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New York State Department of Environmental Conservation

Division of Water

Bureau of Water Compliance, 4th Floor

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Alexander B. Grannis
Commissioner

March 5, 2010

Ms. Karen Argenti and
Mr. Dart Westphal
Co-Chairs of the BCEQ Water Committee
The Bronx Council for Environmental Quality
P.O. Box 265
The Bronx, New York 10464-0265

RE: Designation of Bronx River and Harlem River, including the Bronx Kill, as Sensitive Areas

Dear Ms. Argenti and Mr. Westphal,

This is in response to your February 17, 2010 letter (enclosed) addressed to Ms. Sue McCormick, P.E. of my staff, requesting DEC to designate the Bronx River, Harlem River and the Bronx Kill as "sensitive areas" under the USEPA Combined Sewer Overflow (CSO) Long Term Control Policy ("the CSO Policy"). The CSO Policy defines a sensitive area as those designated as "...Outstanding National Resource Waters, National Marine Sanctuaries, waters with threatened or endangered species and their habitat, waters with primary contact recreation, public drinking water intakes or their designated protection areas, and shellfish beds." Your request is based primarily on your statement that "Both the Bronx River and Harlem River, including the Bronx Kill... support primary contact recreation."

The designation of a waterbody as a sensitive area is done during the development of a Long Term Control Plan (LTCP) by a municipal State Pollution Discharge Elimination System (SPDES) permittee. The State's role in this designation process is to review, comment on and approve the LTCP. Approval of the LTCP would constitute the State's agreement with a municipality's sensitive areas designations. A LTCP has not yet been developed for either the Bronx or Harlem Rivers. However, the Waterbody/Watershed Facility Plan (WWFP) for the Bronx River dated July 2009 does review the potential for sensitive area designations for those portions of the Bronx River that receive CSO discharge (tidal portion) and concludes that no sensitive areas exist. Under the "waters with primary contact recreation" category, it is stated that there are no public access points for swimming, i.e. bathing beaches, so the Bronx River does not meet the criteria to be a sensitive area. Additionally, in the Open Waters WWFP, which

covers the Harlem River, no sensitive areas were identified in the Harlem River, even though many sensitive areas were identified for other portions of the Open Waters.

The New York City Department of Health and Mental Hygiene (NYCDOHMH) only allows bathing at authorized bathing beaches and only during the bathing season. Under the Rules of the City of New York, Title 24, New York City Health Code, Article 167.03, bathing is defined as “recreational activities where any part of the human body may come in direct contact with water to the point of complete body submergence. Bathing includes, but is not limited to, swimming, diving and wading. Bathing does not include any activities where contact with the water is minimal and where ingestion of the water is not probable, such as fishing and boating.”

Further, Article 167.05(d) of the New York City Health Code was amended on March 24, 2009 to allow boundaries delineated for primary contact recreation to be defined by applicable surface water classification regulations of the NYSDEC. Specifically it reads, “(d) Restriction. No person shall operate, construct or maintain and no permit shall be issued for a bathing beach within 750 feet of the point of discharge of the outlet of any sanitary sewer, the flow of which would contribute in any way to the pollution of the waters used by the bathers, and located outside the boundary delineated for primary contact recreation as defined by applicable regulations of the New York State Department of Environmental Conservation (see 6 NYCRR § 700.1; see also, 6 NYCRR Parts 890, 891). “Primary contact recreation” shall mean recreational activities where the human body may come in direct contact with raw water to the point of complete body submergence. Primary contact recreation includes, but is not limited to, swimming, diving, water skiing, skin diving and surfing.”

The City of New York does not condone bathing in the tidal Bronx River, Harlem River or the Bronx Kill as these waterbodies do not have water quality classifications that support primary contact recreation. They are classified as Class I. The best usages of Class I waters are secondary contact recreation and fishing. Secondary contact recreation means recreational activities where contact with the water is minimal and where ingestion of the water is not probable. Secondary contact recreation includes, but is not limited to, fishing, boating, canoeing and kayaking. A Class SB waterbody would support primary contact recreation, as the best usages are primary and secondary contact recreation and fishing,

In the WWFP for the Bronx River, the NYCDEP has evaluated elimination of 100% of the CSOs in the tidal portion of the River. Should all CSOs be eliminated, the tidal portion of the River will not consistently achieve the Class SB standards because of other non-CSO sources of pollution, including background conditions from the East River. The tidal portion of the Bronx River would not qualify for an upgrade in classification to Class SB. Therefore, the tidal portion of the Bronx River in all likelihood will be unable to support primary contact recreation.

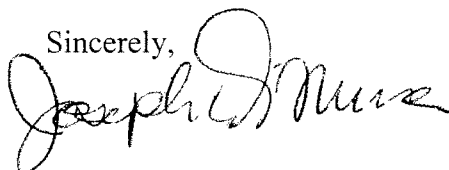
DEC recognizes that there are continuing water quality issues in the Class B freshwater portion of the Bronx River that are not attributable to CSOs. The Department continues to address these issues through rigorous enforcement of Westchester County’s stormwater MS4 permits. Additionally, the New York State Attorney General’s Office has taken legal action against six municipalities in Westchester County in the past few years and continues to pursue compliance with their orders. However, even if the freshwater portion of the Bronx River met

the Class B primary contact standards, bathing would not be allowed by NYCDOHMH because there are no designated bathing beaches on the River.

The goal of Mayor Bloomberg's PlaNYC 2030 is to make all waterbodies in New York City capable of supporting secondary contact recreation. The current WWFPs being finalized by NYCDEP are striving to meet that goal as well. This goal, combined with the New York City Health Code, do not indicate that the Bronx River, Harlem River or Bronx Kill would meet the CSO Policy designation of "waters with primary contact recreation" and therefore, as NYCDEP has indicated in the WWFPs, and the Department would agree, these waterbodies do not meet the designation of "sensitive areas."

If you have any further concerns, please contact me at (518) 402-8177 or Ms. Sue McCormick, P.E. at (518) 402-8199.

Sincerely,



Joseph DiMura, P.E.

Director

Bureau of Water Compliance

Enclosure

cc w/Encl.: Judith Enck, EPA Region 2
Suzanne Mattei, NYSDEC Region 2
Hon. Ruben Diaz, Bronx Borough President
Hon. Jose Serrano, Representative 16 CD
Hon. Joseph Crowley, Representative 7 CD
Hon. Eliot Engel, Representative 17 CD
Eugenia Flatow, NYC SWCD
Linda Cox, Bronx River Alliance
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Larry Levine, NRDC
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February 17, 2010

Ms. Sue McCormick, P.E.
NYS Department of Environmental Conservation
625 Broadway, 4th Floor
Albany, NY 12233-3506 by email sdmccorm@gw.dec.state.ny.us

**RE: Designation of Bronx River and Harlem River,
including the Bronx Kill, as Sensitive Areas**

Dear Ms. McCormick:

This is to request that NYSDEC designate the Bronx River and Harlem River (including the Bronx Kill) as "*sensitive areas*."

Under NYSDEC Long-Term Control Plan Requirements, sensitive areas "*shall include waters with threatened or endangered species and their designated critical habitat, waters with primary contact recreation, public drinking water intakes or their designated protection areas and any other areas identified by the permittee or permitting authority, in coordination with appropriate State or Federal agencies:...*" [emphasis added]

Both the Bronx River and Harlem River, including the Bronx Kill (hereinafter referred to and constituting the whole of the *Bronx and Harlem Rivers*) support primary contact recreation.

"Primary contact recreation" has been defined by the U.S. EPA to include: swimming, rafting, wind surfing, canoeing, kayaking, tubing, scuba diving, snorkeling, water skiing, other.¹ Other states have adopted EPA's perspective that "*primary contact recreation*" means activities "(1) where there is a high likelihood of incidental ingestion of water,Examples include, but are not limited to, kayaking, tubing, skin diving . . ." ² The reasoning clearly is to protect the public health: with "*primary contact recreational uses such as swimming and kayaking, health risk increases with fecal coliform count in the waterbody. For a waterbody to comply with Virginia regulations, fecal coliform standards for primary contact recreational use must be met.*"³ Canoeing and kayaking are supported for both the *Bronx and Harlem Rivers*. The NYC Department of Parks and Recreation⁴ promotes kayaking in Bronx & Harlem Rivers, as does community residents.⁵ There is active scuba diving in the Harlem River.⁶ The *Bronx River Alliance* Recreation Program⁷ works to develop the Bronx River Greenway through canoeing,

¹ see e.g. www.epa.gov/region6/water/ecopro/watershd/standard/rec-uaa_worksheet.pdf

² see, e.g. www.waterquality.utah.gov/WQS/20071017_Follow-up_Email_WQS_Mtg.pdf

³ see, e.g. townhall.virginia.gov/GetFile.cfm?File=E:\townhall\docroot\103\599\1377\dcq1377%a28wqstandards%a29.pdf, p. 2

⁴ www.nycgovparks.org/facilities/kayak

⁵ see www.harlemrivercommunityrowing.org

⁶ see e.g. www.urbandivers.org/

⁷ See www.bronxriver.org/?pg=content&p=getinvolved&m1=32

kayaking, and bicycling.⁸ Additionally, the Harlem River serves as one of the venues for area crew teams (e.g. Columbia University, Manhattan College) and, on information and belief, tubing and snorkeling also take place in and on both rivers.

In and of itself, the public's use of the *Bronx and Harlem Rivers* for primary contact recreation should provide sufficient cause and justification for NYSDEC to designate both rivers as a "sensitive area." Additionally, other New York State definitions of "*environmentally sensitive areas*" have been even more expansive and include: "...*areas of aquifer recharge, exceptional scenic beauty, exceptional forest character, open space, pine barrens, public access, trailways, unique character, wetlands and wildlife habitat...*" [emphasis added]. (see e.g. NYS Environmental Quality Bond Act of 1986).

Finally, in other urban areas, such as Philadelphia, canoeing and kayaking is considered primary contact recreation in keeping with Pennsylvania and EPA authorities. "*Direct contact recreation is also called "primary" contact recreation by state and federal authorities. ... primary contact recreation includes any activity that is likely to cause immersion in the water and includes jet skiing, swimming, kayaking, wading, and water skiing.*"⁹ In Washington, D.C., James Woodworth of NRDC mentioned in his paper "Balancing Bathers and Bacteria ..." that: "*despite the swimming ban, and the current uses recognized by the regulatory body, . . . the reality is that primary contact recreation, and other activities that pose high risk of exposure to bacteria contamination, including fishing, wading, rowing, kayaking, and swimming, do occur in or on the major water bodies . . .*"¹⁰

There is no doubt that both the *Bronx and Harlem Rivers* possess the attributes that would qualify both for designation as "environmentally sensitive areas" under traditional and broader ~~this~~ broader definitions.

Therefore, based upon the above cited qualifications, the NYSDEC is hereby petitioned and requested to designate the **Bronx River and Harlem River (including the Bronx Kill)** as a "sensitive area".

Sincerely,

Dart Westphal Karen Argenti

Dart Westphal and Karen Argenti,
Co-chairs of the BCEQ Water Committee

c: Judith Enck, EPA Region 2
Suzanne Mattei, NYS DEC Region 2
Hon. Ruben Diaz, Bronx Borough President
Hon. Jose Serrano, Representative 16 CD
Hon. Joseph Crowley, Representative 7 CD
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Eugenia Flatow, NYC SWCD
Linda Cox, Bronx River Alliance
Harlem River Working Group
Larry Levine (NRDC) and Philip Musegaas (Riverkeeper)

⁸ See also the news story about these events: www.bronxnewsnetwork.org/2009/05/summer-on-bronx-river.html

⁹ see www.phillyrivercast.org/nav_definition.aspx

¹⁰ www.epa.gov/waterscience/standards/uses/symposium/abstracts/woodworth.pdf