

CITIZENS ADVISORY COMMITTEE

of the New York – New Jersey Harbor & Estuary Program

To: New York State Department of Environmental Conservation, Attn: Robert Simpson.
Cc: Management Committee and Policy Committee of the NY-NJ Harbor & Estuary Program
From: Co-Chairs of the Citizens Advisory Committee of the New York-New Jersey Harbor & Estuary Program
Re: Proposed Amendments to 6 NYCRR Parts 701 and 703 Class I and Class SD Waters
Date: February 9th, 2015

Thank you for the opportunity to comment on the Proposed Amendments to 6 NYCRR Parts 701 and 703 Class I and Class SD Waters. We are gratified and encouraged to learn that the State has proposed to improve the swimmability of NYC waters by amending the Water Quality Standards for Class I and Class SD waters. As a group whose members include recreational users of the region's waterbodies, we think this proposal is highly significant and relevant.

We enthusiastically support the proposed amendments to set the water quality goal of all NYC waters as swimmable. However, we have some suggestions and concerns.

More clearly amend the designated uses for Class I and SD

Under the Clean Water Act, water quality standards are comprised of two parts: designated uses and water quality criteria that support and protect those uses. The proposed amendments appear as if the DEC is proposing to amend the water quality criteria without changing the designated use. At the meeting of the NY-NJ Harbor & Estuary Program Citizens Advisory Committee on January 16th, the DEC representative assured us that the amendments are intended as changes to the designated uses (or "best usages"). Representatives from the U.S. EPA Region 2 also stated that they interpret the amendments as changes to the designated uses for Class I and SD. To avoid any confusion for the future (or worse, a legal loophole), we recommend that the DEC add "primary contact" under best usages as follows:

§ 701.13 Class I saline surface waters. The best usages of Class I waters are ~~secondary~~ primary contact recreation and fishing.

§ 701.14 Class SD saline surface waters. The best usages of Class SD waters is ~~are~~ are primary contact recreation and fishing.

The DEC's proposed amendment for Class I, as it stands now, creates confusion as well. We understand that there are non-water quality factors that may limit the use of a waterbody for primary contact recreation (i.e., "...although other factors may limit the use for these purposes" in Class SD Water Quality Standard). However, for Class I, which currently includes secondary contact recreation, we do not understand what non-water quality factors may limit primary contact recreation while allowing the secondary contact recreation. One would presume if one is able to launch a human-powered vessel into the water, it is likely one can manage to put her/his body in the water as well.

In fact we question whether it is necessary to include the qualifier – "... although other factors may limit ..." – at all. We understand these are water quality standards, and not infrastructure or physical quality standards for waterbody uses. It not only seems unnecessary but also creates ambiguity and potentially a way out of meeting the standards. For instance, we could envision a scenario in which a city agency might argue that if a particular waterbody does not have a shoreline feature that allows access into the water (e.g., bulkhead without a ladder), then the water quality of that waterbody does not have to meet the primary contact recreation criteria.

Citizens Advisory Committee Co-Chairs

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For this reason, we believe that the State Water Quality Standards should not consider non-water quality factors in designating uses. We know that there are many parts of the harbor and estuary where primary contact recreation may require heightened levels of experience and communication on the part of the user (e.g., when crossing shipping channels). However, the goal should remain the same: for all waterbodies to have water quality that is fishable and swimmable.

Protect “existing uses” of NYC’s waterbodies

While we support setting the swimmable goal (i.e., primary contact recreation as the designated use) for all waterbodies in the City, we suggest the DEC assess “existing uses” for Class I and Class SD waters to ensure that these uses are recognized and taken into consideration in water quality improvement programs (e.g., CSO Long Term Control Plans). Many Class I and SD waters are already being used for primary or secondary contact recreation even if the water quality currently does not meet the criteria. Furthermore, human-powered boating, considered secondary contact recreation, often results in people coming into direct contact with the water. We feel it is important to consider human-powered boating as primary contact recreation in assessing existing uses.

Switch to Enterococcus as part of this amendment

We understand the constraints in terms of human and financial resources faced by the DEC. However, we strongly believe that the proposed amendment should move forward with the change to Enterococcus as the water quality indicator. If the DEC continues with its phased approach, the City will have to conduct its analyses twice - once for the new total and fecal coliform criteria based on the proposed amendment and again for the new Enterococcus standards. Another reason to make the switch to Enterococcus is public outreach and communication. The City’s own water testing at public beaches, as well as the tests employed by citizen science groups, all rely on Enterococcus numbers that are consistent and comprehensible to boaters and swimmers. We therefore believe it is worth the investment of resources now to introduce the Enterococcus criteria as part of the current proposal. Doing so will lead to more efficient use of resources for the City’s compliance efforts, and improved understanding on the part of the public

Ensure water quality criteria are relevant to protecting public health

The proposed water quality criteria are based on monthly median and geometric mean. These means, while perhaps appropriate in regulating effluent discharges, are not necessarily protective of public health. Needless to say, people do not swim or kayak in a monthly average water quality. We would like to see criteria that are more relevant and understandable to—and, most importantly, more protective of—the increasingly numerous recreational users of our urban waterways.

Related to the appropriate criteria, the compliance monitoring should also be relevant to recreational water users. Often the water quality data for compliance monitoring are taken from areas of the waterbody not frequented by recreational users (such as the shipping channel of the Hudson River). In waterbodies such as the Hudson River, sampling locations have an effect on the water quality data, as seen from the water quality measurements taken after the fire at the North River Water Pollution Control Plant in 2011. While the water quality in the shipping channel of the Hudson River showed no effect of sewage leaks, near-shore waters, where most primary contact recreation happens, were shown to be highly contaminated.

Clarify impact on ongoing water quality improvement programs

We are not certain how the proposed amendment will affect the CSO LTCPs that have been either approved or submitted to the DEC or the as yet to be finalized MS4 permit for the City. We know that meeting the primary contact recreation criteria would be difficult in some waterbodies. However, we also know that some of those waterbodies are already used for recreation (e.g., Gowanus Canal). We would like assurance that the proposed amendment does not lead to a Use Attainability Analysis. We would also like to know how the new Water Quality Standard, if approved, will be incorporated into the MS4 permit, which, to our understanding, does not include any specific pollutant load reductions.

Our final point is an open question for all of us to ponder. How does New York State’s amendment of Water Quality Standards affect our shared waterbodies, such as the Hudson River, Kill van Kull, and Arthur Kill? How do we expect New York City to meet the standards when municipalities in New Jersey are not required to meet the same standards? The Hudson River and likely other bi-state waterbodies are already used for swimming and

human-powered boating. If primary contact recreation is an already existing use, even if people only enter the water from one state or another, it behooves us to designate these waterbodies for primary contact recreation for both states.

The Harbor & Estuary Program Citizens Advisory Committee looks forward to working with NYC, NYS and NJ to make our harbor and estuary swimmable and fishable.

The Citizens Advisory Committee (CAC) of the New York-New Jersey Harbor & Estuary Program (HEP) is an advisory committee established to support and advocate for the HEP, a National Estuary Program. The CAC is an official committee of the Management Conference first convened by the U.S. Environmental Protection Agency, Region 2; the NY State Department of Environmental Conservation; and the NJ Department of Environmental Protection for the HEP and Bight Restoration Programs.

The purpose of the CAC is to: 1) provide guidance and advice to the Management Committee on Program decision-making on behalf of the diverse stakeholders in the NY-NJ Harbor Estuary and NY Bight; 2) promote public awareness and understanding of the Program's issues, goals, and recommendations; 3) assist the Management Committee in developing and implementing the Comprehensive Conservation and Management Plan (CCMP) as required by Section 320 of the Water Quality Act of 1987.

Sincerely,

The Citizens Advisory Committee, New York-New Jersey Harbor & Estuary Program.

This letter has been adopted by the HEP CAC following procedures established in its bylaws (<http://www.harborestuary.org/pdf/CAC%20Bylaws-Revision-Jun-03-11-F.pdf>). CAC members who have voted in support of this letter include (but are not limited to):

Rob Buchanan, Village Community Boathouse, NY co-chair, Citizens Advisory Committee of the NY-NJ Harbor & Estuary Program

Bart Chezar

Meredith Comi, NY/NJ Baykeeper, NJ co-chair, Citizens Advisory Committee of the NY-NJ Harbor & Estuary Program

Michelle Doran-McBean

Manuel L. Russ, Concerned Citizens Of Bensonhurst, Inc.

Shino Tanikawa, New York City Soil and Water Conservation District, NY alternate co-chair, Citizens Advisory Committee of the NY-NJ Harbor & Estuary Program

Nellie Tshipoura, New Jersey Audubon, NJ alternate co-chair, Citizens Advisory Committee of the NY-NJ Harbor & Estuary Program

Newtown Creek Alliance

***NOTE*: The New York-New Jersey Harbor & Estuary Program is a partner program and its members occasionally have conflicting positions on regulatory and management issues. One of the Program's roles is to facilitate the exchange of ideas and to work towards resolution of these issues. The opinions of individual agencies or committees do not necessarily reflect the opinion of the Program as a whole.**

The Citizens Advisory Committee provides guidance and advice to the New York-New Jersey Harbor & Estuary Program Management Committee on Program decision making on behalf of the diverse stakeholders in the region. Its membership and meetings are open to all interested parties in the region that use, or have concerns about, the New York-New Jersey Harbor Estuary and New York Bight. The Citizens Advisory Committee is the only body in the New York-New Jersey Harbor & Estuary Program that can adopt official positions on issues and topics. These official Citizens Advisory Committee positions are adopted by a majority vote of Citizens Advisory Committee members. Citizens Advisory Committee positions do not necessarily reflect the opinion of the New York-New Jersey Harbor & Estuary Program or its members and partners.