with specific regulatory requirement without regard for a project's comparative public health benefit, competing water system priorities, or likely impact on consumers who pay the bills. Consent orders are difficult and costly to modify to account for local conditions, such as an overheated construction market. When a city like New York is required to satisfy multiple orders simultaneously, the mandated milestone schedules compress the construction window to get the work done and drive up prices because all of the projects are put out for bid at the same time. New Yorkers will carry the debt burden to pay for these projects for decades. Clearly, more can be done to assist cities in planning for capital obligations. We believe the obligation to assist and not merely enforce is all the more pressing given that many significant sources of runoff and other waterway degradation, such as the agricultural sector, remain largely unregulated. Cities should not bear the costs of regulation alone.

One answer is to prioritize infrastructure investments, and this can only happen by addressing our most pressing needs first, using the tools of risk assessments and cost-benefit analyses. While there is general consensus that regulations and other administrative actions must achieve tangible benefits through efficient means, over time the requirement for a rational assessment of regulatory costs has led many to believe there is a tradeoff between the economy and environmental protection in all cases. We believe this is not the case. Rather, New York City has developed a sustainability approach that seeks to prioritize investments that will maximize public health benefits and environmental protection, and enable New York to effectively compete with other global cities to attract and retain residents. Under this paradigm, environmental and regulatory investments can set the groundwork for our economic future, if focused on the most pressing public health needs and other social issues that inhibit development. These suggestions are therefore informed by and incorporate the sustainability principles set forth in such New York City documents as PlaNYC, DEP's Strategy 2011-14, and the NYC Green Infrastructure Plan, as well as earlier comments submitted to the EPA on the Agency's strategic plan and clean water strategy (links to all of these documents can be found on our website, www.nyc.gov/dep).

The comments that follow suggest that EPA undertake a comprehensive review of all administrative actions – not just final regulations, but baseline studies, preliminary determinations, guidance, policy statements, enforcement policy, and enforcement actions – to better align the hundreds of billions of dollars of water and wastewater investments that cities have been and will be required to make, with the most pressing public health, environmental, and economic needs. While rules themselves are clearly important, in many cases where and how EPA chooses to enforce a particular rule can be the real cost driver behind a particular mandate. For example, the EPA's apparent policy to seek compliance with its CSO policy through its Office of Enforcement and Compliance Assistance and to pursue judicial consent orders in all cases as part of its CSO enforcement strategy drives up compliance costs and results in inefficient capital allocations to meet public needs.

We recognize that many critical reforms require legislative action. While DEP is suggesting many revisions to current regulations, enforcement policy, and even statutes in the spirit of promoting the full review invited by Executive Order 13563, we will continue to fully comply with all applicable rules and regulations until changed by the EPA.

I. Background

Periodic review of agency rules is a longstanding requirement, extending from Executive Order 13563 back to Executive Orders 12866 (Sept. 30 1993), 12291 (Feb. 17, 1991), 12044 (Mar. 23, 1978) and 11821 (Nov. 27, 1974), the Regulatory Flexibility Act (5 U.S.C. § 601 et seq.), and ultimately to the original statutory requirements in Sections 552 and 553 of the Administrative Procedure Act that require agencies to explain their decision-making.[1] Collectively, this framework seeks to improve the regulatory system by requiring agencies to compare the benefits of regulations with the costs in a public forum that will validate or refine that analysis against the backdrop of the full range of societal needs. As stated in the earlier executive order that Executive Order 13563 reaffirms:

> The American people deserve a regulatory system that works for them, not against them; a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

Executive Order 12866. As part of the comprehensive regulatory review currently under way, President Obama reaffirmed that:

> Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation

[1] Executive Order 13563 supplements and does not revoke Executive Order 12866, which had revoked earlier executive orders including Executive Order 12291. Various other statutory provisions round out this framework for regulatory review and cost-benefit analyses, including the Unfunded Mandate Reform Act of 1995, the Safe Drinking Water Act of 1996, and the "Stevens Amendment" Regulatory Accounting Provision of the Omnibus Consolidated Appropriate Act of 1997, P.L. 104-208, § 645.

> and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

Executive Order 13563, § 1. Thus, before promulgating a regulation or taking other regulatory actions, agencies should make a reasoned determination that the benefits of a proposed action justify its costs, choose the most cost-effective alternative, and impose the least burden on society after considering the costs of cumulative regulations. Id. In general, this will include assessing alternatives to direct regulation such as economic incentives and providing information and, where regulation is deemed the best alternative, specifying performance objectives rather specific methods of compliance. Id.

While Executive Order 13563 reinforces the principle that cost-benefit analysis and sound science should be the foundation of all prospective agency actions, it also takes steps to ensure that these principles have been implemented in the vast body of regulations that already exist. Specifically, the order requires agencies to consider "how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned" and then to submit a preliminary plan to OIRA for preliminary review of its "existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives." Executive Order 13563, § 6 (emphasis added).

DEP offers three general suggestions about how the EPA should approach the development of its plan for regulatory review. First, the EPA should broaden the scope of its review beyond the minimum requirement to examine promulgated regulations to include the full array of administrative actions that can impose "significant" costs by any measure. These Agency tools include formal and informal agency guidance (which are often applied as if they were promulgated rules), policy statements and memoranda to states, permit writers, and regulated entities, and enforcement actions and strategies. If the scope of the review is not broadened, very significant actions such as multi-billion dollar enforcement actions for combined sewer overflows (CSOs) or sanitary sewer overflows would not fall within the scope of the review, as neither the Agency's CSO Policy nor the recent "capacity, management, operations and maintenance" policy has been adopted as a regulation (but is often treated as such). Another example is a recent memorandum from EPA headquarters to its regional offices that changed the Agency's policy for establishing Total Maximum Daily Load waste load allocations from

municipal sources from best management practices to numeric effluent limits,[2] which would impose significant costs without having documented or quantified countervailing benefits, if any, and without the input of the regulated community. Retrospective agency review of such actions is especially important because in many cases they are not subject to public or judicial review until incorporated into permits.

Similar loopholes have been noted in connection with other reform efforts such as the Unfunded Mandates Reform Act and the Regulatory Flexibility Act, which apply to an even narrower set of rules for which an agency publishes a notice of proposed rulemaking, thus excluding half of all final regulatory actions that federal agencies published without going through the proposed rule stage because of good cause, categorical, or statute-specific exceptions to the Administrative Procedure Act's notice and comment requirements.[3] Given the burdens imposed by non-rule Agency actions, these comments propose a broader scope of review, identify several specific non-rule actions as candidates for review, and use the term "rule" to refer to the full range of agency actions that can impose significant requirements on the regulated community. DEP believes that an expanded scope would better carry out the goals and intent of Executive Orders 13563 and 12866.

Second, EPA should use the review process as an opportunity to re-evaluate all aspects of environmental management that occur after the development of rules, including both the Agency's and regulated entities' implementation of rules, monitoring of compliance, and methods of enforcement.

Third, and finally, the Agency should integrate this regulatory review effort with core strategic documents such as its strategic plan, clean water strategy, and enforcement agenda, and undertake a holistic ranking of priorities across all media. Otherwise, programs will persist in "silos" with little coordination and thus little consideration of overall public health and environmental risks, overall benefits and costs, and the cumulative regulatory burden on regulated entities and regulatory authorities. Both Executive Order 12866 and 13563 affirm that federal agencies are to seek the "least burden on society … [after considering] the costs of cumulative regulations." A cross-media and cumulative effects assessment will help to ensure that EPA achieves this fundamental goal.

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[2] "Revisions to the November 20, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.", Memorandum from James A. Hanlon, Director of the Office of Wastewater Management, and Denise Keehner, Director of the Office of Wetlands, Oceans and Watersheds, to all Water Management Division Directors in EPA Regions 1-10 (Nov. 12, 2010).

[3] GAO, Regulatory Reform, Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements, Statement of J. Christopher Mihm, Managing Director, Strategic Issues (July 27, 2005) (citing other GAO reports).

II. Institutionalizing Regulatory Review

To be effective, regulatory review must be predictable, dependable, and comprehensive. It must be engrained in agency management and culture so that the regulatory system keeps pace with the best and most up-to-date technology, policies, and practices. This will ensure that regulations meet the needs of the present and future generations, not just the needs of past generations. It is especially important for analysis to extend to existing rules and other actions so that the Agency and the public can determine whether the pre-promulgation analyses of costs and benefits were accurate, whether there are lessons to be learned from the experience of regulated entities in complying with the rules, and whether the agency should consider other alternatives that reflect advances in technology and policies.

The required meaningful regulatory review does not occur through the present system of self-policing. While cost-benefit analysis is supposed to be incorporated into every new agency action, in practice meaningful regulatory review occurs only for a limited type of administrative action (e.g., final rules signed by the agency head over a certain cost threshold estimated at the time of promulgation) and during a limited time (e.g., before final adoption, when all costs and benefits are estimated based on the existing record). That is because pre-publication review by OIRA occurs only for "significant" regulations with projected impact of $100 million or more. In the case of EPA, these limitations have meant that half of all Administrator-signed rules from 2005-2009 did not undergo any regulatory review, and of this subset of all rules, fully half were for the Office of Air and Radiation with only one in ten reviews occurring for rules originating in the Office of Water.

Similarly, for existing regulations, agencies are required to review existing rules every ten years, but that obligation is limited to the purpose of determining whether such rules have had or will have a significant impact on small entities and whether such rules should be continued without change, or amended or rescinded to minimize their impact on small entities. As a result, agencies' review of existing rules has been limited and has not resulted in substantial revisions to the regulatory system.[4] In addition, review of a particular rule occurs in isolation from other rules, such that the Agency cannot and does not assess the costs and benefits of the full set of regulatory obligations to assess whether the proper balance of benefits and obligations is being achieved, and that mandates are focusing on our most pressing needs.

In sum, the system for reviewing new and existing rules for the inclusion of cost-benefit analyses needs to be significantly strengthened. DEP's suggestions for EPA's plan to periodically review

[4] Studies by the General Accounting Office have found that agencies in general and the EPA in particular have not been conducting the required 10 year reviews. E.g., GAO, Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary, GAO/GGD-99-55 (Apr. 2, 1999); GAO, Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule, GAO/GGD-00-193 (Sept. 20, 2000).

existing regulations, inclusive of the full range of agency actions, are organized by the questions posed on the Agency's website.

1. *Identification of candidate regulations and other actions for periodic retrospective review*. All regulations and other administrative actions should be candidates for retrospective review, regardless of the size of the economic impact. To institutionalize comprehensive review, many states have sunset laws under which rules expire and have to be readopted through notice and comment rulemaking. (In New Jersey, for example, this occurs every five years). The advantage of this approach is that it is comprehensive and would trigger the obligation of all agencies to use cost-benefit analyses in formulating rules, and would trigger the more searching OIRA review of certain rules deemed to have a large impact. We recognize, however, that a sunset provision could unsettle the expectations of regulated entities, and lead to inefficient or wasted investments to comply with rules that have a short shelf-life. It would be better for the EPA to include a timetable for review when proposing rules; that timetable would be subject to notice and comment along with the substantive portion of the rule in question. Informal rules, guidance, policy statements, enforcement initiatives and other agency actions should be subject to a default period for retrospective review – every ten years at a minimum, and every five years for rules where nationwide, actual compliance costs have exceeded $100 million – with the possibility of a shorter duration under a petition or other mechanism for review, which is discussed in greater detail below.

2. *What criteria should the EPA use to prioritize regulations for review?* Clearly, EPA cannot simultaneously review all of its existing regulations with the same urgency. However, within the maximum ten-year period suggested above for all actions, and five years for actions where compliance costs exceed $100 million, there is sufficient flexibility to apply other factors. One priority should be for actions where the agency or OIRA did not conduct a thorough cost-benefit analysis before a regulation was promulgated.

3. *How should our review plan be integrated with our existing requirements to conduct retrospective reviews?* Current requirements constitute the minimum requirements for review; the review plan should provide for a more robust review, as described above.

4. *How often should we solicit input from the public?* At a minimum, the EPA should solicit public comment on retrospective review on a yearly basis by including the actions to be reviewed on its published regulatory calendar, and taking comments on that calendar. In addition, the Administration should create a process by which a sufficient number of entities could collectively petition for accelerated review of agency action. Such petition could be made to either the EPA or to OIRA.

5. *What should be the timing of any given regulatory review (e.g., should a regulation be in effect for a certain amount of time before it is reviewed)?* DEP believes that experience can provide the best insights into the true costs and benefits of agency action, and that as a general matter five years should pass before retrospective review is triggered. At the same time, actions that were not subject to a thorough cost-benefit analysis beforehand, or that involve very significant compliance costs, should be reviewed sooner.

III. Existing Actions that Should Be a Top Priority for Retrospective Review

The following EPA actions should be among the Agency's top priorities to review for compliance with the cost-benefit and sound science principles set forth in Executive Order 12866 and affirmed in Executive Order 13563. DEP's responses are organized according to the questions posed on the Agency's web site.

Long Term Enhanced Surface Water Treatment Rule

Why the regulation should be modified, streamlined, expanded, or repealed: The Long Term Enhanced Surface Water Treatment Rule (LT2) requires, among other things, that public water systems using uncovered finished water storage facilities either cover the storage facility or treat the discharge from the storage facility to achieve specified inactivation or removal levels for Giardia, Cryptosporidium, and viruses. EPA promulgated LT2 to protect public health from illness due to Cryptosporidium and other microbiological pathogens in drinking water. Given (1) the extremely low public health risk in at least some water systems from pathogens entering uncovered finished water storage reservoirs, (2) the enormous cost of covering an uncovered reservoir or treating the discharge from such a reservoir, and (3) the existence of effective and far less costly methods of achieving the same public health protection, the draft LT2 rule included a waiver provision that would have allowed for site-specific risk assessments and appropriate treatments. This waiver provision was inexplicably eliminated from the final LT2 rule. In its enforcement of the rule, EPA has refused to exercise the discretion afforded by the variance provision of the Safe Drinking Water Act to consider waivers based on alternative proposals that would achieve the same public health benefit. In light of the EPA's narrow reading of the variance provision, the EPA should revise LT2 to allow alternative means of mitigating the risk to uncovered finished water storage facilities, and prioritize review of any submissions of alternative mitigation plans.

Supporting data or other information: New York City operates one uncovered finished water storage reservoir that is subject to LT2, the Hillview Reservoir in Yonkers, New York. Hillview is a 90-acre, 900-million gallon reservoir that balances flows, maintains citywide water pressure and is part of the final treatment steps before water enters the City's distribution system. The City is constructing an ultraviolet treatment (UV) facility north of Hillview that will be capable

of disinfecting 2.4 billion gallons per day with up to 3-log inactivation of Cryptosporidium. Once the UV facility is operating in 2012, water will flow from the UV facility to Hillview through two covered aqueducts. Hillview is the only site where water could be exposed after passing through the UV plant.

Monitoring data uniformly support the conclusion that Hillview is not a source of Cryptosporidium or Giardia and that leaving Hillview uncovered will not pose a public health risk. DEP has conducted an extensive inflow/outflow study of Cryptosporidium and Giardia at Hillview that established that there is no statistical difference in Cryptosporidium and Giardia concentrations in the water entering and leaving Hillview, meaning that Hillview is not a source of these pathogens. As an elevated, man-made structure, Hillview receives no runoff from the surrounding environment, and it is also surrounded by fencing and guarded 24 hours/day and 7 days/week. While bird droppings are in theory a source of contaminants, DEP has an active and successful wildlife management program, including a bird harassment program at Hillview, that has successfully protected Hillview's water quality over the last few decades.

In 2010, the New York City Department of Health and Mental Hygiene (DOHMH) evaluated the risk of illness from Cryptosporidium attributable to the City's water supply. DOHMH determined that the City's incidence rates for cryptosporidiosis have been lower than the national average since 2005 and, in marked contrast to national trends, have fallen dramatically since 1995 when mandatory reporting of cryptosporidiosis began. DOHMH also reviewed historical pathogen data in the City's drinking water, the Cryptosporidium species found in the City's source water, the Cryptosporidium species known to infect humans, possible sources of Cryptosporidium at Hillview, and Cryptosporidium sampling data at Hillview. Based on this data, and the City's comprehensive Waterborne Disease Risk Assessment Program that conducts active surveillance for cryptosporidiosis and giardiasis, DOHMH concluded that "the current water quality management program adopted by DEP provides sufficient levels of public health protection needed to protect the water supply entering and exiting Hillview. At this time, DOHMH has no evidence that suggests that an uncovered Hillview reservoir is a significant public health risk, even prior to the installation of UV treatment." (See attached DOHMH study, p. 9).

The City estimates the cost of covering the 90-acre Hillview reservoir to be at least $1.6 billion. In light of the minimal public health risk posed by leaving Hillview uncovered, the cost of complying with LT2 is not justified. Covering the reservoir will also harm the environment and water quality because of the absence of sunlight, and will make maintenance more difficult. Finally, covering the reservoir would present significant opportunity costs, as the City has water and wastewater infrastructure needs that are a far higher priority from a public health perspective.

The City is in discussions with the federal government about prioritizing certain projects and completing them before constructing a cover at Hillview. We appreciate this flexibility, but

gaining more time to make an investment that the evidence shows will not produce a public health benefit simply defers an expenditure that should not be required in the first place. Moreover, the "cost" of the deferral is potentially very high, as in the intervening years the federal government or the state are likely to seek enforcement orders that would require the City to commit to project milestones on capital work unrelated to the Hillview cover, further limiting the City's ability to set priorities and imposing more costly mandates on New Yorkers who pay the water bills.

Alternative methods of achieving the regulatory program's objective: EPA should allow water suppliers to achieve LT2's goal of protecting the public from risks posed by Cryptosporidium and Giardia in uncovered finished water storage reservoirs without mandating that they choose between two equally unacceptable choices (further treatment or coverage). EPA should allow a water supplier to establish that an uncovered finished water storage facility is not a source of Cryptosporidium or Giardia or does not pose a threat to public health. EPA should also allow a water supplier to protect uncovered finished water storage facilities against Cryptosporidium and Giardia through implementation of a facility-specific risk mitigation plan that identifies and addresses the specific risks faced by a particular facility. Both of these options would encourage investments that achieve cost-effective tangible public health benefits without unduly burdening water suppliers and rate payers.

<u>NPDES Permit Requirements: Industrial Pretreatment Programs</u>

Why the regulation should be modified, streamlined, expanded, or repealed: The EPA requires certain wastewater utilities to develop Industrial Pretreatment Programs that are approved by the EPA and states and incorporated into discharge permits. 40 C.F.R. Part 403.8. In the mid-1980s, DEP provided EPA with a plan for implementing an industrial pretreatment program that included staffing estimates, and the EPA approved DEP's program and granted control authority status in January 1987. DEC, as the oversight authority, incorporated the program into the SPDES permits for the City's fourteen wastewater treatment plants. But during the past quarter century, the number of industrial businesses in New York City has shrunken significantly. Similarly, DEP is forced to perform more-frequent inspections at these businesses due to the requirements of the approved program and the permits even though the remaining industrial businesses covered under Federal categorical standards had long-ago installed treatment systems and come into compliance.

Supporting data or other information: DEP's permits require that we employ 72 people in the pretreatment program and that they inspect 700 facilities and collect 640 wastewater samples. That made sense in the 1980s, when over 300 facilities in New York City were regulated by Federal categorical standards. Today, with the decline in the number of affected businesses, we are sampling and inspecting the same establishments over and over again in order to meet the requirements for 700 inspections and 640 samples, which demonstrate consistent and sustained compliance. Staff could provide more environmental and public health benefit if they could be

redeployed into other DEP programs. Despite DEP's efforts to modify the program requirements to reflect the decline in the City's industrial base and our other program needs, we have been unsuccessful.

Alternative methods of achieving the regulatory program's objective: Local authorities should be given the flexibility to modify their industrial pretreatment programs to meet changing conditions without formal Federal or State approval. The EPA and delegated stated authorities will always have the right to audit local pretreatment programs and can take enforcement action if minimum standards of the Clean Water Act have not been met.

Combined Sewer Overflow (CSO) Policy and Enforcement

Why the regulation should be modified, streamlined, expanded, or repealed: The EPA's approach went from a "strategy" in 1989 to a "policy" in 1995 and then conformance to that policy became required under a rider to an omnibus bill that became known as the Wet Weather Quality Act of 2000. Having never been subjected to the rigors of notice and comment rulemaking, the CSO Policy avoided the formal requirements of Executive Order 12866 such as a cost-benefit analysis. (Indeed, the Congressional Budget Office analyzed the predecessor bill, H.R. 828, that was incorporated into the omnibus rider, and somehow found that it did not create an unfunded mandate and therefore did not create any non-federal costs). True, the 1995 Long Term Control Policy was developed with the input of municipalities and wastewater trade associations, and therefore contains balanced language and concepts; the Policy's "four fundamental principles" include statements that the EPA and states demonstrate "[f]lexibility to consider the site-specific nature of CSOs and find the most cost-effective way to control them" and use "[p]hased implementation of CSO controls to accommodate a community's financial capability". Under the EPA's current program, carried out by officials in the Office of Enforcement and Compliance Assistance with the U.S. Department of Justice, these safeguards have been weakened, and cities have been forced to enter into consent orders with prescriptive control plans that force spending up to a level of "affordability" defined by EPA.

Furthermore, we understand that the EPA is changing its interpretation of the CSO Policy, which plainly states that cities are to develop a path to compliance with existing water quality standards. EPA enforcement and program staff have recently indicated that Long Term Control Plans must meet the so-called "fishable/swimmable" standards regardless of current waterbody classifications, which will increase the level of CSO controls that are necessary. By mandating LTCPs to achieve fishable/swimmable goals, this strategy may overemphasize CSOs as a source of impairment, as historically contaminated sediments, deep dredge areas, and other causes may contribute to the prevention of meeting fishable/swimmable goals. Evaluation of appropriate water quality goals for a particular waterbody should look at all sources of pollution and waterbody features, and not compel costly CSO reductions that, in many cases, will not achieve those goals.

As a result of the EPA's policy and enforcement choices, cities across the country are being made to spend billions of dollars in system upgrades, storage facilities, and other controls, under the EPA's current enforcement initiative for its CSO program. This program has led the U.S. Conference of Mayors to submit a detailed white paper to the EPA challenging the recent pattern of enforcement and asking the Agency to exercise more flexibility in the CSO program, consider more cost-effective controls, provide substantial credit for green infrastructure, consider carbon reduction and other benefits of alternative controls, and consider a broader measure of cities' willingness to pay. See U.S. Conference of Mayors, Local Government Recommendations to Increase CSO/SSO Flexibility in Achieving Clean Water Goals (Oct., 2010). The CSO program also does not consider the costs of other water quality initiatives such as nutrient removal or coordination with those programs to prioritize investments.

Supporting data or other information: The costs of the CSO program are well-established. New York City's program alone includes $2.9 billion for constructed or planned CSO reduction projects and another $750 million for other CSO-related projects such as dredging, aeration, and floatables, and that is before we have entered into Long Term Control Plans. In anticipation of those plans, the NYC Green Infrastructure Plan has proposed another $1.5 billion in public money for green infrastructure, as compared to $3.9 billion in additional grey infrastructure; by any measure, these are substantial investments for a city where more than a million people live below the poverty line.

There is a scarcity of data against which to judge whether the massive investments being made in controlling CSOs are well spent. In part this is due to the lack of a regulatory record or Regulatory Impact Analysis. The likely pathways of exposure are contamination of drinking water, which is not at issue for coastal cities that discharge into saline water, and recreational use. In a 2004 Report to Congress, the EPA estimated that for recreational users in open waters, CSOs cause between 845 and 1,367 cases of gastrointestinal illnesses annually from the entire U.S. population, using studies conducted in the 1970s and published in the 1980s. Report to Congress: Impacts and Control of CSOs and SSOs, EPA 833-R-04-001 (2004), pp. 6-9 to 6-10. Alternatively, the Centers for Disease Control Surveillance Studies attributed 5,601 cases of illness due to CSOs between 1985 and 2000, compared to 14,836 cases of illness from outbreaks linked to swimming pools or hot tubs during the same period, id., pp. 6-8 to 6-9, for which there is no program comparable to the CSO controls that municipalities must build. While the EPA is currently updating some of its health studies for exposure at registered bathing beaches, those studies will not quantify the risks at the many other waterbodies in the nation. To date, then, many tens of billions have been spent or committed by cities without a clear sense of the relative comparison of risks from CSOs with other health risks, or whether the estimates of the benefits are based on sound science.

Additionally, our local health professionals, DOHMH, conduct extensive monitoring and surveillance of ambient waters and the combined sewer system, with adaptive monitoring of overflows, weather, natural local wildlife, nearby failing septic systems, which allows it to

proactively close and manage beach access, further reducing any public health risk from CSOs. Local regulatory authorities have sufficient information to make scientifically reliable determinations and take correct regulatory actions by using (1) ongoing trends based on data collected from regular water monitoring and sample collection (often begun prior to the bathing season), (2) historical water quality data for the general ambient conditions, and probability distributions, (3) reports of pollution events from other regulatory agencies, and (4) practical knowledge of exogenous factors affecting the beach waterbody. New York City's active surveillance system avoids public health consequences by proactively and temporarily closing beaches in extraordinary CSO conditions, and the City has not observed any outbreaks of illness associated with CSO events. These cost-effective efforts should be credited in the EPA's and state's CSO control policies.

Alternative methods of achieving the regulatory program's objective: The EPA should (1) reaffirm that the Clean Water Act provides for a range of water quality standards to be set by the states, and only sets as a broad goal that our waters be fishable and swimmable "where attainable", (2) allow cities the flexibility to develop control programs to meet water quality on a reasonable timetable, without prescribing methods of control, (3) consider competing demands for environmental quality, such as maintaining our treatment plants in a state of good repair, when assessing CSO programs, (4) quantify the environmental benefits of reducing CSOs in a range of waterbodies, and (5) allow cities to adopt green infrastructure controls with provisions for adaptive management at regular intervals to improve the program, without triggering obligations for massive grey infrastructure investments. In addition, EPA should change its enforcement policy to allow for more flexible approaches, such as administrative orders, that would achieve compliance in a more collaborative, less adversarial way. The EPA's Office of Enforcement and Compliance Assistance has recently indicated that judicial consent orders are necessary so that localities can position EPA as a "bad cop" that is forcing local governments to make massive investments on timeframes that require significant water rate increases. We believe this paradigm is fundamentally flawed—and contrary to the stated goal of Executive Orders 12866 and 13563 that the regulatory system work for, and not against regulated entities—and that a flexible, collaborative paradigm is not only preferable, but will produce better, more cost effective public health and environmental outcomes.

<u>Separately Sewered Overflows (SSOs) Enforcement and the "Capacity, Management, Operations, and Maintenance" (CMOM) Policy</u>

Why the regulation should be modified, streamlined, expanded, or repealed: As with CSOs, there has been no formal promulgation of an SSO rule or a CMOM policy. We understand that a proposal is in development, and it is our expectation that a proposal will ultimately reflect the cost-benefit and sound science principles required by Executive Orders 12866 and 13563. In the meantime, however, the Agency's recent enforcement actions against municipalities demonstrate that it views its guidance entitled "Guide for Evaluating Capacity, Management, Operations and Maintenance (CMOM) Programs at Sanitary Sewer Collections Systems" as binding,

empowering it to mandate utilities to address such issues as street flooding and sewer back-ups into basements that do not reach the "waters of the United States." CMOM includes broad, uniform requirements such as "manholes should undergo routine inspection typically every one to five years" and "sewers should be cleaned once every 7-12 years or 8%-14% per year." These blanket requirements are not consistent with effective management in New York City, which has 7,400 miles of sewer infrastructure. It makes no environmental, operational or economic sense to invest resources in areas of the system that do not have problems. Instead, system performance analysis and problem trending allow far more effective use of resources than a one-size-fits-all mandate.

Notwithstanding jurisdictional questions, DEP agrees with and implements many of the best management principles embodied in the CMOM guidance. However, local municipalities must retain the flexibility to apply such principles in the manner that best meets local conditions, waterfront development priorities, and zoning regulations. The EPA's SSO enforcement efforts should not result in consent decrees that mandate adherence to CMOM guidance or micro-manage the daily operation and maintenance of the sewer system. Furthermore, in cities with combined sewer systems, any capacity issues should be addressed in the context of CSO Long Term Control Plans to ensure an integrated approach to our capital improvements. Finally, the EPA should coordinate its enforcement efforts with state oversight of permits and CSO programs, especially if those programs are longstanding and reflect the settled expectations of the parties, rather than seek to duplicate efforts or to impose inconsistent requirements.

Supporting data or other information: DEP has an active program to manage, operate and maintain the City's sewer system, but that system requires flexibility. DEP routinely responds to backup and flooding events through our 311 complaint and work order management systems, which are being integrated with our GIS systems to allow us to track and report on our efforts and problematic areas in the system. DEP also administers multiple emergency contracts that enable DEP to respond to situations which require a rapid response. DEP is continually improving its systems through the application of new technology, and is working to integrate our customer-driven notification system with field crew assignments, which will allow us to efficiently deploy personnel and equipment; DEP has invested over $36 million to digitize and map our sewer and water infrastructure and $1.5 million to improve our work order management system.

DEP also has several programmatic cleaning and prevention initiatives, including a catch basin inspection program that reaches every one of our 144,000 basins every three years. DEP's programmatic degreasing programs reduce the incidence of grease related back-up events. To prevent fats, oil, and grease from reaching the system, DEP also maintains an active grease disposal education and enforcement program, with targeted outreach to restaurants and other significant sources.

Finally, DEP has a unit that is dedicated to drainage planning and capital construction. Our capital improvement plan is significant; from 2002 to 2009, we invested $737 million and replaced or newly constructed 263 miles of sewer.

Alternative methods of achieving the regulatory program's objective: Municipalities must be allowed the flexibility to responsibly manage their systems using their knowledge and expertise of local conditions.

Emergency Generators

Why the regulation should be modified, streamlined, expanded, or repealed: Under EPA's regulations only the actual loss of utility power to the facility is considered to be an emergency situation allowing for the use of gas turbine emergency generators. See 40 C.F.R. § 60.331(e). Reciprocating Internal Combustion Engine (RICE) emergency generators may only be operated for load shaving up to 15 hours per year. See 40 C.F.R. Part 63, subpart ZZZZ. The effective prohibition on the use of emergency generators at wastewater treatment plants prior to an actual loss of power limits operators from taking the precautionary steps of using their emergency generators where the local electrical utility has stated that a blackout or brownout condition is imminent due to a heat emergency, network feeder loss, or other disaster. Delaying the operation of emergency generators until the actual loss of power significantly increases the likelihood of a raw sewage bypass, which clearly has the potential to create a greater public health threat.

Supporting data or other information: The equipment and power distribution networks within large municipal wastewater treatment plants are complex. Each of New York City's 14 wastewater treatment plants requires between 4,160 and 27,000 volts, and the electrical system in each plant is a complex series of switch gears, motor control circuits, synchronized breakers, and compound permissive devices. It can often take more than an hour after the loss of utility power to energize plant-wide electrical systems on emergency generator power. While an engineer is performing these tasks, the plant is neither treating nor disinfecting sewage, which can result in significant quantities of pathogens being released into local receiving waters.

Perhaps more importantly, operating on emergency generators reduces the voltage fluctuations that typically occur during these power situations, reducing the likelihood of damage to large motors at the treatment plants. Such damage can result in significantly longer-term discharges of raw sewage.

Alternative methods of achieving the regulatory program's objective: EPA should modify its regulations to authorize wastewater treatment plant operators to use all RICE or Gas Turbine emergency generators if there is a reasonable belief of an imminent loss of power, rather than an actual loss of power. "Load shaving" for the purpose of monetary remuneration would remain prohibited.

In so doing, EPA would minimize the likelihood of raw sewage bypasses and potentially significant harm to the plant's infrastructure. In addition, removing the load of wastewater treatment plants from the electrical grid during critical power situation would reduce the likelihood of brownouts or blackouts, and would therefore reduce the public health risks created by the loss of air conditioning, refrigeration, and other critical services. The proposed change would ensure that these generators are only operated when absolutely necessary but not so late in an emergency situation that the delay has caused greater environmental harm than if the generators had been able to start up prior to a full blackout.

Water Transfer Rule

Why the regulation should be modified, streamlined, expanded, or repealed: The transfer of untreated water from one waterbody to another has long played an integral part in the operation of the nation's water infrastructure. For almost 15 years following passage of the Clean Water Act, no utility making such a transfer was required to obtain a National Pollutant Discharge Elimination System (NPDES) permit. However, in 2001, a federal appellate court ruled, for the first time, that a NPDES permit was required for such transfers. In response to that ruling and several others that followed in separate litigation involving DEP and a water management agency in Florida, in 2008 EPA promulgated the Water Transfers Rule which unambiguously clarifies that the Clean Water Act does not require utilities to obtain a NPDES permit for the transfer of untreated water. See 40 C.F.R. § 122.30. We understand that the EPA is considering whether or not to revise this common-sense rule, just a few years after it was adopted. We urge EPA to leave the current rule unchanged. It provides DEP and other utilities the flexibility to meet water quality goals and quantity requirements and removes the unnecessary regulatory burden of obtaining a NPDES permit for such routine activities.

Supporting data or other information: N/A

Alternative methods of achieving the regulatory program's objective: N/A

Lead and Copper Rule

Why the regulation should be modified, streamlined, expanded, or repealed: The Lead and Copper Rule (LCR) seeks to maximize public health protection by reducing lead and copper levels at the consumers' tap. Under the LCR, EPA requires utilities to sample a minimum of 100 homes that are known to have lead in their internal plumbing and, if 10% of samples exceed the action level, to treat the water to reduce the corrosion of internal plumbing, conduct an extensive public education campaign, and to replace lead service lines that the utility controls. The LCR holds the utility responsible for water quality at the tap even if the contamination occurs from private plumbing, as is typically the case, and regardless of health data that identifies chipping paint or other sources of lead as a much greater health threat.

Supporting data or other information: DOHMH operates an extensive lead poisoning prevention program. Under the program, one and two year olds are required to be tested for lead and any blood lead levels above 10 mcg/dL must be reported within 24 hours. Any lead poisoning case is investigated and DOHMH orders appropriate remedial steps to be taken to remediate lead paint or other sources. This program is effective. DOHMH reported a 92% decrease from 1995 to 2009 in the number of children 18 years or younger who have a blood lead level greater than or equal to 10 µg/dL (1,634 children in 2009 versus 21,575 children in 1995). See Lead Poisoning in New York City Annual Data Report 2009, http://www.nyc.gov/html/doh/downloads/pdf/lead/lead-2009report.pdf, p. 3. Furthermore, DOHMH found that lead-based paint is the primary cause of lead poisoning for NYC children; in 2009, three-quarters of children newly identified with high lead levels in their blood had an identified lead-based paint violation in their home or secondary address (for example, their babysitter's residence). For men, the most common cause of lead poisoning is occupational exposure in construction-related jobs and 81% of women with lead poisoning reported use of imported products, including food, spices, herbal medicine, pottery, and cosmetics. According to DOHMH, lead in tap water has not been identified as a risk factor for lead poisoning among children in New York City.

The most costly remedial measure is the replacement of lead service lines, which can cost a homeowner or the utility between $2,500 and $10,000 or more per line. From the utility's point of view, such programs may not be possible where it does not own the line between the water main and the home, or will involve the significant additional costs of negotiating agreements with individual home owners. Even for utilities that own the service line between the curbline to the main, partial replacement is likely to resuspend lead that had been sequestered, increasing the public health risk. Finally, replacement may provide a false sense of protection, since many homes with lead service lines often also have extensive lead solder in their plumbing.

Alternative methods of achieving the regulatory program's objective: EPA should consider the lead poisoning risks identified by local health departments in determining the requirements of a water utility to initiate outreach, change corrosion control, or require lead service line replacements. The utility should provide education to property owners and allow them to determine the appropriateness of replacement.

<u>Drinking Water Quality Reporting (Tier 3)</u>

Why the regulation should be modified, streamlined, expanded, or repealed: Administration and enforcement of many of the EPA's Safe Drinking Water Regulations are delegated to state agencies; in New York State, the New York State Department of Health (SDOH) is so delegated. To maintain such delegation, SDOH's rules, the New York State Sanitary Code (SCC), must be consistent with EPA regulations. As a Public Water Supply System (PWS), the New York City water supply system must meet State and EPA regulations for public notification of potential public health hazards, which delineate three tiers of notification depending on the severity of the violation and any potential adverse health effects that may be involved. A Tier 3 violation is the

least severe and requires public notification within 12 months of when a PWS is issued a violation. Tier 3 violations are issued for instances when there is not an immediate public health risk but the consumer should be informed of the situation. Since there is no immediate public health risk associated with a Tier 3 violation, the timing of the public notification is not critical to the customer, but the requirement to issue the Tier 3 public notification within 12 months provides limited flexibility. In particular, PWSs should have the flexibility to issue the required Tier 3 notification as part of required annual water quality statements, which must be delivered to the public by May 31st each year.

Supporting data or other information: In New York City, Tier 3 public notices cost approximately $240,000 each if issued independently; if issued as part of required annual reports, there is no incremental cost. As there is no public health reason to require a separate mailing of Tier 3 violations all customers, but additional mailings result in expenditure of significant costs to the PWS, the rule should afford greater flexibility as to the timings of notice.

Alternative methods of achieving the regulatory program's objective: Allow the PWS to use the annual water quality statement for public notification of Tier 3 violations.

Hydrofracking

Why the regulation should be modified, streamlined, expanded, or repealed: Shale gas development and the associated high-volume hydrofracking have great potential to adversely affect drinking water. While research studies are ongoing there are steps that can be taken now to protect this valuable resource. First, the EPA can expand the scope of its studies to include all of the environmental issues concerning hydrofracking, including air pollution, the integrity of well casings, and the efficacy of state oversight programs.

Second, the EPA can propose a legislative agenda to close the numerous statutory exemptions that this industry enjoys. For example, oil and natural gas companies should be required to report to the Toxic Release Inventory and disclose the chemicals used and transported not only to the State regulators but also to other governmental entities and the public. The oil and gas industry should be fully regulated under the Safe Drinking Water Act and Clean Water Act in order to protect surface and groundwater drinking water sources. Waste disposal, both solid and liquid, is a significant unresolved issue with shale gas development and the exemptions under the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) need to be removed. Finally, the emissions from individual well sites need to be aggregated and treated as a single source for air pollution control under the Clean Air Act.

Supporting data or other information: DEP has commissioned extensive studies on the environmental impacts of hydrofracking, particularly in unfiltered drinking water source areas. See http://www.nyc.gov/html/dep/html/news/natural_gas_drilling_dep.shtml.

Alternative methods of achieving the regulatory program's objective: N/A

Satellite Collection Systems

Why the regulation should be modified, streamlined, expanded, or repealed: DEP supports rules under development that would require a satellite collection system owned by another municipality to comply with the general conditions of the NPDES program. Treatment facilities that receive such flows must be able to rely upon the satellite system owner to operate and maintain the collection system sufficiently to protect the treatment facility's operations. The NPDES permit for satellite systems should be separate from the treatment facility owner's NPDES permit, which would streamline requirements and enforcement issues. For example, if inflow and infiltration in the satellite system violated the satellite system's NPDES permit, the enforcement action would be focused on the party with control of the infrastructure, rather than the treatment facility that has no, or at most limited, authority to effectuate improvements to the collection system.

It is more efficient and equitable for such systems to be regulated by permit authorities rather than treatment facility operators. The NPDES permitted treatment facility owner is at a disadvantage in instances where another municipality owns and controls a satellite collection system that discharges wastewater to the treatment plant and where, as in DEP's upstate facilities, the treatment plant owner has insufficient jurisdiction to control how the satellite system is operated. In such cases, the satellite system owner may have inadequate incentives to properly maintain their system, and when their inaction results in violations of the treatment facility's NPDES or SPDES permit, the treatment facility is held responsible. Contracts that exist between the treatment facility operator and the local municipal satellite system owner are generally difficult to enforce in a timely fashion, and an overarching regulatory scheme that places the satellite collection system owner into the NPDES program would be more helpful in getting the compliance necessary to protect the treatment facility.

While such permits should adopt flexible maintenance and operation principles, the owner of the satellite collection system should be responsible for its proper operation and maintenance, separate from the treatment facility's NPDES permit.

Supporting data or other information: There are many examples of such issues. The collection systems that discharge into DEP's Mahopac and Port Jervis treatment facilities are owned and operated by the Town of Carmel Sewer Districts 1 and 3 and the City of Port Jervis, respectively. A portion of the collection system serving the City's Grand Gorge treatment facility is owned by the Town of Roxbury; the remaining portions are owned and operated by DEP. During wet weather events inflow and infiltration into the collection systems are problematic causing non-compliance events at the treatment plants for high flows as well as treatment bypasses. Since DEP holds the permit, DEP is held responsible, even though the problems are ultimately in the

collection systems and not the treatment plants. For example, currently, DEP's Port Jervis Wastewater Treatment Plant is under review by the Delaware River Basin Commission (DRBC) for water quality standards discharging into the Delaware River in response to capital improvements done at the plant. These improvements resulted in the plant falling into a DRBC regulated project category. DRBC is proposing more stringent limits for the plant which will result in DEP having to perform further capital improvements to the plant. Due to the insufficient maintenance the City of Port Jervis has performed on the collection system, the cost of the capital improvements to the plant could be a magnitude higher than if the collection system was properly maintained due to the higher amount of inflow that requires treatment due to excessive inflow and infiltration.

Alternative methods of achieve the regulatory program's objective: Permits for collection system owners would provide the proper incentives and oversight for them to maintain their infrastructure.

IV. Proposed Rules or Developing Actions that Should be a Top Priority for Prospective Review for Consistency with the Principles in Executive Orders 12866 and 13463

<u>MS4 Rule Proposal/Guidance for MS4 Permit Writers for Municipalities</u>

DEP has several concerns about the EPA's developing stormwater rule for municipal separately sewered stormwater systems (MS4s), which we have expressed in prior submissions. In general, DEP's concern is that MS4 requirements not discourage much needed urban revitalization by making it economically infeasible, and that it be coordinated with expensive infrastructure improvement projects to address sewer overflows and improve nutrient controls that have caused significant rate increases. We ask that the Agency's eventual rulemaking and cost-benefit analysis consider (1) the need for MS4 controls in cities where CSOs may provide more loadings to the waterways, and are therefore a higher priority for control, (2) the benefits of citywide detention standards, which will allow for eventual full treatment in combined sewer areas and will protect against storm surge and scour in separately sewered areas, (3) limited lot areas and underground infrastructure in densely developed cities, which may preclude many standard on-site stormwater management techniques and requirements, and (4) that requirements related to pre-development hydrology are not applicable in redevelopment areas where urban soils exist, which are typically hardpan with low permeability. The MS4 rule should allow states to develop specific performance criteria that work for their local communities based on specific regional or local characteristics and needs, and should include workable proposals for tradable credits for redeveloping in certain areas or reducing impervious surface overall. Flexible, site-specific requirements will lower the compliance costs that the EPA must consider in connection with publication of a rule under Executive Orders13563 and 12866.

BEACH Act/Water Quality Standards/Recreational Water Quality Criteria

Similarly, DEP understands that the EPA is reassessing certain primary contact recreational water quality criteria for pathogens as required by the BEACH Act and has recently completed epidemiological studies. We look forward to reviewing those studies and providing comments in the spirit of promoting sound science.

At the same time, the EPA is proposing changes to its regulations governing water quality standards. See EPA Dkt. No. EPA-HQ-OW-2010-0606, 75 Fed. Reg. 44930 (July 30, 2010). DEP has provided comments on that rule and looks forward to further participation, including the EPA's cost-benefit analysis. As we have pointed out, the proposal to standardize uses around a "fishable/swimmable" goal would sacrifice the flexibility of the state-by-state system, which creates uses and sub-uses that are tailored to conditions within the states, and would therefore undermine the structure of the Clean Water Act, which authorizes states to set water quality standards. For example, New York and other states have sub-classifications of swimmable waters, fishable waters (e.g., fish propagation), and recreational uses. That flexibility must be preserved. Furthermore, incremental improvements in water quality may result in excessive costs for ratepayers when taking into consideration the full set of costs for clean water projects and the costs for state of good repair and upgrades, such as adaption to climate change and improved resiliency against flooding.

Accordingly, we suggested that the 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), and (4) reflect the need for supporting land-side infrastructure (e.g., public transportation and access to support bathing areas). There is a relatively small risk of exposure to humans in area where swimming is not a designated use. In the City of New York, for example, it makes sense to focus protections and higher standards on the nine permitted public beaches that cover 14 miles, are staffed with lifeguards, bathrooms, and other support facilities, and serve 20 million visitor each year during the three-month bathing season. A complete cost-benefit analysis will consider the true extent of recreational use of waters and fishing and the appropriate protective actions, and will not base requirements on remote risks borne by small numbers of people.

Our more immediate concern is how the BEACH Act criteria will be used in light of proposals to change the Water Quality Standards regulations. The BEACH Act applies to "marine coastal waters … that are designated by a State for swimming, bathing, surfing, or similar water contact activities." Congress narrowly tailored the BEACH Act to reflect the relative risks based on exposure and the federalist structure of the Clean Water Act, which provides states with the role of designating appropriate uses. Our concern is that EPA Regional Offices, enforcement

officials, or states that seek to implement the views of EPA staff will apply BEACH Act criteria to all waterways, regardless of current use designation and classification. This would trigger substantial costs – possibly in the billions of dollars for New York Harbor alone – with unclear benefits. At a minimum, such decisions should be subject to the cost-benefit analysis and disclosure required by Executive Orders 13563 and 12866 because of the great social impact. Leaving such critical decisions to enforcement proceedings or administrative actions that are not formal rulemakings would be contrary to the spirit of these executive orders and the principles of sound regulatory decisions.

Water quality regulatory decisions must consider practicality, need, equitable impacts, and tradeoffs with other social and environmental goals. We welcome a public dialogue about appropriate use classifications in the Harbor, and DEP has held several stakeholder meetings with environmental groups about water quality, and published its own strategic plan that reflects input from those discussions. In addition, DEP and the City have created an extensive public process for waterfront planning our coastline, which is over 500 miles. Among other things, these sessions have made clear the widespread acknowledgement that our 156 square mile Harbor must continue to support many uses, as are currently designated under State law, and that the most stringent use classifications are accompanied by tradeoffs of other social and environmental goals. Of course, many would like to see an expansion of swimmable areas, and DEP is willing to work with stakeholders to identify appropriate areas that have benefited from the billions of dollars that we have invested in water quality – but those efforts may be inhibited depending on the outcome of the BEACH Act criteria.

Additionally, when assessing the microbial indicator criteria and monitoring requirements of the BEACH Act, EPA should work with local authorities to provide feedback regarding field logistics, funding, equipment, certifications, and human resources. The requirement of rapid testing may result in a heavy burden on local regulatory agencies and the cost-benefit-analysis of such a requirement should be performed.

Thank you for the opportunity to provide these initial comments and to inform EPA's formation of a preliminary plan. We look forward to working with you on this process as it moves forward, and can be available to meet at any time on this, or any other issue.

Sincerely,

Caswell F. Holloway

Encl.: DOHMH study of Hillview Reservoir

c: Robert Perciasepe, Deputy Administrator, EPA
Judith Enck , Regional Administrator, EPA Region 2
Cass Sunstein, Administrator, OIRA