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VIA EMAIL

New York State Department of Environmental Conservation
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Re: Proposed Rulemaking Regarding New York City Saline Water Classifications and Harlem River Use Attainability Analysis

Dear Ms. Temple,

We respectfully submit the following comments on behalf of Riverkeeper, Inc., Save the Sound, Natural Resources Defense Council, Waterkeeper Alliance, and Bronx Council for Environmental Quality (the Environmental Groups) regarding the Department of Environmental Conservation's (DEC) April 16, 2025 Notice of Proposed Rule Making published in the State Register to amend Parts 701, 703, 864, 890, 891, 920, and 935 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, including the Harlem River Use Attainability Analysis (UAA) and the Financial Capability Assessment (FCA) referenced in and supporting the proposed rule (together, the Proposed Rule). The Environmental Groups do not believe that the Proposed Rule satisfies the requirements of the Clean Water Act (the CWA or the Act), and the UAA and FCA do not provide a legal basis for the proposed Harlem River reclassification, which would exempt the waterway from bacterial limits during and following wet weather. Further, the Environmental Groups further believe that the Proposed Rule's compatibility with the Clean Water Act is a question that must be resolved by submission of any final rule to EPA upon publication and prior to any subsequent revisions to other water quality standards for the waters around New York City.

It is the Environmental Groups' goal that the Rule Making, analyses, and actions by DEC and New York City Department of Environmental Protection (DEP) drive cost-effective progress toward improving sewer infrastructure and water quality. We thank DEC for designating six water body segments as Class SB, which will set water quality goals as safe for swimming and other recreation. Other water body segments, however, are receiving lesser designations. Overall, it is evident from the Regulatory Impact Statement that the Proposed Rule is merely recognizing the status quo for these water body segments based on existing Long Term Control Plans (LTCPs) rather than driving further progress. The Rule Making will have little tangible impact on water quality, except for a $17.5 million improvement to install de-chlorination at the Port Richmond Wastewater Treatment Plant and a $20,415 investment to install dechlorination at Goethals Mobile Park.[1] These investments, while sizable and important for water quality, will not address the roughly 21 billion gallons of raw sewage and polluted stormwater that New York City discharges annually to surface waters through combined sewer overflows. The Environmental Groups urge DEC to revise the Proposed Rule to ensure incremental, meaningful reduction in these sewer overflows.

Accepting the current UAA and FCA as drafted would also mean embracing the status quo for the Harlem River, which receives an estimated 1.9 billion gallons of combined sewer overflow annually—more than 5 million gallons per day on average—causing unswimmable conditions and contributing to low dissolved oxygen and nutrient exceedances in the East River and Long Island Sound. The UAA fails to adequately consider a range of projects that may produce meaningful incremental reductions in overflows. The FCA seeks to justify avoiding further investments in reducing sewage overflows based on this inadequate UAA, and the UAA both fails to adequately support the proposed "highest attainable use" and compares the cost of doing nothing to only the cost of full achievement of water quality standards. Taken together, the FCA and UAA argue for no meaningful progress to improve recovery time nor accommodate larger storms through a reduction in sewage overflow volume. They provide an argument that—if accepted—would prevent the city from achieving its stated goal of eliminating sewage overflows by 2060.[2]

The wet-weather (ww) designation, based on the inadequate UAA and flawed FCA, in the draft regulations is a poor substitute for what DEC should have done, and must do in the final regulations: for all of these waters: define and require New York City to achieve meaningful, incremental water quality improvements via variances or reclassifications that seriously examine infrastructure investments that can improve water quality, within realistic financial constraints. The Environmental Groups urge DEC to designate the Harlem River as Class SB, setting the goal for the water as safe for primary contact recreation, and to pursue temporary (five-year)

[1] N.Y. Dep't of Envtl. Conservation, Regulatory Impact Statement (RIS) Saline Water Quality Standards & Reclassification Rule 1, 6 NYCRR Parts 701, 703, 864, 890, 891, 920 & 935, at 14 (2025), https://dec.ny.gov/sites/default/files/2025-04/ris_salinewaterquality_standardsandreclass.pdf.

[2] New York City, PlaNYC: Getting Sustainability Done 87 (2024) https://climate.cityofnewyork.us/wp-content/uploads/2023/06/PlaNYC-2023-Full-Report.pdf.

variances from this use, as the state and the city, with robust public involvement, continue to identify cost-effective measures to reduce CSO discharges in the coming years toward the city's goal of zero CSO. DEC should require the revision of the DEP's UAA and pursue further evaluation of potential alternatives, such as phased development of a CSO capture tunnel; treatment capacity increases at Rikers Island; and neighborhood-scale green infrastructure implementation. The planned daylighting of Tibbetts Brook, which will provide for both improved water quality and improved access to green spaces for overburdened neighborhoods, is a laudable project and an example of the type of infrastructure improvement that should be explored.

In sum, while the Environmental Groups are pleased to see use designations for several waterbodies being upgraded, the Proposed Rule overall falls unacceptably short of the Clean Water Act's goals and requirements for fishable and swimmable waters, resigning the Harlem River to business as usual and setting a concerning precedent for other New York City waters. While the Environmental Groups understand that DEC's view of this may be different, the resolution of the question of consistency with the Clean Water Act must be resolved by submission of any final rule to EPA before revising any other water quality standards for the waters around New York City. We elaborate on our reasoning below.

Submission to the United States Environmental Protection Agency

As a threshold matter, the full Rule Making, including the UAA and FCA, must be submitted to EPA immediately upon finalization. The Proposed Rule does not address this issue, but DEC has not yet committed to immediately submitting the final Rule to EPA prior to commencing revisions of any other water quality standards for other water body segments around New York City. This is not acceptable legally or practically.

As DEC is aware, submission to EPA is what is required by the Act (33 U.S.C. § 1313(c)(2)). This requirement is even more important here, because other water body segments, particularly those surrounding New York City, will similarly require variances or reclassifications, so the precedent set by the Proposed Rule will likely be repeated for those waters. Without knowing if the redesignations, UAA, or FCA proposed in the Rule Making are consistent with the Act according to EPA, it will be impossible to make meaningful progress on water quality standards for any water body segment that DEC intends to revise in the future based on similar analysis or methodology. Absent submission and approval by EPA, the Proposed Rule is nothing more than a guess as to what ultimately will be the applicable water quality standards. Accordingly, immediate submission to EPA is necessary for the Proposed Rule to be of any value.

Use Redesignation Issues

A. Class SB Designations

The Environmental Groups strongly support DEC's proposal to designate the Hudson

River, Raritan Bay, certain Tributaries of Jamaica Bay, Hawtree Basin, Shellbank Basin and Sheepshead Bay as Class SB waterways. These designations would support swimming uses of these waterways. Where CSOs are continuing to impact waters, the designations will set the waters on a path toward swimmability and may even allow New York City to open weather dependent beaches in those areas in the near future. These six designations represent a significant step forward for New York.

Nevertheless, the Environmental Groups are concerned that there is little evidence that these classifications will result in infrastructure upgrades, given the limited investments contemplated in the Regulatory Impact Analysis. Such upgrades are critical to protect human health. Substantial evidence from community science monitoring demonstrates that near-shore areas have significant levels of contamination, exceeding swimmable criteria, following rain.

B. Class SC Designations

The Environmental Groups also support primary contact use designations for other waters currently classified as SD or I, including all of those that DEC has proposed to be classified as SC: Erie Basin, Gowanus Canal, Newark Bay, Kill Van Kull and tributaries, tidal tributaries of Arthur Kill, Old Place Creek, the tidal portion of Bodine Creek, tributaries of Seatuck Creek, tributaries of the East River, a tributary of Jamaica Bay, and the tidal portion of a tributary to Little Neck Bay. We appreciate that DEC proposes to establish strong enterococcus criteria for these waters, the same as for Class SB waters. The Environmental Groups also appreciate that DEC has asserted "the . . . reclassifications of these waters will result in Water Quality Standards protective of primary contact recreation."[3] However, DEC's history of reinterpreting the language accompanying its rule makings suggests a risk that DEC will later disclaim this statement…

In a tortured reading of New York saline water classifications, DEC has argued in court that only the first sentence of its classifications—the "best use" sentence—is relevant, and the rest of the classifications are superfluous, "auxiliary" suitability goals, irrelevant under the Clean Water Act and only operative when the state seeks to impose them. For Class SC waters, this first sentence does not include primary contact recreation. Whereas "[t]he best usages of Class SB waters are primary and secondary contact recreation and fishing," the "best usage of Class SC waters is fishing."[4] DEC's "best use" argument would conflict with the above pronouncement in the Summary Regulatory Impact Statement about the Class SC designations protecting primary contact, and does not comport with the proposed enterococcus criteria for SC waters. DEC must clarify whether the Class SC use designations establish federal Clean Water Act protections for primary contact recreation. DEC must also submit the designations and criteria for EPA approval, as EPA has made clear that the suitability language DEC deems a "goal" actually has

[3] Dep't of Envtl. Conservation, Summary Regulatory Impact Statement (RIS) Saline Water Quality Standards & Reclassification Rule 1; 6 NYCRR Parts 701, 703, 864, 890, 891, 920 & 935, at 2 (2025).

[4] 6 NYCRR §§ 701.11, 701.12.

the effect of adopting a designated use. These waters should be classified as SB absent DEC acquiescence to EPA's interpretation.

C. Class SB(ww) Regulatory Language Change to 6 NYCRR part 703.4(d)(1)

The Final Rule should reinstate the language in 6 NYCRR 703.4(d)(1) that requires DEC to follow the Clean Water Act's UAA process before designating a wet weather use. The Environmental Groups previously worked with DEC and other agencies to find acceptable language outlining the lawful steps to designating such a use. The Environmental Groups recognize and do not object to setting forth clear standards in 704.3(g) for each waterway that has already completed that required procedure. However, as DEC intends future wet weather designations, the process should remain clearly described in state regulations to ensure uniformity and legality. In other words, DEC should not remove the reference to 40 C.F.R. 131.10 from 6 NYCRR 703.4(d)(1), as the Proposed Rule suggests. Without this language, it is unclear whether DEC will enforce compliance with the Clean Water Act.

Harlem River Financial Capability Analysis Flaws

Environmental Groups have retained Jonathan S. Shefftz, an economist with specific expertise in financial capability assessments, to review and provide opinions on the draft FCA. Mr. Shefftz' memorandum to the Environmental Groups supports the analysis below and is attached and herein incorporated as part of our comments. While the Environmental Groups appreciate the DEC's regular convening of technical staff, despite multiple requests, DEP declined to meet with the Environmental Groups' expert or provide detailed year-by-year cost projections from the city concerning the potential Harlem River tunnel or the projected 25-year "baseline" capital improvement plan. These cost projections are a key part of the analysis because the cost of additional Harlem River CSO reductions is added to the baseline capital improvement plan costs to analyze the costs to residential ratepayers. As explained in Mr. Shefftz's memo, without the year-by-year breakdown, it is impossible for the public to meaningfully assess the validity of the FCA. DEP's flawed methodology, which treated the full capital costs as being bonded at the start of the 25-year period, may even have *doubled* the projected cost per household that would result from using a proper year-by-year projection.

For the above reason and many others, Mr. Shefftz's detailed review found that "the **FCA's substance does not support its conclusion** that, 'Attaining the upgraded SB use classification without WW designation in the Harlem River is not feasible in accordance with Factor 6 at 40 CFR 131.3(10)(g)' under U.S. EPA guidance" (emphasis added). He summarized his findings as follows:

1. Although New York City, like any major American municipality, faces many current and future socioeconomic challenges, the FCA essentially reverse cherry-picks from the potential data to put its worst foot forward, quite unlike how the City presents itself to its potential investors in its bond prospectuses.

2. The impacts of future sewer rate increases cannot be meaningfully assessed at this time since the FCA presents only a static one-time bonding for the $6.14 billion cost of a tunnel and the additional $43 billion cost of a 25-year capital improvement program, despite how such a major capital program over so many years would not be funded in such a simple manner. Moreover, the precise basis for the FCA's current baseline is unclear. Cost projections and the resulting calculations of cost as a share of household income need to be presented on a year-by-year basis in order to allow any meaningful assessment of financial capability. (This methodological flaw can have a huge impact on the results of the analysis. For example, looking at the FCA of another major municipality that appropriately relied on year-by-year projections, that municipality's projected sewer bill as a percentage of household income would have almost *doubled* if it had followed the City's approach.)
3. The $6.14 billion cost estimate is a significant reduction from the prior estimate of $9.3 billion only a few months earlier. But despite this reduction, the total cost per household has somehow increased, instead of decreased. The lack of transparency regarding this counterintuitive change further emphasizes the need for detailed year-by-year modeling and the inadequacy of the City's current presentation.
4. Once the detailed year-by-year capital program amounts are ready to be analyzed, the annual sewer rate impacts on households also need several adjustments, including to account for the amounts that would be absorbed by landlords (as opposed to being passed onto tenants), the alternatives for the expenditures to be financed via means other than sewer user fees, and the possibility of receiving outright grants or loan forgiveness (or below-market rate loans), as well as correcting for the overly high escalation factor the City used to project future capital costs.
5. Furthermore, while the FCA seeks to characterize cost impacts on the lowest quintile of household income, the City's calculations do not account for its own existing programs to reduce sewer costs for lower-income households or for additional programs the city could adopt (including some it is actively considering) to further mitigate sewer costs for those households.

In addition, the FCA implausibly claims that increased water and wastewater costs would lead to a downward spiral in the city's economy, resulting in a future decrease in household income.[5] In reality, no such macroeconomic impacts can reasonably be attributed to the marginal cost of Harlem River CSO controls, which would be, effectively, a rounding error relative to the city's overall expenditures.

The FCA also includes a deeply flawed analysis of environmental justice considerations. The arguments regarding environmental justice entirely ignore the environmental justice impacts of leaving the community burdened by water polluted by excessive CSO events. The Harlem River and the communities surrounding it bear the brunt of the pollution, and host two of the

[5] FCA at 10-1.

highest-volume CSO outfalls in the city, WIB-056 (582 million gallons per year) and WIB-060 (285 million gallons per year). The analysis implicitly assumes, with no justification, that environmental impacts from building a tunnel are more significant than the impacts from the water pollution from CSOs. While other communities in New York City will benefit from sewer infrastructure projects, like the sewage capture tanks in Gowanus, and the capture tunnels slated for Newtown Creek and Flushing Bay, the Harlem River has no relief in sight, despite its watershed being home to some of the most economically disadvantaged communities in the country.

Finally, as described below, the UAA fails to consider a range of investments that could meaningfully improve water quality. Because these options are not scoped in the UAA, the FCA cannot consider their cost-feasibility. The UAA must identify a range of options, and then those options must be considered in a revised FCA.

Harlem River Use Attainability Analysis Deficiencies

A. A Variance is the Only Appropriate Mechanism to Reach Highest Attainable Use.

DEC's decision to pursue a UAA for the Harlem River is fundamentally flawed because the UAA cannot be used to justify a permanent relaxation of water quality standards in the Harlem River. For the many reasons stated herein, and in Environmental Groups' letter to parties dated February 29, 2024, a variance is the only appropriate mechanism to allow for all feasible improvements to reach the Harlem River's highest attainable use (HAU).[6] Moreover, EPA's Financial Capability Assessment Guidance states that "substantial and widespread economic impact" factor (Factor 6) may be appropriate to consider for a time-limited variance, but it discourages using that factor as a basis for setting a permanent designated use because economic factors may change over the long run.[7] Yet that is what DEC has done here.

DEC has expressed in the cover sheet for the UAA that the UAAs could be reviewed as part of five-year permit updates for each Wastewater Resource Recovery Facility (WRRF). Given that the five-year interval for review is exactly the scheme delineated by the variance regulations, it makes no sense to attempt an end run around those procedures via a permanent relaxation of water quality standards. Following the variance procedures and requirements established at 40 CFR § 131.14 would require DEC to continually confirm the Harlem River is

[6] Letter from Todd Ommen to Defendants in Riverkeeper v. Regan, 1:17-cv-4917-VSB (S.D.N.Y.) at 3-6 (Feb. 29, 2024) ("[T]here remains significant uncertainty as to what uses will be attainable after completion of the LTCPs. Time-limited variances are a better means to address this uncertainty, rather than a permanent redesignation. The information collected throughout the term (or terms) of the variances can inform subsequent determinations on the appropriate water quality standard for the water body segments currently affected by CSO and non-CSO discharges.").

[7] EPA Office of Water, Clean Water Act Financial Capability Assessment Guidance at 36 (2024), https://www.epa.gov/system/files/documents/2023-01/cwa-financial-capability-assessment-guidance.pdf

meeting the highest attainable use and highest attainable interim use.

DEC argues without basis that "a WQS Variance requires an endpoint that meets the baseline WQS."[8] Nothing in the regulations supports that statement. To the contrary, EPA's draft guidance on variances recommends that where a state finds that a "designated use and criterion remain unattainable for a period of time, but additional water quality *progress* can still be made [the state] can pursue adopting a subsequent WQS variance consistent with 40 CFR § 131.14."[9] DEP expects to make further progress to improve water quality in the Harlem River, including through the proposed green infrastructure projects, and even goes so far as to set a goal of eliminating CSOs in 2060. Those commitments favor a variance over a redesignation.

B. The Reclassification Is Not an Upgrade

The UAA repeatedly describes the Harlem River SB(ww) reclassification as an upgrade. This is not accurate. As a Class I waterway, the Harlem River was previously designated as a swimmable waterway. As explained by Environmental Protection Agency Region 2 Clean Water Division Director Javier Laureano, DEC promulgated, and EPA approved, the recreational use in 2015 and 2016, respectively:

> On February 24, 2016, the United States Environmental Protection Agency (EPA) received the New York State Department of Environmental Conservation (NYSDEC) revisions to New York State's water quality standards (NYSWQS). These revised water quality standards (WQS), adopted by the NYSDEC on November 4, 2015, amended the designated uses of Class I and Class SD saline surface waters [including Harlem River] to include a designated use of primary contact recreation (6 NYCRR §§ 701.13 and 701.14). Additionally, these revised WQS amended the water quality criteria for Class I and Class SD saline surface waters (6 NYCRR Part 703). In a letter dated May 9, 2016, the EPA approved, pursuant to Section 303(c) of the Clean Water Act (CWA), 33 U.S.C. §1313(c), the revised designated uses of Class I and Class SD saline surface waters at 6 NYCRR Part 701.19.[10]

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[8] New York State Department of Environmental Conservation, Fact Sheet for the Use Attainability Analysis of the Harlem River; Notice of Proposed Rule Supporting Documentation at 4 (2025), https://dec.ny.gov/sites/default/files/2025-04/harlemriveruseattainanalysis.pdf.

[9] EPA, Water Quality Standards Handbook Draft Chapter: Water Quality Standards Variances at 58 (2024), https://www.epa.gov/system/files/documents/2024-12/draft-chapter-wqs-variances_public-comment_508c.pdf (emphasis added).

[10] Letter from Javier Laureano, Director of Clean Water Division at EPA, to Mark Klotz, N.Y. DEC (Mar. 7, 2018) (citation omitted).

The Environmental Groups recognize that DEC has disputed this issue. They request that DEC remove the "upgrade" language from the UAA and FCA and use more neutral language, if DEC is to continue with a UAA rather than a variance. At the very least, DEC should include an acknowledgement that this issue remains in dispute.

C. The UAA Is Substantively Flawed.

Aside from being an inappropriate mechanism to reach the Harlem River's HAU, the UAA as proposed does not satisfy the requirements of the Clean Water Act or EPA policy. While, as made clear above, Environmental Groups do not support DEC moving forward with the UAA and advocate instead for a variance, DEC must at the very least address the following deficiencies in the UAA, given that there are many common features to a UAA and Variance.

1. *"Highest Attainable Use" Is Not Adequately Supported Without an Examination of Pollution Reduction Strategies That Could Improve Water Quality Short of Full Swimmability.*

The UAA poses a false dilemma of an "all or nothing" choice, comparing only the cost impacts of making no improvements following the Tibbetts Brook project or building a 75% or 100% storage tunnel. The UAA must identify strategies to improve water quality so that the Harlem River achieves water quality standards during more days and hours. Fewer days of discharge and/or more hours of swimmable water quality is a "higher" use than fewer and would bring the waterway closer to the uses specified in Clean Water Act Section 101(a)(2), as required by 40 CFR § 131.3(m). The CSO Control Policy directs that DEP perform a knee of the curve analysis "to determine where the increment of pollution reduction achieved in the receiving water diminishes compared to the increased costs."[11] That analysis was not completed. To support a UAA based on Factor 6, as DEP has tried to do here, and as the Department is proposing to accept, the Department must show that reasonable progress in sewer investments over time to improve water quality and reduce the degree of wet-weather impacts would be unviable. To do so, DEC must compel DEP to consider alternatives between nothing and an immediate financial outlay for a 75% sewage capture tunnel. Meaningful progress, as defined above, toward "swimmable" water quality can be achieved through intermediate-scale projects. An example of such a project is the Tibbetts Brook daylighting, which is projected to cost approximately 1% of the projected cost of the 75% storage tunnel,. We criticized similar deficiencies in the Citywide/Open Waters LTCP for failing to identify any but the least expensive and impactful interventions, as well as the most expensive and impactful interventions, to the exclusion of intermediate-scale interventions that could provide meaningful incremental improvements at affordable costs. The UAA repeats this error for all sewage-impaired waters citywide in Table 4-15. The chart lists the costs of 75% and 100% sewage capture, where 100% capture adds up to an enormous total of more than $102 billion in infrastructure costs. The table

[11] CSO Control Policy at II(C)(5), 59 Fed. Reg. 18688, 18693 (Apr. 19, 1994), https://www.epa.gov/sites/default/files/2015-10/documents/owm0111.pdf.

is a great reminder of the city's tremendous problems with CSO discharges, and the known projects that it is *not* undertaking.

The UAA must avoid repeating the deficiency in the LTCP. It must identify and analyze an adequate range of alternatives, including new interventions and interventions already identified in other plans and documents, including both gray and green infrastructure. These alternatives should be considered both separately and in combination to identify the degree to which they can reduce sewage overflows, improve recovery time, or yield other meaningful improvements. The FCA, likewise, will have to be revised to consider intermediate-scale projects.

For instance, the UAA discards the 25% and 50% tunnel designs, estimated to cost $800 million and $1.9 billion, respectively, stating that they do not "result in any substantive improvements in overall water quality." This statement is demonstrably false, as the 50% tunnel design could reduce CSO discharges by 991 million gallons per year, bringing the water substantially closer to meeting the swimming use, and commence a phased approach to reducing CSOs in the Harlem River to hit DEC's 2060 zero CSO target.[12] These tunnels should be carried forward for full consideration in the UAA, and their cost-feasibility should be considered in the FCA.

The LTCP considered only tunnels of the same length with different diameters to capture different volumes of CSO from a different set of outfalls. The UAA should consider shorter tunnels connected to one or more of the largest outfalls. Moreover, DEC should direct DEP to study a plan for phased implementation of a sewage capture tunnel, starting with a tunnel at the southern portion of the Harlem River to connect to Wards Island WRRF or to the potential new Rikers Island plant. The tunnel could be built out to capture 25% or 50% of the southernmost CSOs with the goal of immediate water quality improvements, and also allow for future construction phases that will continue to expand the tunnel northward. As these projects take decades, the costs would be spread over time.

Phasing a tunnel project to capture overflow from CSOs closest to Wards Island first, with later phases sequenced to extend benefits to the entire river over time, could diminish the fiscal impact of a tunnel project, while achieving meaningful incremental improvements to water quality through reduced overflow volume. This approach could align with the 2024 Renewable Rikers feasibility study, which describes how four WRRFs built between 1939 and 1952 can be replaced with a new treatment facility on Rikers Island, making each of the older facilities available for conversion for wet-weather treatment. DEP found that constructing a new WRRF on Rikers Island would be feasible and less costly than refurbishing older plants, including Ward's Island.

[12] UAA at 4-20.

2. The UAA Should Incorporate Opportunities for Green Infrastructure and Quantify Their Potential Contributions to Water Quality Improvements in the Harlem River.

DEC should also direct DEP to complete its green infrastructure analysis. Other than for Tibbetts Brook, there is no analysis in the UAA of the 65 buried streams that might be daylighted in order to reduce sewage overflows and provide other benefits. And besides the Tibbetts Brook project's impact on CSO WIB-056, there is no outfall-specific analysis of reducing overflow volume from any of the five CSOs (WIM-046, WIB-056, WIB-057, WIB-060, and WIB-062) that contribute roughly two-thirds of the discharge volume to the Harlem River. These options should be analyzed in a revised UAA.

While the UAA identifies a number of potential green infrastructure opportunities, it delays further analysis to some future date. In its February 25, 2025 presentation, DEP asserted that it "is targeting 22 green infrastructure projects in the watershed."[13] The UAA concedes that green infrastructure implementation "will require additional planning analyses to identify specific opportunities that may exist."[14] The analysis should be incorporated as part of the UAA planning,[15] and DEC should direct DEP to complete this analysis prior to approving the UAA. Where the WRRF operator acknowledges but fails to analyze the feasibility of future water quality improvements, the UAA cannot serve to justify the relaxation of a designated use in perpetuity. Those potential water quality improvements must be examined first.

Further, DEP has at its disposal multiple municipal and state reports containing relevant information; for example, reports related to the riverfront revitalization program, comprehensive waterfront management or revitalization plans, and brownfield opportunity reports, just to name a few.[16] Some of these plans include ideas for projects, including green infrastructure projects, and should be analyzed as alternatives in the UAA. The Harlem River Watershed & Natural Resources Management Plan,[17] for example, provides a vision and goals for the Bronx portion of the Harlem River watershed; introduces 14 strategies, 77 watershed-wide, and 97 site-specific recommendations for achieving the stated goals; and identifies priority projects. The plan builds

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[13] New York City Dep't of Envt'l Protection, Presentation, Harlem River; Use Attainability Analysis Public Meeting, at slide 14 (Feb. 25, 2025).

[14] UAA at vi.

[15] *See* Memorandum from Benhamin H. Grumbles, Assistant Administrator, U.S. Envtl. Protection Agency, to EPA Regional Administrators, "Using Green Infrastructure to Protect Water Quality in Stormwater, CSOP, Nonpoint Source and other Water Programs (Mar. 5, 2007).

[16] *See* Bronx Council for Environmental Quality, 25 Selected Studies of the Harlem River over 35 years (2024), https://bceq.org/2017/05/14/25-selected-studies-of-the-harlem-river-over-35-years/.

[17] New York City Department of Parks & Recreation, Harlem River Watershed and Natural Resources Management Plan for the Bronx (2020) [hereinafter Harlem River Watershed Plan], https://static.nycgovparks.org/images/pagefiles/155/FINAL-HR-Wshed-Plan-spread 5fc54e9b16626.pdf.

upon past planning efforts and would not have been possible without input from community partners, including the Bronx Council for Environmental Quality, and the support from the Urban Waters Federal Partnership and the New York-New Jersey Harbor & Estuary Program. The watershed plan, published in 2020 by NYC Parks, identified 28 green infrastructure opportunities that would reduce stormwater volumes contributing to the largest CSOs discharging into the Harlem River: WI-056, WI-060, WI-062, and WI-068. These projects should be recognized and clearly evaluated before approving the UAA.

3. The UAA Should Consider Alternatives that Address Post-CSO Water Quality.

Alternatives to addressing the impacts of CSO pollution once it is in the water should be considered to supplement the impact of gray and green infrastructure improvements that reduce the volume and frequency of CSOs. For example, the potential for using ribbed mussel beds along the waterfront of the Harlem River has been contemplated,[18] but it is not adequately accounted for in the UAA. These mussel beds would be placed around WI-056, the largest CSO, and the location where the soon-to-be daylighted Tibbetts Brook will enter the Harlem River. This particular treatment train could be utilized along other areas on the Harlem River such as WIB-066 and other large CSO outfalls.

These—and potentially other—CSO pollution reduction strategies should be analyzed in a revised UAA to identify projects that are affordable relative to a revised FCA, which would achieve higher attainable uses, defined by meaningful reductions in sewage overflows that reduce recovery time after precipitation and increase the number of days and hours that the Harlem River meets water quality standards. Until intermediate-scale projects, such as those outlined above, are identified and compared in a revised FCA, the UAA cannot reasonably be based on Factor 6. Similarly, arguments made relative to Factor 3 must be rejected because they are based on the same concern about investing in a 75% or 100% storage tunnel relative to other clean water investments, as described in further detail below. Until right-sized projects and their costs are adequately identified and considered, the economic impact of implementing projects to improve water quality and meet higher attainable uses cannot be accurately assessed.

4. The UAA Inappropriately References Factors 3 and 4.

DEC references Factors 3 and 4 despite that it bases the UAA on only Factor 6. DEC describes the regulatory process at 40 CFR § 131.10(g): "UAAs can provide analyses for multiple UAA factors; however, regulatory agencies base designated use decisions on one of the six UAA factors that must be met in entirety."[19] To invoke one of the factors, conditions must demonstrate that it fully and permanently precludes the use. DEC cannot rely on a mix of multiple factors that only partially preclude that use. However, DEC goes on to assert "DEP also

[18] *See*, *e.g.*, New York Restoration Project, Understanding Sherman Creek's Living Shoreline (Apr. 20, 2020) https://www.nyrp.org/en/blog/understanding-sherman-creeks-living-shoreline/.

[19] UAA at vii.

finds that UAA Factors 3, 4, and 6 *build on each other* to establish the Class SB . . . WW Limited Use designation."[20] This explanation is confusing and undermines the ability of the public to participate in the UAA and rulemaking process. References to those factors should be eliminated entirely.

To the extent DEC intends to rely on Factors 3 and 4 in the future to support the Rule Making, the discussions of those factors do not demonstrate that the use is precluded.

a. The UAA arguments under Factor 3 are unsupported or irrelevant.

As noted above, one of the arguments in the UAA is that investing more in CSO control will "cause more environmental damage to correct than to leave in place" because it would divert spending from other valuable environmental improvements.[21] This argument is presented without support from quantitative data and is inconsistent with EPA guidance. Unlike other UAAs that specify how funding would be diverted from other, more beneficial water quality projects to justify foregoing further CSO reduction, DEP fails to identify or commit to any other water quality project.[22] The EPA Office of Water issued a memo in January 2024 expressing skepticism toward reasoning like that utilized here by DEP when justifying a UAA based on Factor 3.[23] Put simply, the memo requires that hypothetically foregone opportunities be specifically related to and address the same contaminants at issue with the CSO events, and should be set out with details and analyses concerning those hypothetical opportunities.[24] A blanket concern about other unspecified, lost opportunities does not satisfy this factor.

The invocation of Factor 3 seems to be based, at least in part, on the community's opposition to construction burdens and impacts. While those impacts may be significant, DEP should not merely assume, without first soliciting *some* public input, that:

This new economic burden may not result in the greatest benefit to

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[20] UAA at 5-2 (emphasis added).

[21] UAA at 5-19.

[22] For instance, EPA found Fort Wayne was able to show that it could "achieve greater environmental benefits, in terms of increased opportunities for safe recreation, by controlling non-CSO sources of bacteria compared to controlling the remaining CSOs," by committing to multiple ongoing non-CSO water quality projects that improved the quality of waters for which a relaxation of water quality standards was sought. U.S. Env't. Prot Agency, EPA's Review of Revisions to Indiana's Water Quality Standards: CSO Wet Weather Limited Use Designation for St. Mary's River, Natural Drain #4, St. Joseph River, Spy Run Creek, Baldwin Ditch, Harvester Drain and Maumee River (327 IAC 2-1.1-3) and Revisions to CSO Wet Weather Limited Use (327 IAC 2-1-3.1, 327 IAC 2-1-11.5, 327 IAC 2-1.1-1 and 327 IAC 2-1.1-2) Under Section 303(c) of the Clean Water Act; WQSTS # IN2019-1935 (2023).

[23] Memorandum from Deborah G. Nagle, Director Office of Science and Technology, EPA, to Water Division Directors, Regions 1-10, EPA (Jan. 19, 2024), https://www.epa.gov/system/files/documents/2024-02/cso-temp-recreational-memo-1-19-2024.pdf.

[24] *Id.*

> residents, with the long-lasting impacts of construction and operations of a Harlem River CSO storage tunnel system *likely outweighing* the water quality benefits to residents.[25]

For decades, Bronx and Manhattan community members, organizations, and elected officials have reiterated their interest in improved water quality in the Harlem River, so DEP should not merely assert that short-term construction impacts outweigh permanent improvements in water quality.

The UAA's Factor 3 argument also claims that "Climate change uncertainty makes it difficult to quantify the long-term effectiveness of CSO controls."[26] The "controls," again, are limited to the 75% and 100% storage tunnels, so this argument boils down to saying that a 75% storage tunnel may be inadequate to meet water quality standards under future climate conditions. That the CSO issues may become worse is no reason to do nothing. And because the argument is based on the same false "all or nothing" choice we have critiqued above, this argument should be rejected. If anything, increased annual and extreme precipitation will trigger additional CSO events, and warmer temperatures will produce conditions that make public swimming an important public health benefit. These climate impacts point to the need to reduce CSO through incremental meaningful infrastructure investments.

In short, the arguments raised in the UAA for Factor 3 do not support the conclusions reached in the UAA.

b. The UAA ignores potential swimming uses and inappropriately invokes Factor 4 as justification.

The UAA makes an extended argument that the Harlem River is unsuitable for swimming beaches, regardless of water quality, due to strong flows, hardened shorelines, and other physical conditions, referencing Factor 4. But there are sheltered areas of the river, such as Shermans Creek, Inwood Hill Salt Marsh, and at the confluence with Bronx Kill at Randall's Island, that do not conform to the picture painted by the UAA. Indeed, the 22% of "natural mean high water"[27] shores lining the Harlem River are completely unevaluated for their swimming potential. Further, the UAA focuses only on swimming beaches, and not river pools. Various river pool designs are in use around the world, and their potential to provide swimming access should be considered as an option, particularly in densely populated areas with many hardened shorelines. The vision expressed in the Harlem River Watershed and Natural Resources Plan is of a river "safe for boating, wading, swimming, and fishing."[28] Event-based swimming already occurs in the Harlem

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[25] FCA at ii (emphasis added).

[26] UAA at 5-23.

[27] UAA [at] 5-8.

[28] Harlem River Watershed Plan, *supra*, at 49.

River, including multiple swims each year by athletes around Manhattan, as part of the "Triple Crown" of open water swimming. Factor 4 should therefore not be used to justify a UAA.

There are at least three areas in the Bronx where plans for public swimming have been made and requested by the public. In addition to boat launches, plans for access to swimming are at Lincoln Avenue Street End and/or the Bronx Kill along Randall's Island, Depot Place or Bridge Park South along the existing waterfront (a historically swimming area), and Fordham Landing north (which looks like a beach). The community plans also include a feasibility study of shoreline modifications in the $1.5 million Congressional funding for the Army Corps of Engineers for a feasibility study by the "Engineering with Nature" group and DEP (who are waiting for OMB approval of the match). This project connects the Green Infrastructure Greenway with the water's edge to enable runoff to infiltrate through the ground to the river in the natural filtration of water to the base flow of the waterbody.

5. *The UAA Omits Reference to NYC's CSO Elimination Goal and Alternatives Related to Renewable Rikers.*

While the UAA and FCA make broad policy arguments against investments over and above those already committed to, they omit reference to the PlaNYC goal of eliminating combined sewer overflows by 2060 and the Renewable Rikers feasibility plan, which is an important component of achieving that policy goal. It is impossible to square these goals with the conclusion in the Proposed Rule that there can be no further improvement for Harlem River water quality.

6. *The UAA Excludes Adequate Consideration of Certain Pollutants and Downstream Uses.*

Sewage discharge impacts on DO in the Harlem River are not considered adequately. The UAA states that "Class SB chronic standard calculated attainment is 88 percent of the time in the Harlem River near the East River; however decisions regarding use attainment or revising DO criteria with the SB (ww) reclassification are not appropriate given the model uncertainty." There is evidence in DEP sampling data that DO in the Harlem River has been measured below 4 mg/L, the Class I acute standard, though not, according to the UAA, the 3 mg/L Class SB standard. Relaxing the DO criteria for the waterway amounts to backsliding and must be assessed specifically in a UAA.

The UAA states that data are too limited to assess potential violations of the chronic Class SB standard of a daily average of 4.8 mg/L. The wet weather (ww) limited use designation does not apply to DO. The summary provided is too limited to fully analyze. DEP has, in past instances, compared depth-averaged results against standards, in contradiction to EPA and DEC guidance. The UAA must be updated with a more robust description of its modeling methods, results, and interpretation. It is imperative that DEC scrutinize the modeling methods and results, and that sufficient data be collected to verify the model results relative to both the acute and chronic DO standards. Sample frequency should be sufficiently robust at several points in the

river, at depth, in summer and at appropriate intervals following CSO events, in order to truly assess the river's attainment of DO standards.[29]

The UAA considers only impacts of fecal indicator bacteria on downstream uses in the Hudson River and East River, neglecting to fully analyze the impact of ongoing nutrient pollution caused by CSOs and the impact of relaxing the dissolved oxygen acute criteria by redesignating the waterway from Class I to Class SB. Nitrogen loading to Long Island Sound from Harlem River CSOs should be considered in the context of protecting downstream uses, as should the Harlem River's contribution to low DO results in the East River, including sampling site E4.

7. *The UAA Mistakenly States that the Long Term Control Plan Was Projected to Meet Water Quality Standards in the Harlem River.*

The first paragraph of the UAA states that the Harlem River "was projected to meet the current W[ater] Q[uality] S[tandards] associated with the Class I designation."[30] That was not true at the time, and it is not true now that lawful enterococcus standards have been established in New York State. As stated in our comment letter on the Citywide/Open Waters LTCP, it seems that the waterbody would have complied with water quality standards only 90% of the time:

> DEP's modeling defines compliance as attainment of water quality criteria only 95% of the time. In its Response to Comments on the Citywide LTCP Retained Alternatives Summary, DEP states that 95% attainment is a "widely utilized and accepted statistical methodology for analyzing large data sets." DEP did not explain what it meant when it said that 95% attainment is an "accepted statistical methodology."[31]

It seems likely that DEP analyzed and selected alternatives based on whether they attain water quality criteria only 95% of the time, which would allow DEP to be in violation of the Clean Water Act 5% of the time. DEP should reassess the Citywide/Open Waters LTCP given the changed enterococcus water quality standards.

8. *The UAA Should Have Included a Waterbody/Watershed Facility Plan.*

In the Bronx River, as well as each of the previous LTCPs, there was an approved Waterbody/ Watershed Facility Plan prior to the LTCP. The Harlem River is the exception, as it was part of the Open Waters LTCP, for which DEC never approved a Facility Plan. The

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[29] Moreover, Commenters' technical comments on the open waters LTCP includes a chart showing that the Harlem River clarity is often poor, indicating likely eutrophication. *See* Letter from Save the Sound, Natural Resources Defense Council and Riverkeeper to James Tierney, Esq., Deputy Commissioner at 51 (Apr. 15, 2021).

[30] UAA [at] i.

[31] Letter to Vincent Sapienza, P.E., Comm'r New York City Dep't of Envtl. Protection, from Swim Coalition, at 6 (March 2, 2020) (citations omitted), https://drive.google.com/file/d/1v8Q5Z6lKfI5etgXt7jQ4vgjlpWxdrwQP/view.

Proposed Rule and UAA would have benefited greatly had a Facility Plan been completed first. The result is, as detailed above, an incomplete review of the available information and options and a lack of prior public involvement. To help remedy this gap, we request that DEP establish a working group with the public and the city to identify cost-effective alternatives to reduce CSO discharges in the coming years towards the city's goal of zero CSOs by 2060.

D. The UAA Was Proposed Without Meaningful Community Engagement or Consideration of Readily Available Information.

By failing to expressly consider the green infrastructure projects in the New York State-funded Harlem River Watershed and Natural Resources Management Plan and the Harlem River Watershed Hilltop Green Infrastructure Neighborhood Concept Plan, the UAA failed to credit and consider readily available information that could be used to identify meaningful sewage-overflow reduction projects. The UAA also shows no evidence of having benefited from consultation with other city agencies, including NYC Parks, the author of the Watershed and Natural Resources Plan.

The Watershed and Natural Resources Plan, significantly, identifies several goals for stormwater management that are relevant:

- Improve Harlem River water quality to meet standards set by EPA and DEC and implemented by DEP, so that the river is safe for boating, wading, swimming, and fishing.
- Restore the hydrology of the watershed to the fullest extent possible through green infrastructure.
- Bring buried and piped streams to the surface, a process known as daylighting, and remove them from the CSO system, where possible.

Having only a single public meeting to present the draft UAA prevented the development of meaningful input that could have influenced the UAA, despite community members demonstrating longstanding and significant interest and expertise on the topics.

Conclusion

As stated above, this list of considerations is not exhaustive of our concerns. It is also not meant to convey any priority, rather it is a list of considerations not taken into account or which were inadequately developed into the Proposed Rule's conclusions. That said, we appreciate being granted the opportunity to submit this feedback on such an important milestone for the Harlem River, and we remain committed to a cooperative dialogue on how more can be done for the Harlem River.

Sincerely,